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THE INDIAN LAW REPORTS, ALLAHABAD SERIES,
CONTAINING CASES DETERMINED BY THE HIGH
COURT AT ALLAHABAD AND BY THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL ON APPEAL
FROM THAT COURT.

ALLAHABAD—Vol. VII-1885.

PRIVY COUNCIL.

1884.

PRESENT :

LORD BLACKBURN, SIR B. PEACOCK, SIR R. COUCH AND SIR A. HOBHOUSE.

Raja Rup Singh.....Plaintiff

versus

Rani Baisni and the Collector of Etawah.....Defendants.

[On appeal from the High Court for the North-Western Provinces.]

*Mitakshara—Impartible raj—Succession in joint family to ancestral,
impartible, estate—Right of nearest male collateral—Exclusion of
widow, where the family is joint, and the estate not separate.*

Impartible, ancestral estate is not, merely by reason of its being impartible, the separate estate of the single member of the undivided family, upon whom it devolves, so long as the family continues joint.

Chintamun Singh v. Nowlukho Konwar, I. L. R., 1 Cal., 153; L. R., 2 Ind. Ap., 263, referred to and followed.

A female cannot inherit impartible, ancestral, estate, belonging to a joint family, under the Mitakshara, when there are any male members of the family who are qualified to succeed as heirs; a rule of law not dependent on custom; and a custom modifying the law in this respect must be a custom to admit females, not a custom to exclude them.

Maharani Hiranath Koer v. Ram Narayan Singh, 9 B. L. R., 274, approved.

Where raj estate, ancestral and impartible, was not separate property and the family was undivided, and where no special custom existed, modifying the Mitakshara law of succession, held that the nearest male collateral relation of the last Raja, who died without male issue, was entitled to succeed in preference to the Raja's widow.

This relation, viz., a brother of the late Raja's deceased father, at one time received an allowance for maintenance out of the family estate. What amounted to an attachment of this, according to a subsequent judicial decision, occurred in 1857. Held that he had not thereby been deprived of his right of succeeding as a member of the joint family.

[2] The raj estate in question originated in the partition of a more ancient one with others out of which minor estates were formed. If in the latter there had been descents to widows, no inference hence, to support the widow's claim to inherit in this family, could be

drawn. Such minor estates might have been separate (which estates granted for maintenance probably would be), and in that case the widows of the last holders would have succeeded them in due of law. Unless connection is shown between families, evidence of special family custom in one is not evidence of a similar family custom in another.

• **APPEAL** from a decree, (7th May 1880) of the High Court affirming a decree (25th September 1878) of the Officiating Judge of Mainpuri.

This appeal related to the succession to the Bhara Raj estate in the Etawah district, comprising fifty-four villages, and valued at about Rs. 3,10,265. The principal question was whether the appellant Rup Singh, brother of the late Raja's father, being the male collateral nearest to the late Raja, who died without male issue in 1875, was to be preferred to the late Raja's widow, a minor, on whose behalf the estate had been taken under the management of the Court of Wards.

The impartible Raj of Bhara passed from father to first-born son for many generations, the younger brothers of the family receiving only maintenance.

It was one of five which some centuries ago formed the single raj of Raja Singandeo Singh, who had five sons. He was the common ancestor of the families which had, since then, held the estates into which, on partition among his sons, his estate was divided. There had also been sub-division in some of the five estates. Of the five principal estates, three beside the Raj of Bhara, remained, viz., Jagamanpur, Ruh, and Kakhouto. Of these, the first had been broken up into the minor estates, Tarsor, Sorawan, Bhaddek, and Hardoe : while from Ruh Ruh were stated to have been derived the minor estates, Mulhosi, Sabhad and Bukhera.

During the time when Rup Singh's brother, Ram Partab Singh, held the Raj, an allowance of Rs. 1,000 per annum was made to Rup Singh. In consequence, however, of his misconduct in 1857, during the disturbances of that year, this annuity was discontinued. A suit brought by him against the manager of the Court of Wards during the minority of the late Raja, for the recovery of arrears, [3] and to enforce payment of maintenance, was dismissed by the High Court in June, 1868, on the ground that the annuity had been in effect attached, by the direction of Government, on account of Rup Singh's having joined the rebels. About that time an allowance of Rs. 43 a month was made to him, out of the raj estate, increased, after the death of the Raja, by the Court of Wards to Rs. 50, with the same amount for his son.

This suit was brought on the 24th July 1877, for possession of the Bhara Raj, on the ground that, by the ancient usage thereof, the nearest and eldest male heir, which the plaintiff was, succeeded to the exclusion of other male heirs, and of women. The widow of the late Raja, and the Collector of Etawah as manager of the Court of Wards, defended, on the ground that the alleged family usage excluding women from the succession, did not exist. It was also alleged for the defence that the plaintiff was separate in estate.

The Court of First Instance was of opinion that this family was not joint and undivided in the ordinary way, but that it held the Raj of Bhara according to special family custom. The Judge, stating it to be the question whether the plaintiff had given good evidence of the existence of a custom excluding women from the succession in this family, found that he had not. On the other hand, referring to the origin of the family, he found that the evidence showed that widows were not excluded by collaterals. His judgment concluded thus :

" It appears that no instance, as far as is known, has occurred in Raj Bhara, where the Raja has died sonless, until the present time.

"But instances of this have occurred in other branches of the common family which descends from Raja Singhdeo, and are adduced by defendant in support of her allegation that the *Kul-rit*, or family custom, and *Raj-rit*, or custom of the Raj, is as she alleges it to be."

"Thus, in the allied family termed Raj Ruh Ruh, it is shown that Raja Kusal Singh died, and was succeeded by his widows, Rani Chandelin and Rani Bhadaurni, although his younger brother Sambar Singh and the sons of Sambar Singh were alive.

"This Raj is not, and, as far as is ascertainable from the record, never was a separate principality, the possessor of which enjoyed [4] sovereign rights. It is simply a great estate the proprietor of which has the honorific title of Raja.

"In the Tarsor estate the proprietor was called "the Lala." His wife was termed the Rani. This, it will be remembered, is one of the families of the same stock.

"In Tarsor, on the death of Tarnet Singh, the widow (the then Rani) succeeded, to the exclusion of a nephew, who deposed to the fact before this Court.

"Similarly in Sorawan estate Diwan Sri Dhar's widow succeeded and still holds it.

"Both these estates are impartible, it is alleged, and in no wise (except in the title of the zamindar) differing from Bhara.

"Going out of this family stock but keeping to strictly Thakur families, there is the Chandel Thakur family of Raj Bhara, zila Mirzapur.

"Raj Bhara.—In this Raj the Raja Kesho Saran Sahai was succeeded by his widow, Rani Bed Saran Kuar, who, it was deposed, is still in possession, although male relations of the last holder exist.

"Raj Bijaigarh.—Again also in Mirzapur, the instance of the Raj Bijai-garh is quoted for the defence, where the last Raja, Ram Saran Sahai, died childless, and his Rani, Perthi Raj Kuar, succeeded, though the Raja's cousin, Lachman Saran Sahai, is alive now.

"Raj Ganga Ganj.—In Cawnpore a similar instance is given where Rani Gaurni has succeeded her deceased husband though his cousins and nephews are alive.

"Raj Rawatpur.—In Cawnpore, —Rani Baghelin similarly has succeeded and is still in possession, though many male collaterals exist.

"Other instances are given.

"On the whole I consider that defendant has clearly made out :—

"(1) That plaintiff's contention that widows never succeed to a Raj in this part of India is untrue.

[5] "(2) That there is good evidence that in the family, to which the possessors of this estate belong, the custom is, that the widow is not excluded by collaterals.

On appeal this judgment was confirmed by the High Court (Sir R. STUART, C.J., and PEARSON, J). The judgment of the latter Judge referred to the succession of Kusal Singh's widows in the Ruh Ruh Raj, and stated that "the instance cited by the Raja Raghunath Singh" (who was the Ruh Ruh family representative, and a witness for the plaintiff), "so far from proving the

custom alleged by him, is really an instance of widows succeeding in preference to a niece's son." The judgment continued thus:—

"The outcome of the evidence adduced on behalf of the plaintiff is, (1) the case of Arjun Singh of Purna; (2) the case of Niranjana Singh; (3) the case of Trivikram Singh of Machan.

"On the side of the defence Raja Rup Sah, raja of Jagamanpur, states that, in the five estates divided among Raja Sigandeo's sons, the custom is that in the absence of a son the widow succeeds.

"The second witness is the widow of Raja Himanchal Singh, and has recently succeeded her husband in his estate comprising 30 villages in the districts of Shahjahanpur and Budaun, although two uncles survive him beside his widow.

"The third witness is Rao Jodha Singh of Kakhouto, to whose evidence reference has already been made in the matter of the succession to the Ruh Ruh Raj on the death of Raja Kusal Singh. This witness further deposed, in proof of a custom allowing widows to succeed their husbands, that Lala Tarnet Singh, the raja of Tarsor, died childless about 50 years ago, and that his Rani Gaurni succeeded him, and that Sri Dhar Diwan, of Sorawan, was succeeded by his widow. He also mentioned the instances of the Rani of Jhansi, and of a Rani in Anupshahr likewise succeeding.

"Kuar Roshan Singh is the fourth witness, and his evidence has already been referred to in respect of the succession to the Ruh Ruh Raj on the death of Raja Kusal Singh. The sister of this witness was the wife of Raja Partab Singh, the plaintiff's elder brother, and his mother's sister was Musammam Gaurni, the wife and successor in his raj of Tarnet Singh of Tarsor. The testimony of this [6] witness is particularly valuable in consequence of his connection with the plaintiff's family; and he can hardly be mistaken about the Tarsor case. He confirms what Rao Jodha Singh said about the Sorawan case and adds that Sri Dhar's widow is still in possession. He also cites other cases in the Mirzapur and Cawnpore districts in which widows succeeded their husbands.

"The last witness, Kalandar Singh, was at one time in the female defendant's service as a karinda, and mentions, besides the Ruh Ruh, Tarsor, and Sorawan cases, two instances in the Mulhosi estate and one in the Sabhad estate in which widows succeeded their husbands. In Mulhosi, he says, Lala Lok Singh and Lala Chamna Joo died childless and were succeeded by their Rani, though at the time of their death, Chatter Singh, the uncle of Lok Singh, was alive. In Sabhad, Mukhut Singh has been succeeded by his widow.

"This witness also refers to the cases in the districts of Mirzapur, Cawnpore, and in Anupshahr.

"Having reviewed the evidence adduced on both sides, I consider the conclusions at which the lower Court has arrived to be warranted thereby."

On this appeal, Mr. J. F. Leith, Q.C., and Mr. R. V. Doynne, for the Appellant. In the first place, the presumption is that the Bhara family continued joint, and that the raj estate was not the separate property of the late raja. That it is impartible does not affect the rights of the appellant; for impartibility does not imply separation in estate so long as a family remains joint, nor does it cause it to be governed by the law applicable to separate succession.—*Chintaman Singh v. Nowluhko Konwari*, I.L.R., 1 Cal., 153; L.R., 2 Ind. Ap., 263. Secondly, the attachment of Rup Singh's allowance for maintenance did not operate to deprive him of his right as a member of the joint family. Thirdly, the remaining point is that the general law of the Mitakshara, which in the absence

of proof of special custom must prevail, has not been shown to have in this instance modified by family custom. That law, as stated in *Moharam Hiranath v. Ram Narayan*, 9 B. L. R., 274, is applicable here, viz., that in a joint family to which ancestral property belongs, whether impartible or not, if that property be not separate, the successor, in the event of a holder [7] dying, without male issue, goes to the next collateral male heir, in preference to the widows. And it further appears from that case that there is a presumption in favour of an impartible ancestral estate descending to a male member of the joint family. That the right of the co-parcener in the case of joint estate to take by survivorship is superior to the right of the widow to inherit, is also shown by *Katama Natchiar v. The Raja of Shivagunga*, 9 Moo. I. A., 539; and, although the widow in that case succeeded, it was on the ground of the estate being separate; see also *Stree Raja Yanumula Venkayamah v. Stree Raja Yanumula Boochia Vankondora*, 13 Moo., I. A., 333.

The Court of First Instance erred in ascribing a peculiar position to the estate, throwing the proof on to the plaintiff; and both Courts were wrong in concluding that the evidence sufficiently proved a custom in the family for a widow to succeed.

Reference was also made to *Naragunty Lutchmeedavamah v. Vengama Naidoo*, 9 Moo., I.A., 66; *Gunesb Dutt Singh v. Maharaja Moheshur Singh*, 6 Moo., I.A., 1164; *Beer Pertab Sahee v. Maharaja Rajender Pertab Sahee*, 12 Moo., I. A., 1; *Ramalakshmi Ammal v. E. vanantha Perumal Sethurayar*, 14 Moo., I.A., 570.

Mr. J. Graham, Q. C., and Mr. J. T. Woodroffe, for the Collector of Etawah. The appellant alleged a custom of descent in the Bhara family excluding females from the succession, and this custom he failed to prove. In his plaint he did not rely on the application of the ordinary law of the Mitakshara. On the other hand, upon the general view of the evidence, two Courts have concurred in finding that, by the family custom, the widow succeeds. The law of the Mitakshara can only apply where custom is silent. The case of the Tipperah Raj--*Neelkisto Deb Burmono v. Beerchander Thakoor*, 12 Moo., I. A., 523--shows that, in the case of an impartible raj, survivorship does not exist, as being an incident of joint ownership, inconsistently with the ownership of the raj by one person. The heir must be the one person regarded as nearest to the last holder at the time of his death; and it is submitted that this, in the present case, is the widow.

This raj, the title to which rests upon heirship, must not be assumed to be subject to the same rule of succession as ordinary [8] ancestral estate. The nature of a raj is an exception to the general system of estates held by families under the Mitakshara. *Harrington's Analysis*, vol. III, 329; *Neelkisto Deb Burmono v. Beerchander Thakoor*, 12 Moo. I. A., 523; *Gunesb Dutt Singh v. Maharaja Moheshur Singh*, 6 Moo. I. A., 164; *Rajkisen Singh v. Ramjoy Surma Mozoomdar*, I. L. R., 1 Cal., 195; *Thakoor Jeetnath Sahee Deo v. Lokenath Sahee Deo*, 19 Suth. W. R., 239, were referred to. To prove the custom, the succession in Ruh Ruh was rightly referred to, the presumption being that what was the ancient usage at the time when this family was separated off, would continue to be followed. And the division of the more ancient raj was within such a period that direct connection between the families is established. On this point reference may be made to *The Marquis of Anglesey v. Lord Hatherton*, 10 M. and W., 218, which, however, presents only a remote analogy. The appellant, in consequence of the proceedings in 1857, to which the effect of attachment was given by the High Court in 1868, ceased to be a member of the joint family. He was proclaimed a rebel, and his property was in effect confiscated. Acts XI, XIV, XV, and XXV of 1857, and IX of 1859 were referred to.

Mr. C. W. Arathoon, for the Rani Baisni.

Mr. J. F. Leith, Q.C., replied.

Their Lordships' judgment was delivered on a subsequent day, March 22nd, by

Sir B. Peacock.—This is an appeal from a decision of the High Court of Judicature for the North-Western Provinces by which a decree of the Judge of Mainpuri in favour of the defendants, the present respondents, dismissing the plaintiff's suit, was affirmed. The appellant, who was the plaintiff, sued for possession of the estate called Raj Bhara, comprising the villages and other moveable and immoveable properties specified in the schedules annexed to the plaint, by right of succession to the deceased Raja Mahander Singh, according, as stated in the plaint, "to the custom prevalent in other estates and the usage of the family of the Raja of Bhara."

The plaintiff in his plaint stated that—

"The ancient usage of the Raj of Bhara, in common with the other families of the Rajas, is that, after the decease of a Raja, his [9] nearest and eldest male heir succeeds him, to the exclusion of the other male heirs and the total exclusion of women. That when Raja Mahander Singh died on the 22nd September 1871, the revenue authorities caused the name of his widow to be recorded, notwithstanding the presence of the plaintiff, the nearest heir; that they subsequently placed the estate under the management of the Court of Wards, who fixed an allowance of Rs. 50 for the plaintiff, which he still receives."

The Rani, defendant, in her written statement stated, amongst other things, that the custom alleged by the plaintiff had no existence; that there was nothing in the history of the family of the Raja of Bhara to prove that a widow was ever deprived of the possession of the estate of her husband in the presence of the male relatives of her deceased husband; that as the property of her deceased husband was separate, she was, under the general rules of the Hindu law, entitled to enjoy it during her life-time; that the plaintiff bore a very bad character; that he had taken arms against the Government during the mutiny, and was guilty of many atrocities; and that his property was confiscated and made over to Lala Laig Singh.

The Collector, as manager under the Court of Wards, also appeared and defended the suit. He in his written statement stated that the family custom alleged by the plaintiff did not exist; that the plaintiff and his nephew, the late Raja, were separate in estate, and that, therefore, according to the ordinary rules of Hindu law, the Rani defendant was entitled to succeed to the property of her deceased husband in preference to the plaintiff.

The Raj, although it was not proved ever to have been a principality in the strict sense of the word, or endowed with sovereign rights, was an ancient ancestral impartible estate which had always been held by a single member of the family at a time, and had passed for several generations in lineal succession according to the law of primogeniture.

Partab Singh, the father of the late Raja, Mahander Singh, was the elder brother of the plaintiff, who, as a younger brother, became entitled, according to the usage of the family, to maintenance, and for some time after the death of his father received an annuity of [10] Rs. 1,000 out of the estates of the Raj. The family was joint and undivided down to the time of the Indian mutiny; but it appeared that, in consequence of the plaintiff's misconduct during the disturbances, payment of his annuity was withheld with the sanction and under the direction of Government, and that in a suit against the Manager of the

Court of Wards to enforce payment during the minority of the late Raja, it was held that there had been that which, advertent to the nature of the property, was equivalent to an attachment thereof, and the suit was dismissed. There had not, however, been any adjudication of forfeiture under Act XXV of 1857, nor had any proceeding ever been taken under that Act, with reference to the estate itself.

It was contended on the part of the defendants that, in consequence of the proceedings with reference to the maintenance annuity, the legal status of the plaintiff was altered, and that he ceased to be a member of the joint family.

Their Lordships are clearly of opinion that there is no foundation for contending that the stoppage of the annuity, and the proceedings in respect thereof, amounted to a confiscation of the estate, or in any manner altered the status of the plaintiff as a member of the joint family.

The Mitakshara is the Hindu law of inheritance in the district in which the estate is situate, and it is clear that according to that law, in the absence of any special custom to the contrary, the plaintiff, as the uncle of the deceased Raja, and the surviving member of the joint family, was entitled to succeed to the ancestral estate upon the death of his nephew. According to the Mitakshara a widow is not entitled to succeed to her husband's estate in preference to collateral male heirs, unless he is separate, or, as in the *Shrivagunga case*, his estate was separate or self-acquired (see Mitakshara, chap. 2, sec. 1, paras. 8—19 and 30 and 31, note).

The cases were all reviewed by the late Chief Justice of Bengal, Sir RICHARD COUCH, in the case of *Maharani Hiranath Koer v. Ram Narayan Singh*, 9 B. L. R., 274, in which, in a careful and well considered judgment, it was held that a female cannot inherit an impartible ancestral estate belonging to a joint Hindu family, governed by the Mitakshara, when there are any male members [11] of the family who are qualified to succeed as heirs; that this is a rule of law not dependent on custom, and that a custom modifying the law must be a custom to admit females, not a custom to exclude them. That case was upheld by the Judicial Committee in the case of *Chintaman Singh v. Nowlukho Konwari*, L. R., 2 Ind. Ap., 263, and their Lordships are of opinion that it was correctly decided and is a binding authority.

In the last-mentioned case, following the decision in 13 Moore's Indian Appeals, 333 and 339, it was held that an ancestral estate, even though impartible, is not the separate or self-acquired estate of the single member upon whom it devolves, so long as the family continues joint.

In the argument before their Lordships some importance was attached by the learned counsel for the respondents to the manner in which the plaintiff's case was stated in the plaint, but their Lordships are of opinion that in dealing with the case they must look not to the mere wording of the plaint, but to the issue which was settled for trial, and to the manner in which the case was treated by the lower Courts.

The following is the issue upon which the parties went to trial, viz., "whether, according to the custom relied upon by the plaintiff, and under the Hindu law, the plaintiff has a right to succeed to the *gaddi*, and whether the plaintiff's character can in any way affect the suit or not." The plaint stated that "the ancient usage of the Raj of Bhara, in common with other families of the Rajas," was "that upon the decease of a Raja his nearest and eldest male heir succeeds him to the exclusion of the other male heirs, and the total exclusion of women," that is to say, that females were excluded by a male heir.

The Zila Judge in dealing with the case says:—

"Plaintiff alleges that the property in question is ancestral property belonging to a joint and undivided Hindu family governed by the law of the Mitakshara, of which he and the deceased Raja Mahander Singh were members; that by virtue of a custom prevailing in the family, the estate of the Raj of Bhara was impartible; that it was enjoyed by a single member of the family at a time, [12] and devolved, on the death of the holder, on the eldest male heir; that Mahander Singh, the last holder, having died without male issue, he, the plaintiff, being the eldest collateral male heir, was entitled to succeed to the estate, to the exclusion of the widow of Mahander Singh. The defendant pleads—

"(1) That the custom alleged by plaintiff, whereby females are excluded from the succession, has no existence.

"(2) That the plaintiff, and his nephew, the late Raja Mahander Singh, were *separate in estate*, and were not members of a joint undivided Hindu family, and that, therefore, according to the ordinary rules of Hindu law, the Rani, defendant, was entitled to succeed to the property of her deceased childless husband in preference to the plaintiff."

He further says—

"It is admitted on both sides that the estate is impartible, and is enjoyed by a single holder at a time. It is admitted that the mode of succession is governed by special custom. The dispute is as to what that special custom is."

Ultimately he arrived at the conclusion, first, that the defendant had clearly made out that the plaintiff's contention that widows never succeed to a Raj is untrue; and, secondly, that there was good evidence that in the family to which the possessors of the estate belonged, the custom was that the widow is not excluded by collaterals, and he therefore dismissed the suit with costs.

Upon appeal, the High Court affirmed the decision. The Chief Justice held that there was sufficient evidence of a custom, by which the widow, failing direct descendants, was not excluded by collaterals. Mr. Justice PEARSON agreed with the District Judge, and held, first, that the plaintiff's contention that widows never succeed to a raj in that part of the country is untrue; and, secondly, that there was good evidence that, in the family to which the possessors of the estate in question belonged, the custom was that the widow is not excluded by collaterals.

With reference to the findings of the Zila Judge, and of Mr. Justice PEARSON, that the contention of the plaintiff that widows never succeeded to a raj in that part of the country is untrue, their [13] Lordships fail to find that the plaintiff ever made an allegation to that effect. His allegation was that, according to the ancient usage of the Raj of Bhara, male heirs succeeded to the exclusion of females. He, no doubt, in his plaint, used the words "according to the custom prevalent in respect of other estates," and also the words "in common with the other families of the Rajas." The main allegation had reference to the usage of the Raj of Bhara, and was "that, after the decease of a Raja, his nearest and eldest male heir succeeds him, to the exclusion of other male heirs and the total exclusion of women," and that allegation was true; for the Raj of Bhara, from its earliest creation, had always descended to a male heir, and no female ever succeeded to it. The allegation made no distinction between lineal and collateral heirs, or between widows and other females.

It is not certain to what other estates or to what other Rajas the plaintiff referred, when he added the words, "in common with the other families of the Rajas;" whether he meant the Rajas of the other estates which were formerly united with Bhara, or not, is not very important; he evidently

referred to other estates and Rajas similarly circumstanced, or in some way connected with the Raj of Bhara, and not to every raj in that part of the country, whether the Raja was separate, or a member of a joint family, or whether the Raj was ancestral, or self-acquired. But, however this may be, it is clear that the issue did not impose upon the plaintiff the necessity of proving that widows never, under any circumstances, succeeded to a Raj in that part of the country.

The first part of the finding, therefore, is irrelevant, and the case must be decided with reference to the question whether the Mitakshara law of succession had been so far modified by custom, with respect to the ancestral Raj of Bhara, as that, failing lineal descendants of a deceased Raja, his widow was entitled to succeed to the Raj in preference to the plaintiff, who was a collateral male heir, and the eldest male member of the joint family. No such case ever occurred in respect of the Raj of Bhara, and their Lordships are of opinion that there is no evidence to prove such a custom.

[14] It was contended that a case had occurred in respect of the Raj of Ruh Ruh, in which a widow had succeeded in preference to a male collateral.

The District Judge stated that the estate of Bhara was—

“One of five, all of which came from a common stock and had a common ancestor, the Raja Singandeo, who lived 650 years ago.”

He proceeded,—

“The five were,—

“(1) Bhara (the property in suit).

“(2) Jagamanpur.

“(3) Ruh Ruh.

“(4) Kakhouto.

“(5) Nakkatpatti.

“The last family, Nakkatpatti, is extinct, and the second family, Jagamanpur, has split up into the families of Tarsor, Sorawan, Bhaddek, Hardoe.

“It appears that no instance, as far as is known, has occurred in Raj Bhara, where the Raja has died sonless, until the present time.

“But instances of this have occurred in other branches of the common family which descended from Raja Singandeo, and are adduced by defendant in support of her allegation that the *kul-rit*, or family custom, and *raj-rit*, or custom of the Raj, is as she alleges it to be.

“Thus, in the allied family termed Raj Ruh Ruh, it is shown that Raja Kusal Singh died, and was succeeded by his widows, Rani Chandelin, and Rani Bhadaurni, although his younger brother, Sambar Singh, and the sons of Sambar Singh, were alive.”

A similar statement is made by Mr. Justice PEARSON as to the origin of the five estates. He says:—“The estate in question is one of five which originally constituted a single property, and belonged to Raja Singandeo, the common ancestor of the families which have since held them separately, a partition of them having been made between his five sons.”

The fact of the formation of the five separate estates by the partition of one entire estate is not disputed, and it may be assumed, although not necessary to be decided, that there was such a connection between Ruh Ruh and Bhara that evidence of a custom of descent in one of them would be admissible in support of a similar custom in the others. There is, however,

no evidence except in one single instance in Ruh Ruh that a female ever held any one of the other four principal estates.

With respect to that exceptional case in Ruh Ruh, the District Judge held it to have been shown that when Raja Kusal Singh died, he was succeeded by his widows Rani Chandelin and Rani Bhadaurni, although his younger brother Sambar Singh and the sons of Sambar Singh were living.

Mr. Justice PEARSON also treated the case as an instance of widows succeeding in preference to a niece's son, meaning probably the son of a nephew.

It appears, however, to their Lordships that it was not a case of succession by inheritance at all.

Raja Raghunath Singh, a member of the Ruh Ruh family, and a great great grandson of the deceased Raja Kusal Singh, was examined as a witness, and stated that in his family women never sat on the *gaddi*; that upon the death of his great grandfather Kusal Singh, Himanchal Singh, his nephew's son, sat on the *gaddi*, and after him Kusal Singh, who appears from the pedigree to have been the son of a nephew of the deceased Raja.

Mr. Justice PEARSON, in dealing with the evidence of this witness, says:—

"The plaintiff's witness, Raja Raghunath Singh, the representative, seemingly of the Ruh Ruh branch, avers, generally that females are altogether excluded from succeeding to their husbands' estates by the custom of his Raj. The only instance mentioned by him in support of his assertion is that his great-grandfather Kusal Singh was succeeded by his niece's son Himanchal."

He should rather have said the son of his great nephew Ram Khaman Singh.

He proceeds:—

"His statement on this point is opposed to the evidence of Rao Jodha Singh, of Kakhouto, of Kuar Roshan Singh, and of Kalandar [16] Singh, witnesses on the other side, which is corroborated by two exhibits on the record, one being a copy of a proceeding of the Provincial Court at Bareilly, dated 12th April 1813, and the other being a copy of a proceeding of the Civil Court of Mairpur, dated 12th December 1849. From the evidence indicated it appears that Himanchal's claim to succeed to his grandfather was based on the allegation of his having been adopted by one or both of Raja Kusal Singh's widows and was disallowed. The instance cited by Raja Raghunath Singh, so far from proving the custom alleged by him is really an instance of widows succeeding in preference to a niece's son."

It appears from the record of the Provincial Court, referred to by the learned Judge, that Rani Bhadaurni, the widow of the deceased Raja Kusal, who is supposed to have succeeded on his death, and who was one of the defendants in an action at the suit of Himanchal, was the junior widow, and that she in her answer admitted that, after the demise of Kusal Singh (he died in 1774), his estate fell under the management of the agents (*karpadazan*) therein named, and that a nankar allowance was assigned by the Government (which must have been the Native Government) to her and Rani Chander Bans, the elder widow of the deceased Raja; that in the year 1195=A.D. 1787, she caused the settlement of the estate to be made with Himmamchal, who kept the accounts, and became the proprietor; that in that year losses amounting to Rs. 7,300 occurred, which she paid to the Government; that her name, with that of Sudun Singh, having been entered in the decennial register, she in 1210 Fasli =about A.D. 1802 (which was shortly after the cession of Etawah to the East India Company) caused the settlement to be made with Himanchal Singh, under the suretyship of Sudun Singh. She contended, in her answer, that

under that settlement Himanchal Singh was one of her karindas, and that he having become insubordinate, she subsequently procured the second and third revenue settlements to be made with herself. Himanchal, on the other hand, contended that he had been adopted by the elder widow as the son of the deceased Raja, that the defendant, Bhadaurin, the junior widow, had obtained the second and third revenue settlements by fraud, in his absence, and he sued to recover possession. The litigation commenced in 1810, and if [17] seems that the only issue raised between the parties was as to the validity of the alleged adoption. That issue was decided against Himanchal by the Provincial Court upon the ground that Rani Chunder Bans had no authority from her husband to adopt, and on the 12th April 1813, it was ordered and decreed by that Court that Himanchal's suit should be dismissed. The decision of the Provincial Court was, on appeal to the Sudder Court, affirmed on the 11th of August 1817, and it was decreed that the property in dispute should, in right of succession, descend to Kuar Ghansham Singh as the proprietor thereof. Subsequently, on the 10th of August 1818, it was ordered that possession be given to Kuar Ghansham Singh, if he should enter into sufficient security for subscribing to the appeal to Her Majesty in Council. This he appears to have done, and the appeal was heard, and in 1834 the decree of the Sudder Court was affirmed by Her Majesty in Council, so far as it affirmed the decree of the Provincial Court of the 12th April 1813, and reversed so far as it decreed that the landed property should, in right of succession, descend to Ghansham Singh as proprietor thereof, and had the effect of declaring him entitled to be put into possession.

It is clear from the above statement that the widows did not succeed to the Raj by inheritance, or to an impartible estate according to the rule of primogeniture, even if such a rule could be applicable to the case of two widows; on the contrary, it appears that upon the death of Kusal, the estate was put under management of *karpardazan* by the Native Government, and an allowance assigned not to the elder widow, but to the two widows jointly, probably as the guardians of Himanchal and that subsequently the revenue settlement was made with Himanchal, and afterwards with the younger widow, Bhadaurin.

It is not clearly shown who obtained possession of the estate after the decree of Her Majesty in Council. Raja Raghunath Singh stated that Kusal Singh sat on the *gaddi* after Himanchal. This, however, is not very material, as it is clear that both the widows died before 1834, and that no other female ever obtained possession of the estate. Raja Raghunath must have been under a mistake when he stated that his grandfather's widow was living at the time when he gave his evidence.

[18] It is rather remarkable that the District Judge, having found that the two widows succeeded upon the death of their husband (a finding in which Mr. Justice PEARSON concurred) should have considered that a descent to the two widows jointly was evidence of a custom as to descent in Bharat, which he admitted to be an impartible Raj held by only one member of the family at a time, and that one the eldest.

It was stated by Kuar Roshan Singh that the elder widow succeeded to Ruh Ruh on the death of her husband, and the younger widow on the death of the elder, but that is quite contrary to the evidence, and to the findings of the District Judge and of Mr. Justice PEARSON.

In the case of *Ramalakshmi Ammal v. Sivanantha*, 14 Moo. I. A., 570, it was said:—

"Their Lordships are fully sensible of the importance and justice of giving effect to long established usage in particular districts and families in India, but

It is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable; and it is further necessary that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

Their Lordships entirely concur in that doctrine, and they are clearly of opinion that there is no sufficient evidence that, even in the Raj of Ruh Ruh, a custom existed by which a widow succeeded by inheritance to the estate of her husband in preference to collateral heirs on his dying without issue.

The contention of the defendants was, that the plaintiff and the late Raja were separate, not that there was a custom for widows to inherit in preference to collaterals in the case of an undivided ancestral estate in a joint family; yet inferences were drawn in favour of such a custom by the District Judge and Mr. Justice PEARSON, from descents to widows in the case of certain minor estates carved out of some of the five principal estates, such, for example, as Tarsor, Sorawan, Sabhad, and Mulhosi. These [19] estates it was said descended to widows, though collaterals must have been living. Three of these estates were granted for maintenance. Neither Tarsor nor Sorawan was a Raj. Mulhosi was not impartible. No clear or satisfactory evidence was given that the estates were not separate estates of the last holders; whereas, if they were separate or self-acquired (which estates granted for maintenance probably would be), the widows would succeed, in due course of law, as in the *Shivagunga* case and the case of *Periasami v. Periasami*, L. R., 5 Ind. Ap., 61. In the only instance, as regards Sorawan, in which a widow succeeded to a minor estate created out of the Raj estate, her husband left a son, and upon a mutation the name of the son as well as that of the widow was entered. The case shows how easily witnesses may create a false impression when speaking generally of the succession of widows without showing, and probably without knowing, the circumstances under which such successions took place. Other cases, such as one in Mirzapur and another in Cawnpore, were relied on, in respect of which no connection between them and Bhara was shown to exist. Such cases, even if they could have any weight, were not admissible as evidence to prove a family custom in Bhara. (*The Marquis of Anglesey v. Lord Hatherton*, 10 Mees. and Welsby, 218.)

Upon the whole their Lordships are of opinion that the plaintiff made out his case satisfactorily, viz., that the Raj of Bhara was an ancient Raj, and an ancestral estate, and that by virtue of an ancient custom in the family it was impartible, and to be held and enjoyed by only a single member at a time. His title then depended upon his legal right under the Mitakshara, and according to that law, the estate being ancestral, and the family undivided, he, as the nearest male heir of the deceased Raja, and the surviving member of the undivided family, was entitled to succeed to the Raj in preference to the widow. The defendants did not prove their allegation that the plaintiff and the deceased Raja were separate, as alleged by them, and it was for them to prove, by clear and unambiguous evidence, that the law of succession, according to the Mitakshara, was modified by an ancient uniform custom in favour of a widow. This, in their Lordships' opinion, they failed to do. The result is that their Lordships will humbly advise Her Majesty [20] to reverse the decrees of both the lower Courts, and to order and decree that the plaintiff do recover possession of the estate called Raj Bhara, together with his costs in both the lower Courts.

The Respondents must pay the costs of this appeal.

Solicitors for the Appellant: Messrs. W. and A. Ranken Ford.

Solicitor for the Respondent, the Collector of Etawah: Mr. H. Treasure.

Solicitor for the Respondent, the Pani Baisni: Mr. T. L. Wilson.

NOTES.

[I. For purposes of *succession*, *maintenance*, etc., impartible estates are to be treated as ordinary property joint or separate according to the nature of the case, but not for other purposes:—23 M.L.J., 79 per BENSON and SUNDARA AYYAR, JJ., where previous cases were exhaustively reviewed.

II. As regards exclusion of females, see also 29 Cal., 628; 31 Cal., 561 at 564.

III. As regards pleadings, see also (1900) P.R., 111.

IV. A further piece of litigation relating to this estate is reported in 11 All., 57.]

[7 All. 20]

APPELLATE CIVIL.

The 17th July, 1884.

PRESENT:

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, AND
MR. JUSTICE MAHMOOD.

Shibcharan.....Plaintiff

versus

Ratiram.....Defendant.*

Arbitration—Refusal of arbitrators to act—Civil Procedure Code, s. 510.

It is an essential principle of the law of arbitration that the adjudication of disputes by arbitration should be the result of the free consent of the arbitrators to act; and the finality of the award is based entirely upon the principle that the arbitrators are judges chosen by the parties themselves, and that such judges are willing to settle the disputes referred to them.

Where certain matters were referred to arbitrators who refused to act, and the Court of First Instance passed an order directing them to proceed and to make an award, and they, on the passing of such order, made an award,—held that all proceedings taken by the arbitrators in obedience to the order of the Court directing them to arbitrate against their will were null and void.

THE matters in difference in this suit were referred to three arbitrators. The arbitrators refused to act, and returned the papers which had been sent to them. The Court of First Instance (Subordinate Judge) thereupon sent the papers back, directing the arbitrators to proceed and make an award within ten days. Two of the arbitrators made an award, dismissing the plaintiff's suit. The third arbitrator did not make an award. The plaintiff objected to the validity of the award upon the ground, among others, that when the arbitrators refused to act, the case should not have been returned to them, but should have been decided by the Court. This objection the Court of First Instance disallowed; and gave judgment in accordance with the award. On appeal

* Second Appeal No. 6 of 1884, from a decree of H.A. Harrison, Esq., District Judge of Meerut, dated the 25th September 1883, affirming a decree of Rai Bakhtawar Singh, Subordinate Judge of Meerut, dated the 10th August 1883.

by [21] the plaintiff, the Lower Appellate Court (District Judge) affirmed the decree of the first Court. With reference to the objection set forth above, the Court observed that, as the agreement to refer the dispute to arbitration was uncanceled, the Subordinate Judge was well within his powers in again referring the matter to the arbitrators.

The plaintiff appealed to the High Court, on the ground (1) that the Subordinate Judge was not competent to order arbitrators to act who had refused to do so; and (2) that the award was not made within the time fixed by the Court, and no application for enlarging the period was made within time.

Mr. J. D. Gordon and Pandit *Ajudhia Nath*, for the Appellant.

Babu *Jogindro Nath Chaudhri* and *Munshi Sukh Ram*, for the Respondent.

The Court (STRAIGHT, Offg. C. J., and MAHMOOD, J.) delivered the following judgment:—

Mahmood, J.—We are of opinion that this appeal must prevail on the first ground urged before us, if not also on the second ground. It appears that after the order of reference had reached the arbitrators, they all filed a joint application stating that they did not consent to arbitrate in the case, and, with this refusal to act, they returned the papers which had been sent to them by the Court. The Subordinate Judge, instead of accepting the refusal, passed an order directing that "the record be sent back to them, and they should arbitrate and send the award within ten days from the date of the order; their refusal cannot be admitted; when the arbitrators first took this record and agreed to hold arbitration, so much so that they even obtained time from the Court, their refusal now is not free from suspicion." Upon this order being passed, the arbitrators proceeded to make the award, the legality of which is now in question, as the judgments of both the lower Courts have upheld it.

Expression has recently been given by this Court to the view, that one of the most essential principles of the law of arbitration is, that the adjudication of disputes by arbitration should be the result of the free consent of the arbitrator to undertake the duties [22] of arbitrating between the contending parties who have agreed to repose confidence in his judgment. Indeed, the finality of such award is based entirely upon the principle that the arbitrators are judges chosen by the parties themselves, and that such judges are willing to settle the disputes referred to them. This essential characteristic of the effect of such adjudications is necessarily vitiated if compulsion is employed by the Court. "Though the arbitrator has taken on himself the burden of the reference, and held several meetings, but not closed the case, he may decline to go on any further with the arbitration, and the Courts have no jurisdiction over him to compel him to proceed; nor can they order him to make his award according to a particular principle."—(Russell on Arbitration, 196). It seems that, under the Civil Law, an arbitrator might be compelled to make an award. But "it was decided in equity, by Lord Chancellor ELDON, that if arbitrators refused to proceed with a suit referred to them, the suit might be prosecuted as if no reference had been made; and, in giving judgment, Lord ELDON put it on the same footing as a case where one of the arbitrators had died."—(Russell on Arbitration, 156). This principle, and not the rule of the Civil Law, appears to have been adopted by s. 510 of our Civil Procedure Code, and therefore the learned District Judge was wrong in holding that "as the agreement to refer the dispute to arbitration was uncanceled, the Court was well within its powers in again referring the matter to arbitrators." Such is not our law; and we hold that all proceedings taken by the arbitrators in obedience to the order of the Subordinate Judge, directing the arbitrators to arbitrate against their will,

were null and void. This view renders it unnecessary to consider the second ground of appeal before us. We therefore set aside the decrees of both the lower Courts and remand the case under s. 562, Civil Procedure Code. Costs in all the Courts to abide the result.

Appeal allowed.

[23] *The 17th July, 1884.*

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE,
AND MR. JUSTICE BRODHURST.

Bhairon Singh.....Plaintiff

versus

Lalman and another.....Defendants.*

Pre-emption—Notice to pre-emptor of projected sale—Purchase-money—In action of pre-emptor—Acquiescence.

The plaintiff in a suit to enforce the right of pre-emption alleged that the true consideration for the sale was less than the amount stated in the sale-deed. It was found that he made no communication to the vendor after he became aware that a sale was being negotiated, nor did he make it known to him that, while he stood upon his pre-emptive right, he declined to pay the price stated in the deed, because it was not the consideration agreed on between the vendor and the vendee.

Held, that the plaintiff was bound, instead of remaining silent, to communicate to the vendor that he was prepared to purchase at the price within a reasonable time, and that not having done so, he must be taken to have countenanced the completion of the bargain with the vendee, and to have waived his right of pre-emption.

THE plaintiff, who was a co-sharer in mauza Bindani, sued to enforce his right of pre-emption under the *wajib-ul-arz*, in respect of a sale by Bijai Singh to Lalman of a share in the village, under a sale-deed dated the 31st March 1881. He alleged that the consideration for the sale was not Rs. 4,000 as stated in the deed, but that Rs. 2,152-8-0 was the true amount. Among other objections, the defendants (vendor and vendee) pleaded that the plaintiff had forfeited his pre-emptive right by having neglected to exercise it, after the defendant-vendor had given him sufficient notice that the sale was in contemplation. The Court of First Instance (Subordinate Judge) was of opinion that notice of the intended sale had not been proved, and also that the purchase-money was not Rs. 4,000 as stated in the sale-deed, but Rs. 2,152-8-0, as alleged by the plaintiff. The Court accordingly decreed the claim. On appeal the Lower Appellate Court (District Judge) reversed the decree. It observed that, in the Appellate Court, the due receipt of notice was admitted by the plaintiff's pleader, and was otherwise sufficiently established; that the notice was shown to have been received on the 30th March 1881, and the sale-deed, though executed, *i.e.*, engrossed, on the 31st March, was not registered until the 14th April; that this delay might reasonably be supposed to have been made in order to give the plaintiff time to interfere; but [24] that he had taken no steps whatever to assert his claim. The Court was further of opinion that it was not incumbent upon the defendants to prove an express refusal by the plaintiff to exercise his pre-emptive

* Second Appeal No. 1062 of 1883, from a decree of A. Sells, Esq., District Judge of Cawnpore, dated the 30th April 1883, reversing a decree of Maulvi Farid-ud-din, Subordinate Judge of Cawnpore, dated the 25th September 1882.

right, and that when the notice of sale had been established, the burden of proving an assertion of the right was thrown upon him.

In second appeal, the plaintiff contended, first, that the Lower Appellate Court was wrong in treating his mere silence as an acquiescence in the sale and a waiver of his pre-emptive right; and secondly, that, inasmuch as the notice of sale had specified a price disputed by him and found by the Court of First Instance to be fictitious, he was justified in disregarding it. The High Court remanded certain issues for determination by the Lower Appellate Court, and it appeared from the findings returned upon these issues that there was no evidence to prove that the purchase-money had been falsely stated in the sale-deed.

Mr. T. Conlan and Pandit *Ajudhia Nath*, for the Appellant.

Mr. W. M. Colvin and Pandit *Nand Lal*, for the Respondents.

The Court (STRAIGHT, Offg. C.J., and BRODHURST, J.) delivered the following judgment:—

Straight, Offg. C. J.—Upon full consideration of all the circumstances of this case, and by the light of the findings returned to us upon the issues remanded, we are of opinion that the decree of the Judge, which is impeached in appeal, should be sustained. The single question for our determination is whether, after having notice of the intended sale to the respondent-vendee, the appellant's conduct was such as to warrant the inference that he either expressly or impliedly acquiesced in or relinquished his claim to pre-emption. It is found by the Judge that he made no communication whatever to the vendor after he became aware that a sale was being negotiated, nor did he make it known to him that, while he stood upon his pre-emptive right, he declined to pay the Rs. 4,000, because it was not the consideration agreed on between the vendor and the vendee. The offer to him having come to his knowledge, as is now found, by the 30th March, we think he was bound, instead of remaining silent, to communicate to the vendor that he was prepared to purchase at the price within a reason-[25]able time, and that, not having done so, he must be taken to have countenanced the completion of the bargain with the vendee, and to have waived his right of pre-emption. The cases referred to by the learned pleader for the appellant are not strictly analogous, for in them the pre-emptor satisfied the requirements to which we have adverted above. It seems to us, therefore, that the conclusions arrived at by the Judge were well founded, and that this appeal must be dismissed.

Appeal dismissed.

NOTES.

[See also (1908) 35 Cal., 575 ; 13 I.C., 561.]

[7 ALL. 25]
The 21st July, 1884.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE DUTHOIT.

Muhammad Habibullah Khan.....Defendant
versus
Safdar Husain Khan.....Plaintiff.*

Resulting trust—Suit against trustee for possession of share, and for account and recovery of profits—Act XV of 1877 (Limitation Act), s. 10, sch. ii, Nos. 62, 89, 120.

M and S purchased certain property jointly in 1865, and had equal interests in it till 1868, when M's interest was reduced to one-third. S paid the entire purchase-money in the first instance, and incurred expenses in conducting suits for possession of the property, and for registration of the deed, and ultimately obtained possession in 1869 or 1870, and took the profits from that date. M did not pay any part of the money up to 1870, and it was not till 1871 that the whole of his share of it was subscribed, and he paid little or nothing towards the expenses. Subsequently he sued S for possession of his share, to have an account taken of the profits, and to recover his share of them with future mesne profits and costs.

Held that, under the above circumstances, there was a resulting trust in favour of the plaintiff and the defendant became liable to account to him for his share; but inasmuch as there was no express trust, and the property did not become vested in trust for a specific purpose within the meaning of s. 10† of the Limitation Act, and the suit was not brought for the purpose of following such trust property in the hands of a trustee, within the meaning of the section, such suit was not one which, under s. 10, might not be barred by any length of time. *Bulwant Rao v. Puran Mal*, 1. L. R., 6 All., 1, referred to.

Held, also, that No. 89 of schedule ii of the Limitation Act did not apply to the suit; and that No. 62 did not meet a claim like the present relating to an equitable claim against a trustee liable to account, in which the relief sought was to have an account taken of the trust property, and to recover what might be due. *Guru Dass Pyne v. Ram Narain Sahu*, L. R., 11 Ind. App., 59: 1. L. R., 10 Cal., 860, referred to.

Held, also, that No. 120 of schedule ii of the Limitation Act applied to the suit, as it was one for which no period of limitation was provided elsewhere in the schedule.

[26] THE plaintiff in this case sued for possession of a one-half share of certain property which had been purchased jointly by himself and the defendant in 1865; to have an account taken of the profits; and to recover his share of them to the amount of Rs. 15,000, with future mesne profits and costs. The purchase-money was paid, in the first instance, by the defendant, with whom the property, from the time when possession of it was obtained in 1869 or 1870, remained, and who, according to the plaintiff, held the half share in trust for him. In 1877, when the plaintiff demanded an account and share of the profits, the defendant denied his right to more than one-third of the property. In 1880, the defendant refused to come to any arrangement. He alleged that the plaintiff had promised to pay

* First Appeal No. 57 of 1882, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 27th February, 1882.

† [Sec. 10 :—Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property, shall be barred by any length of time.]

Suits against express trustees and their representatives.

his share of the purchase-money and of the expenses incurred in obtaining possession of the property, or, in default, to relinquish his claim, and that, having failed to make such payment, he had now forfeited the one-third share:

There were between the parties various issues of fact, to which it is not necessary to refer at length. The Court of First Instance found that the parties had joined in making the purchase; that the plaintiff's share was originally one-half, but that he had relinquished a portion in 1868, his share being thus reduced to one third; that the defendant held this one-third share in trust for the plaintiff with a liability to account for it to him; that the plaintiff did not bind himself to relinquish the share upon failure to make certain payments; and that he was entitled to a third of the profits which the defendant had received.

One of the pleas set up by the defendant was that the claim was barred by limitation. The learned Judge was of opinion that the limitation applicable to the claim for account and profits was that provided by sch. ii., art. 120 of the Limitation Act, and that the suit being brought within six years from the accrual of the cause of action in 1880, when the defendant first denied the plaintiff's right to the one-third share, the plea of limitation failed.

On appeal to the High Court, it was contended for the defendant that the learned Judge was wrong in treating him as a trustee in respect of the property; that the limitation applicable to the case was not art. 120, but art. 62, or possibly art. 89; and that [27] the plaintiff could only claim profits for three years, and the claim had become barred.

Mr. T. Conlan, Mr. G. T. Spankie, Munshi Hanuman Prasad and Shaikh Mehdi Hasan, for the Appellant.

Mr. G. E. A. Ross, Pandit Bishambhar Nath, the Senior Government Pleader (Lala Juala Prasad), and Pandit Nand Lal, for the Respondent.

The Court (OLDFIELD and DUTHOIT, JJ.) delivered the following judgment:—

Duthoit, J., (After stating the facts, continued):—With regard to the appeal on behalf of defendant in respect of the character in which defendant held the property, it seems clear that the plaintiff and defendant joined in the purchase in 1865, and each had equal interests in the properties until 1868, when the plaintiff's interest was reduced to one-third. The defendant paid the entire purchase-money in the first instance, and incurred expenses in conducting suits for possession of the property, and for registration of the deed; and ultimately obtained possession in 1869 or 1870, and took the profits from that date. The plaintiff does not appear to have paid any part of the money up to 1870; he subsequently paid Rs. 3,500, and it was not till 1871 that the rest of his share of it was subscribed; and he seems to have paid little or nothing towards the expenses.

Under the above circumstances, there was a resulting trust in favour of the plaintiff, and the defendant became liable to account to the plaintiff for his share; but there was no express trust; the property did not become vested in trust for a specific purpose within the meaning of s. 10 of the Limitation Act, nor is this suit brought for the purpose of following such trust property in the hands of a trustee within the meaning of the section. Their Lordships of the Privy Council have ruled that the section applies to suits for the purpose of recovering the property for the trusts in question, and that when property is used for some purpose other than the proper purpose of the trusts, it may be recovered, without any bar of time, from the hands of the persons indicated in the section.—*Bulwant Rao v. Puran Mal*, I. L. R., 6 All., 1. This suit is not

[28] therefore one which, under s. 10, may not be barred by any length of time.

The Judge has applied to it the limitation of art. 120, so far as it is a suit for account, and recovery of the money found to be due. On the other hand, it is contended for the defendant that either art. 89 or art. 62 of the Limitation Act (XV of 1877) is applicable.

In our opinion, the former article is not applicable, for no relation of principal and agent can be said to subsist between the plaintiff and the defendant, nor do we consider art. 62 to apply. That article refers to suits for money payable by the defendant to the plaintiff for money received by the defendant, for the plaintiff's use, but it does not meet a suit like this relating to an equitable claim against a trustee liable to account, in which the relief sought is to have an account taken of the trust property and to recover what may be due. The form in which the suit is brought is not that of an action for money had and received for the plaintiff's use, and the latter class of suit would not afford a sufficient relief.

We may refer to the case of *Guru Dass Pyne v. Ram Narain Sahoo*, L.R., 11 Ind. Ap., 59: I. L. R., 10 Cal., 860, decided by the Privy Council on the 21st February 1884, in support of the view of art. 62 which we take. The plaintiff in that case had obtained a decree for money against the widow of one Modhosadan as representing the latter, on account of the value of timber converted by Modhosadan to his use. Some property of Modhosadan's brother was attached, and the plaintiff instituted the suit to try his right to recover the amount of his decree by sale of the property, on the ground that Modhosadan's brother had misappropriated the proceeds of the sale of the timber. Their Lordships held that art. 60, Act IX of 1871, which corresponds to art. 62, Act XV of 1877, was inapplicable to the suit, which they observe was "to enforce an equitable claim on the part of the plaintiffs to follow the proceeds of their timber, and, finding them in the hands of the defendant, to make him responsible for the amount;" and they held that the suit came within art. 118, Act IX of 1871, which corresponds with art. 120, Act XV of 1877.

[29] In the same way, an equitable claim of the nature of the present will not fall under art. 62, but under art. 120 of the Limitation Act, and the Judge was right to apply that article, as the suit is one for which no period of limitation is provided elsewhere in the schedule.

[Other matters dealt with in the judgment are not material to the purposes of this report. The case was remanded to the lower Court for the determination of certain questions of fact.]

Cause remanded.

NOTES.

[Sec. 10 of the Limitation Act, 1877 (1908), does not extend to cases of constructive trust:—(1890) 14 Bom., 476; (1907) 31 Bom., 222; (1911) 36 Bom., 214.

As regards the applicability of Art. 62, see also (1907) 30 Mad., 459; (1911) 12 I.C., 704 (Mad.).]

[7 All. 29]

CRIMINAL REVISIONAL.

The 22nd July, 1884.

PRESENT :

MR. JUSTICE BRODHURST.

Queen-Empress

versus

Dungar Singh and another

Convictions of rioting and causing grievous hurt—Offences distinct—Separate sentences not illegal—Criminal Procedure Code, ss. 35, 235 — Act VIII of 1882, s. 4—Act XLV of 1860 (Penal Code), ss. 147, 325.

The offences of rioting, of voluntarily causing hurt, and of voluntarily causing grievous hurt, each of the two latter offences being committed against a different person, are all distinct offences within the meaning of s. 35 of the Criminal Procedure Code.

Under the first paragraph of s. 235 of the Criminal Procedure Code, a person accused of rioting and of voluntarily causing grievous hurt may be charged with and tried for each offence at one trial, and, under s. 35, a separate sentence may be passed in respect of each. *Queen-Empress v. Ram Partab*, I. L. R., 6 All., 121, dissented from.

The facts of this case are sufficiently stated in the judgment.

Mr. C. Dillon, for the Applicants.

The Public Prosecutor (Mr. G. E. A. Ross), for the Crown.

Brodhurst, J.—In this case Dungar Singh, Chuni Singh, and five other accused persons were tried by the Deputy Magistrate of Pilibhit for the offences of rioting and causing grievous hurt, punishable respectively under ss. 147 and 325 of the Indian Penal Code. Dungar, Chuni, and one Nathu Khan were convicted and sentenced to six months' rigorous imprisonment under s. 147, and were also convicted under s. 325, and were each sentenced to a further term of six months' rigorous imprisonment. [30] The remaining four persons were each sentenced to six months' rigorous imprisonment under s. 147.

The prisoners preferred appeals which were dismissed by the Sessions Judge, and Dungar and Chuni have each now presented an application to this Court for revision of the orders of the lower Courts. Four objections to these orders were taken; three of them are now abandoned by the applicants' learned counsel; and the fourth and remaining one is :—"Because, under a ruling of this Hon'ble Court, separate sentences under ss. 147 and 325, Penal Code, are illegal." I have therefore to decide whether this plea is valid or not.

In the ruling referred to, *Queen-Empress v. Ram Partab*, I. L. R., 6 All., 121, Mr. Justice STRAIGHT after coming to the conclusion that the appeal must be dismissed on the merits, continued :—"But it is incumbent upon me now to consider the further question of whether under the double convictions of the appellant, under ss. 147 and 325 of the Penal Code, the separate sentences of one year and two years' rigorous imprisonment respectively were legally passed. I concede at once that by the first clause of s. 235 of the Criminal Procedure Code, it was competent for the Judge to try him, in a single trial, for the offences of

riot and causing grievous hurt;" and my learned colleague, towards the end of his judgment, observed:—"So in the present case the appellant was a member of an unlawful assembly; he participated in a riot, and, in the course of such riot, grievous hurt was caused by persons other than himself, for which he was responsible in law, as if his own hand had inflicted it, by reason of his being a member of an unlawful assembly of which they also were members. It was permissible to try and convict him for riot and for causing hurt or grievous hurt, as the case might be, in respect of each person assaulted, subject, of course, to the limitations of s. 234 of the Criminal Procedure Code as to the number of charges joined; but while he might be punished for the riot or upon each of the charges of grievous hurt separately, I do not think that different sentences can be passed for the riot and in respect of each of such other charges as well. In my opinion the riot is a part of those other [31] offences, the force or violence incident to their commission converting what would otherwise have been a mere unlawful assembly into a riot. In this view of the matter, I hold that the sentence passed upon the appellant under s. 147 should be quashed, and as I think the two years' rigorous imprisonment, imposed under s. 325 of the Penal Code, meets the requirements of justice, I consider it unnecessary to make any further orders."

I will notice one or two other rulings of this Court under the same or similar sections of the Penal Code, and will then state my own opinion as to the law on the subject.

In the case of the *Queen v. Hurgobind*, N. W. P. H. C. Rep., 1871, p. 174, the prisoners, who had been convicted under ss. 148, 304, and 326 of the Penal Code, and had each been sentenced to rigorous imprisonment for three years under s. 148, to five years under s. 304, and to two years under s. 326, or in the aggregate to ten years' rigorous imprisonment, appealed against these convictions and sentences, and TURNER, J. (now Chief Justice of the High Court at Madras), in disposing of the appeal, observed: "Then it is said, the appellants cannot be convicted of rioting, armed with deadly weapons, and of committing culpable homicide and grievous hurt. The facts established show that these appellants engaged in a riot, armed with deadly weapons; that in the prosecution of the common object of the assembly, one man was killed and several severely wounded. With every respect for the opinion of the learned Judges who decided the case of *R. v. Razz-ulla*, 7 W.R., Cr., 13, I cannot assent to the ruling that, under such circumstances as exist in this case, the appellants cannot be convicted of the three several offences. A different view of the law has heretofore obtained in this Court. The sentence is collectively severe, but not so much out of proportion to the offence that I feel justified in interfering. The appeal is dismissed."

The above-mentioned judgment was delivered when Act XXV of 1861 was the Code of Criminal Procedure in force, but a more recent ruling by PEARSON, J., in *Empress v. Ram Adhin*, I.L.R., 2 All., 139, is to the same effect. In that case, eight persons, who had been separately charged with, convicted of, and punished for [32] offences under s. 147 and 323 of the Penal Code, by the Magistrate, and whose sentences had, on appeal, been affirmed by the Sessions Judge, presented an application to this Court for revision of the order above-mentioned, and their learned counsel contended that they could not be punished both for the offence of rioting and for that of voluntarily causing hurt. PEARSON, J., in the course of his judgment, remarked:—"It appears that in the case of *Queen v. Hurgobind*, N. W. P. H. C. Rep., 1871, p. 174, decided by this Court on 7th July 1871, TURNER, J., held that persons found guilty of rioting may, if the circumstances warrant it, be convicted of the several offences of rioting

armed with deadly weapons, culpable homicide, and grievous hurt. The learned Judge referred to the case of *Rabi-ulla*, 7 W. R., Cr., 13, mentioned above, and expressed his dissent from the ruling therein, and observed that a different view of the law had heretofore obtained in this Court. It further appears that the learned Judges of the Calcutta Court, who disposed of *Rabi-ulla's case*, ruled in a different direction in the case disposed of by them in the following month of April. On the whole, the precedents which have been produced are opposed to the contention in this case. It is obvious to remark that rioting and unlawful assembly are offences against the public tranquillity, while assault, hurt, &c., are offences affecting the human body. Seeing no sufficient reason for interference, I reject this application."

The then law on the subject was contained in para. 1, s. 454, Act X of 1872, and if any doubt could possibly be entertained as to the meaning of that paragraph, it would have been removed by referring to *Illustration (f)*, which clearly shows that an accused person might be separately charged with, convicted of, and punished for offences under ss. 147, 323 and 152 of the Penal Code.

For many years past, the Sessions Judges and Magistrates of these Provinces have constantly decided such cases in accordance with the above and similar rulings, and a very large number of their judgments has undoubtedly been affirmed by this Court, on appeal and in revision.

That accused persons could, during the ten years and more that Act X of 1872 was in force, be separately charged with, con-[33]victed of, and punished for the offences under ss. 147 and 325 of which the applicants in the present case have been convicted and sentenced, appears to be indisputable, and all that remains now to be seen is whether any change on this point has been effected by Act VIII of 1882, or by Act X of 1882, which came into force on the 1st January 1883.

Section 235 of Act X of 1882 is the corresponding section to s. 454 of Act X of 1872. The wording of para. 1, s. 235 of the new Code, differs slightly from the wording of para. 1, s. 454 of the late Code, but the meaning of the two paragraphs is precisely the same, and *Illustration (g)* to para. 1, s. 235 of Act X of 1882 is almost word for word the same as *Illustration (f)*, para. 1, s. 454 of Act X of 1872. *Illustration (g)* shows that a person may still be separately charged with, and convicted of, offences under ss. 147, 325, and 152 of the Indian Penal Code; but the word "punished" is not to be found in the new illustration as it was in *Illustration (f)* above referred to in the Code lately repealed. The word "punished" has apparently been omitted from all the illustrations in the new Code, and the reason of this is explained by Mr. Mayne on page 43 of the twelfth edition of his *Commentaries on the Indian Penal Code*, as follows:—

"This section (235 of Act X of 1882), combined with s. 71 of the Penal Code, seems to reproduce the provisions of the former Criminal Procedure Code (Act X of 1872), s. 454. The omission of all those references to punishment in the section itself and in the illustrations which were contained in the repealed s. 454, shows that it is to be treated merely as containing rules for criminal pleading and procedure, and that the rules as to assessment of punishment must be sought for in s. 71 of the Penal Code, as amended by Act VIII of 1882, and in the Criminal Procedure Code, s. 35, ante, pp. 34-42."

Section 71 of the Penal Code did not affect para. 1, s. 454, Act X of 1872, and s. 71, as amended by s. 4, Act VIII of 1882, does not in any way affect para. 1, s. 235 of Act X of 1882, so that an accused person can still, as before, be separately tried, convicted, and punished for offences under ss. 147, 325 and

152 of the Indian Penal Code. Reading s. 71 of the Penal Code as amended [34] by s. 4 of Act VIII of 1882 with s. 235 of Act X of 1882, the law on the subject is the same as it was when Act X of 1872 was in force. Portions of paragraphs 2 and 3 of s. 454, Act X of 1872, contained matter of substantive law, and they were, therefore, when the Criminal Procedure Code was re-enacted, omitted from that Code, and were by s. 4, Act VIII of 1882, placed in the Penal Code.

By s. 35 of the Criminal Procedure Code it is enacted :

"When a person is convicted, at one trial, of two or more distinct offences, the Court may sentence him for such offences to the several punishments prescribed therefor which such Court is competent to inflict: such punishments, when consisting of imprisonment or transportation, to commence the one after the expiration of the other in such order as the Court may direct.

"It shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court.

"Provided as follows:—

(a) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years.

(b) if the case is tried by a Magistrate (other than a Magistrate acting under s. 34) the aggregate punishment shall not exceed twice the amount of punishment which he is, in the exercise of his ordinary jurisdiction, competent to inflict."

The offence of rioting, and the offences of voluntarily causing hurt and voluntarily causing grievous hurt, each of the two latter offences being committed against a different person, are all distinct offences. The offence of voluntarily causing hurt or of voluntarily causing grievous hurt obviously can be committed without the commission of the offence of rioting, and, in like manner, rioting can be committed without the commission of the two other mentioned offences. If then a person is accused of having committed the offence of rioting armed with a deadly weapon, and also with having at the same time committed the offences of voluntarily causing hurt to one person, and of voluntarily causing grievous hurt, by means of a dangerous weapon, to another person, he may, under the provisions of para. 1, s. 235 of the Criminal Procedure Code, be charged with and tried, at one trial, for each of the three above-mentioned offences; and, in my opinion, he may, under the provisions of s. 35 of the Criminal Procedure Code, be sentenced to three years' rigorous imprisonment under s. 148 of the Penal Code, to one year's rigorous imprisonment under s. 323, and to ten years' rigorous imprisonment under s. 326, or to an aggregate punishment of fourteen years' rigorous imprisonment. This appears to me to be not only in accordance with the law, but also with common sense.

A commits a most aggravated assault on B, causing bone fractures and other very serious injuries, and conducts himself generally in such a way as to render any punishment less than the maximum amount of seven years' rigorous imprisonment that can be awarded under s. 325 of the Penal Code, inadequate. In another case C, a zamindar, collects two hundred men and arms them with lathis, spears, and tulwars in order to eject D, a neighbouring landholder, from a certain portion of his land, and to take it into his own possession. C and his followers thus become members of an unlawful assembly; when the members of this unlawful assembly proceed to D's land, which he is having

ploughed, and stop and unyoke the bullocks, they, having thus committed "force," are guilty of the offence of rioting armed with deadly weapons. C, on being remonstrated with by D, for bringing the members of the unlawful assembly on to his land and stopping his ploughing, assaults D, and commits grievous hurt of a similar nature to that above described in the case of B. C would, equally with B, be deserving of the maximum term of imprisonment under s. 325 of the Penal Code, and C, having in addition to the serious offence affecting the human body that he is guilty of, committed another grave offence against the public tranquillity, and having caused alarm to women, children, and other peaceably disposed persons within a large tract of country, obviously ought not to go unpunished for the offence of which he is guilty under s. 148 of the Penal Code.

The Deputy Magistrate's decision is in accordance with the vast majority of the rulings of this Court for many years past. It is, moreover, in accordance with the judgments of the majority [36] of the Judges of this Court ever since Act X of 1882 came into force. It is also, in my opinion, in conformity with the law, and is otherwise unobjectionable. I therefore decline to interfere, and I reject the application.

• Application rejected.

NOTES.

[See also the explanation of this case in 7 All., 757; 9 All., 645; 10 All., 53; 16 Cal., 442, F.B.]

[7 All. 36]

APPELLATE CIVIL.

The 23rd July, 1884.

PRESENT :

MR. JUSTICE MAHMOOD AND MR. JUSTICE DUTHOIT.

Nath Mal Das and others..... Defendants

versus

Tajammul Husain.... Plaintiff.*

Civil Procedure Code, s. 244—Question for Court executing decree—Plaintiff suing in a character separate from that in which decree was passed against him—Separate suit not barred.

A judgment-debtor, upon the attachment of certain land in execution of decrees passed against him personally by the Revenue Court, instituted a suit for a declaration and establishment of his right to such land, not as his own property but as *wakf*, of which he was *mutawalli* or trustee.

Held, that inasmuch as the plaintiff was not suing in his own right, but in his capacity as custodian, trustee, or manager of the *wakf* property, and he must therefore be taken to fill a character separate from that in which the decrees were passed against him by the Revenue Court, his suit was not barred by the provisions of s. 244 of the Civil Procedure Code. *Madho Prakash Singh v. Murli Manohar*, I. L. R., 5 All., 406, and *Shankar Dial v. Amir Haidar*, I. L. R., 2 All., 752, referred to.

* First Appeal No. 16 of 1884, from a decree of Maulvi Nasir Ali Khan. Subordinate Judge of Moradabad, dated the 14th September 1883.

THE appellants, in execution of decrees passed by the Revenue Court against the respondents personally, attached certain land. The respondent objected on the ground that the land was not liable to attachment, as it was *wakf* under his father's will. The objection was disallowed by the Revenue Court, presumably under s. 179 of the N.-W. P. Rent Act (XII of 1881), on the 4th of June 1883. The present suit for a declaration and establishment of right to the land in question was subsequently instituted by the respondent, not in his own right, but as *mutawalli* or trustee of the *wakf* property.

The Court of First Instance (Subordinate Judge) decreed the claim on the ground that the property was the subject of *wakf*, and therefore not liable to attachment or sale in execution of a decree against the plaintiff personally.

[37] On appeal to the High Court, it was contended, *inter alia*, that this being a question arising between the parties to the suit in which the original decree was passed, and relating to the execution of the decree, it should, with reference to s. 244 of the Civil Procedure Code, be settled in the execution department, and not by a separate suit.

Munshi Hanuman Prasad and Lala Harkishen Das, for the Appellants.

Mr. Amir-ud-din and Bubu Barodā Prasad, for the Respondent.

The Court (MAHMOOD and DUTHOIT, JJ.) delivered the following judgment:—

Mahmood, J.—In the appeal before us, the learned pleader for the appellants has laid the greatest stress on the contention that the suit was not maintainable by the plaintiff, as he was the judgment-debtor of the decrees in execution whereof the property was attached. For this contention, s. 244 of the Civil Procedure Code is relied upon, on the ground that the Courts of Revenue, in those matters of procedure on which the Rent Act is silent, have been held by a Full Bench of this Court in *Madho Prakash Singh v. Murli Manohar*, I. L. R., 5 All., 406, to be governed by the principles of the Civil Procedure Code.

We are, however, of opinion that the suit was maintainable. The plaintiff in this suit is not suing in his own right, but in his capacity as custodian, trustee, or manager of the *wakf* property, and he must therefore be taken to fill a character separate from that in which the decrees were passed against him by the Revenue Court. Section 244 of the Civil Procedure Code does not, therefore, bar the present suit, and the view which we have taken is supported by the principle laid down in *Shankar Dial v. Amir Haidar*, I. L. R., 2 All., 752, and in the cases there cited. The legal objection therefore has no force.

(The Court proceeded to consider the findings of the Court of First Instance upon the merits, and, holding that no grounds for disturbing these findings had been established, dismissed the appeal with costs.)

Appeal dismissed.

NOTES.

[The view laid down in this case to the effect that the court should look to the "substance of the objection, and not to the accident that it is put forward by A rather than by B" is in accordance with the dictum in (1886) 10 Mad. 117 (119) and also the following cases:—(1885) 7 All. 547; (1889) 12 All., 313 (legal representative subsequently setting up his own independent right); (1886) 8 All., 626; (1901) 23 All., 263; (1906) 28 All., 644; (1888) 15 Cal., 437 (judgment-debtor objecting under his *mutwali* right); (1898) 23 Bom., 237 (where trustee right on behalf of third parties was set up); (1888) 16 Cal., 1; (1890) 17 Cal., 711 referred to and discussed in (1898) 23 Mad., 195 F. B. (where trustee right was set up) and (1911) 12 I. C., 411 (Oudh).]

[38] The 28th July, 1884

PRESENT :

MR. JUSTICE MAHMOOD AND MR. JUSTICE DUTHOIT.

Fida Husain and another.....Plaintiffs
versus

Kutub Husain.....Defendant.*

Execution of decree—Decree for money—Property not attached—Such property not sold in execution—Submersion of contiguous estate—Alluvion.

F owned a share in a village *M*, which in 1875 was divided into two separate mahals, *K* and *U*, and Government revenue was separately assessed on each mahal. In 1876, *K* was entirely submerged by the Ganges. On the 20th September 1877, *F*'s share was sold in execution of a decree, and the auction-purchaser was put in possession. In the sale-certificate, the village *M* was named, without specific mention of either of the two mahals, and the Government revenue referred to was the amount assessed on *U* only. Subsequently the river receded, and part of *K* was again left dry, and it was treated by the revenue authorities as having accreted by alluvion to *U*, in the proprietary possession of the auction-purchaser.

Held, that this view was erroneous inasmuch as before the auction-sale of 20th September 1877, the two properties were separate, being separately assessed with revenue, and the incidents of the ownership of one could not affect the ownership of the other; and since there was no such rule of law as would justify the proposition that simply because two mahals are contiguous, and one of them is liable to be submerged, therefore it is nothing more or less than an accretion to the other.

Held, also, that inasmuch as the mahal *K*, being at the time under water, was not attached in execution of the decree against *F*, and was not advertized for sale, and the revenue assessed thereon was not referred to in the sale-proceedings, and the sale certificate contained no reference to it as the property sold, the sale of the 20th September, 1877, did not convey any rights to the auction-purchaser in respect of *K*. *Mahadeo Debey v. Bholu Nath Dicit*, J. L. R., All., 86, referred to.

ALI BAKHSH, father of the plaintiff in this suit, Fida Husain, owned a two annas share in mauza Mustafabad, and in 1875 the village was divided into two separate mahals, one being called "Uparwar" and the other "Kachar," and Government revenue was separately assessed on each. In 1876, the Kachar mahal was entirely submerged by the river Ganges. On the 20th September 1877, the share of the plaintiff's father in Mustafabad was sold in execution of a simple money-decree, and the auction-purchaser was put in possession. In the sale-certificate Mustafabad was named, without specific mention of either of the two mahals, and the Government revenue referred to was the amount assessed on the Uparwar mahal [39] only. In 1879 and 1880, the river having to some extent receded, part of the Kachar mahal was again left dry, and it was treated by the revenue authorities as having accreted by alluvion to the Uparwar mahal in proprietary possession of the auction-purchaser. The plaintiffs (Fida Husain and one Mir Khan to whom he had sold half of the property in dispute) thereupon instituted the present suit for the recovery of this land, and the whole question between the parties was, whether the sale of the 20th September 1877, conveyed the share of Ali Bakhsh in the Uparwar mahal only, or also his rights and interests in the Kachar mahal.

* Second Appeal No. 16 of 1884, from a decree of F. S. Bullock, Esq., Offg. District Judge of Allahabad, dated the 12th September 1883, affirming a decree of Pandit Indar Narain, Munsif of Allahabad, dated the 16th July 1883.

The Court of First Instance (Munsif of Allahabad) and the Lower Appellate Court (District Judge of Allahabad) concurred in dismissing the suit, on the ground that the sale conveyed the rights and interests of Ali Bakhsh in both the mahals. The Lower Appellate Court, in arriving at this conclusion, relied principally on the circumstance that, at the time of the sale, the Kachar mahal was under water, and that, therefore, besides the Uparwar mahal, "there was no other mahal in existence at the time of the sale. No mahal Kachar existed, or it would inevitably have been sold."

The plaintiffs appealed to the High Court, contending that the mahal Kachar had not been conveyed by the sale of the 20th September 1877, and should not be treated as an accretion by alluvion to the estate of the adjacent proprietor.

Mr. *Amir-ud-din*, for the Appellants.

Pandit *Ajudhia Nath*, Shaikh *Maula Bakhsh* and Babu *Jogindro Nath Chaudhri*, for the Respondent.

The Court (MAHMOOD and DUTHOIT, JJ.) delivered the following judgment:—

Mahmood, J.—It is clear to us that the question in this case is not what might have been sold, but what was *actually* sold. And upon this question there can be no doubt. There is nothing to show (and indeed it is not seriously maintained) that the Kachar mahal was ever actually attached or advertized for sale, and the only explanation given is that it was under water at the time. The explanation, however, far from supporting the defence, strengthens the plaintiff's case. The two mahals were made into separate [40] properties in 1875, and it is admitted that during the sale-proceedings, in describing the shares to be sold, the revenue assessed on the Uparwar mahal only was mentioned. Such is the case in the sale-certificate itself, which is the basis of the defendant's title. Yet the Courts below have allowed the defendant more than his title-deed includes, apparently on the ground that although the two mahals were separate properties, yet the ownership of the Kachar depended upon the ownership of the Uparwar mahal, the latter being regarded as the main property, and the former as accretion to it. But such a view is clearly erroneous in law. Before the auction-sale of the 20th September 1877, Ali Bakhsh could have sold his share in the Kachar, and kept his share in the Uparwar mahal, and *vice versa*. The two properties were separate being separately assessed with revenue, and the incidents of the ownership of one could not affect the ownership of the other. There is no such rule of law as would justify the proposition that simply because two mahals are contiguous, and one of them is liable to be submerged, therefore the former is nothing more or less than an accretion to the other. Yet such seems to be the view upon which the judgments of the lower Courts proceed. The ownership of property cannot pass without a valid legal conveyance or other incident of law which has the same effect. Here the plaintiff's father, Ali Bakhsh, was admittedly the owner of the two annas share in the Kachar mahal, and the plaintiff Fida Husain, as his legal heir, has inherited it. The only fact relied upon by the defendant for proving that the ownership has passed to him is the auction-sale of the 20th September 1877, which, as we have already said, did not include the share in the Kachar mahal now in dispute.

In the case of *Mahadeo Dubey v. Bhola Nath Dichit*, I. L. R., 5 All., 86, a Full Bench of this Court laid down the rule that "a regularly perfected attachment is an essential preliminary to sale in execution of simple money decrees, and that where there has been no such attachment, any sale that may have taken place is not simply voidable, but *de facto* void." In the present case, the

Kachar mahal, being at the time under water, was not attached, it was not advertized for sale, the revenue assessed thereon was not referred to in the sale-proceedings, and the sale certificate itself contains no reference to it as the property sold; but, on the contrary, the share sold is described as paying the amount of revenue assessed on the share of Ali Bakhsh in the Uparwar mahal only. We are therefore unable to agree with the lower Courts in holding that the sale of the 20th September 1877, conveyed any rights to the defendant in the Kachar mahal, and, the title of the plaintiff being admitted, we decree the appeal, reversing the decrees of both the lower Courts. Costs in all the Courts will be paid by the defendant respondent.

Appeal allowed.

NOTES.

[This was *dissented* from in (1886) 9 All., 136.]

[7 All. 41]

The 28th July, 1884.

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, AND MR. JUSTICE MAHMOOD.

Harihar Dat.....Plaintiff

versus

Sheo Prasad and others.....Defendants.*

Pre-emption—Acts or omissions by pre-emptor's authorized agent binding on pre-emptor.

It is a general rule of pre-emption that any act or omission on the part of a duly authorized agent or manager of the pre-emptor has the same effect upon pre-emption as if such act or omission had been made by the pre-emptor himself.

THE plaintiff in this suit, which was one to enforce the right of pre-emption, had been living in Nepal for sixteen years, leaving the property upon the ownership whereof his pre-emptive claim was based under the management of his son Kantika Prasad. The latter was found by both the lower Courts (Subordinate Judge and District Judge of Benares) to have relinquished pre-emption by acquiescing in the sale to which the present suit related. The plaintiff appealed from this decision. Upon remand by the High Court, it was found by the Lower Appellate Court that "Kantika Prasad's position with regard to his father's share was such as to legally warrant his buying or selling on his father's behalf." No objection to this finding was preferred by the plaintiff-appellant under s. 567 of the Civil Procedure Code.

Mr. Simeon and the Senior Government Pleader (Lala Juala Prasad), for the Appellant.

Mr. T. Conlan and Munshis Hanuman Prasad and Kashi Prasad, for the Respondents.

[42] The Court (STRAIGHT, Offg. C.J., and MAHMOOD, J.) delivered the following judgment :—

Mahmood, J.—It is a general rule of pre-emption that any act or omission on the part of a duly authorized agent or manager of the pre-emptor has the

* Second Appeal No 1199 of 1883, from a decree of D. M. Gardner, Esq., District Judge of Benares, dated the 31st May 1883, affirming a decree of Babu Kashi Nath Biswas, Subordinate Judge of Benares, dated the 15th March 1883.

same effect upon pre-emption as if such act or omission had been made by the pre-emptor himself. The refusal of Kāntika to purchase the property now in suit therefore debars the plaintiff from maintaining the present suit. The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[See, for a similar position, (1906) 28 All., 691 ; (1908) 35 Cal., 575, where the guardian or manager under the Court of Wards was held entitled to perform the ceremonies of pre-emption whether such power has been conferred on him or not.]

[7 All. 42]

CIVIL REVISIONAL.

The 29th July, 1884.

PRESENT :

MR. JUSTICE MAHMOOD AND MR. JUSTICE DUTHOIT.

Gulab Rai.....Petitioner

versus

Mangli Lal.....Opposite Party.*

*Civil Procedure Code, ss. 2, 54 (c), 582, 622—"Decree"—Order rejecting
plaint—Plaint held to include memorandum of appeal—Order
rejecting appeal—Act XV of 1877 (Limitation Act), s. 4—
High Court's powers of revision.*

An order rejecting a memorandum of appeal as barred by limitation is a "decree" within the meaning of s. 2 of the Civil Procedure Code ; it is therefore appealable, and not open to revision by the High Court under s. 622 of the Code.

Gajraj Singh v. Bhagwant Singh, Weekly Notes, 1883, p. 255, and *Dianatullah Beg v. Wajid Ali Shah*, 1. L. R., 6 All., 438, distinguished.

THE facts of this case are sufficiently stated in the judgment.

Babu Jogindro Nath Chaudhri, for the Petitioner.

Pandit Ajudhia Nath and Munshi Sukh Ram, for the Opposite Party.

The Court (MAHMOOD and DUTHOIT, JJ.) delivered the following judgment:—

Mahmood, J.—This is an application under s. 622 of the Civil Procedure Code, for revision of an order of the District Judge rejecting an appeal as barred by limitation. The learned Pandit who has appeared on behalf of the opposite party has raised a preliminary objection that the order of the District Judge was a "decree" within the meaning of s. 2 of the Civil Procedure Code ; [43] that it was appealable, and could not, therefore, be made the subject of revision.

There can be no doubt that "an order rejecting a *plaint*" is treated by the Code as a "decree," under the express words of s. 2, and the learned Pandit contends, that with reference to the provisions of the last paragraph of s. 582, the word "plaint," as used in s. 2, must be understood to include

* Application No. 117 of 1884, for revision under s. 622 of the Civil Procedure Code of an order of T. B. Tracy, Esq., Officiating District Judge of Bareilly, dated the 4th January 1884.

memorandum of appeal. He further contends that the first part of the definition of "decree" given in s. 2 is sufficiently broad to include orders such as the one now under consideration.

On the other hand, the learned pleader for the petitioner relies upon a ruling of a Division Bench in *Gajraj Singh v. Bhagwant Singh*, Weekly Notes, 1883, p. 255, in which STUART, C.J., and TYRRELL, J., held that an order rejecting a memorandum of appeal, for failure of the appellant to supply the deficiency of stamp, was not appealable as a decree. The case, however, is not on all fours with the present case, and whatever view we ourselves might have taken in that case, we do not regard it as governing the question now before us, though the *ratio decidendi* bears upon this case. The power exercised by the Judge in that case could have been exercised only under s. 54 (b), read with the last part of s. 582 of the Code, and the proposition of law laid down in that case may seem doubtful, but we are not directly concerned with the point decided in that case.

In the Civil Procedure Code there is no separate provision which allows the Appellate Court to "reject" a memorandum of appeal on the ground of its being barred by limitation. Section 543 is limited to cases in which the memorandum of appeal is not drawn up in the manner prescribed by the Code, and it is only by applying s. 54 (c), *mutatis mutandis* (as provided by the last part of s. 582), to appeals that the Code can be understood to make provision for rejection of appeals as barred by limitation. However, s. 4 of the Limitation Act clearly lays down that every "appeal presented after the period of limitation prescribed therefor shall be dismissed." It is therefore clear that the order of the District Judge in this case must be taken to be one which falls under the [44] definition of "decree" within the meaning of s. 2 of the Code, as the order, so far as the Judge was concerned, disposed of the appeal. We do not think any other view can give effect to the provisions of the Code, for we cannot hold that the Legislature intended such orders to be final.

The learned pleader for the petitioner, however, contends that the view which we have taken is inconsistent with the *ratio decidendi* of a recent ruling of this Court in *Dianatullah Beg v. Wajid Ali Shah*, I. L. R., 6 All., 438, to which one of us was a party. But the point decided in that case was different to the one now before us, and the question of interpretation there related to the language of the Limitation Act, and not to that of the Civil Procedure Code.

The order to which this application for revision relates was, therefore, appealable, and cannot be dealt with by this Court in revision under s. 622 of the Civil Procedure Code. The application is dismissed with costs.

Application rejected.

NOTES.

[For similar decisions on the same point, see (1903) 27 Mad., 21; 13 M. L. J., 300; (1886) 9 Bom., 452; (1885) 12 Cal. 30.

For the adoption of the principle of this case see, (1891) 16 Bom., 23 (case of default); (1892) 16 Mad., 285 (case of rejecting an appeal); (1898) 22 Mad., 155. (rejection of appeal memorandum).]

[7 All. 45] .

CRIMINAL REVISIONAL.

The 31st July 1884.

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, AND MR. JUSTICE DUTHOIT.

Queen-Empress

versus

Ghulet and another.

Criminal Procedure Code, sch. V, No. XXVIII (4)—Alternative charges—Act XLV of 1860 (Penal Code), s. 193—False evidence—Contradictory statements—Assignment of false statement not necessary.

In a charge under s. 193 of the Penal Code, it is not necessary to allege when of two contradictory statements upon oath is false, but it is sufficient (unless some satisfactory explanation of the contradiction should be established) to warrant a conviction of the offence of giving false evidence to show that an accused person has made one statement upon oath at one time, and a directly contradictory statement at another. *R. v. Zumeerun*, 6 W. R. Cr. 65; *R. v. Palany Chetty*, 4 Mad., H. C. Rep., 51, and *R. v. Mahomed Hoomayoon Shaw*, 13 B. L. R., 324, followed; *Empress v. Niaz Ali*, I. L. R., 5 All., 17, overruled.

Per DUTHOIT, J.—Every possible presumption in favour of a reconciliation of the two statements should be made, and it must be found that they are absolutely irreconcilable before a conviction can be had upon the ground that one of them is necessarily false.

The English cases upon this subject are irrelevant to the interpretation of the law of India, since the Indian Legislature has not followed the law of England [45] in regard to perjury. *Trimble v. Hill*, L. R., 5 Ap. Cas., 342, and *Kathama Natchiar v. Dorasinga Tever* L. R., 2 Ind. Ap. 159, referred to.

In this case the Sessions Judge of Azamgarh forwarded, for the orders of the High Court, under s. 339 of the Criminal Procedure Code, an application from the Magistrate of Azamgarh, for sanction to prosecute two persons, Ghulet and Sahai, for the offence of giving false evidence. The Magistrate's application stated the following facts :—

"Both men were admitted as approvers in the lower Court, and there gave a detailed account of a dacoity in which they confessed to have been engaged. When, however, they appeared as witnesses in the Sessions Court they denied all knowledge of the facts previously stated. They have therefore committed perjury either by the former or by the latter statement, and are thus liable to prosecution under the section above quoted (s. 193 of the Penal Code)."

The facts of the case are further set forth in detail in the judgment of DUTHOIT, J.

The Public Prosecutor (Mr. G. E. A. Ross), for the Crown.

The accused were not represented.

The Court (STRAIGHT, OFFG. C.J., and DUTHOIT, J.) delivered the following judgments :—

Duthoit, J.—This is a case submitted under the provisions of the final clause of s. 339 of the Code of Criminal Procedure, which came before me in single Bench. Being of opinion that sanction to prosecute for the offence of giving false evidence should not be granted unless there be good *prima facie*.

ground for considering that a conviction will follow, and that, in this case, unless the charge be drawn in the alternative form provided as No. XXVIII (4) in sch. V, Act X of 1882, such result is improbable, I had to consider the law regarding an alternative charge of offences made punishable by s. 193 of the Indian Penal Code, as laid down for these Provinces in *Empress v. Niaz Ali*, 1. L. R., 5 All., 17, at p. 22. The passage to which I refer is the following:—"It is not of itself sufficient to warrant a conviction either for giving false evidence or making a false oath, that an accused person has made one statement on oath [46] at one time, and a directly contradictory one at another. The charge must not only allege which of such statements is false, but the prosecutor must be prepared with confirmatory evidence, independent of the other contradictory statement, to establish the falsity of that which is impeached as untrue. The remarks of HOLROYD, J., in *R. v. Jackson*, 1 Lewin C. C., 270, are valuable upon this point:—"Although you may believe that on one or the other occasion the prisoner swore what was not true, it is not a necessary consequence that he committed perjury, for there are cases in which a person might very honestly and conscientiously believe and swear to a particular fact from the best of his recollection and belief, and from other circumstances at a subsequent time be convinced that he was wrong, and swear to the reverse without meaning to swear falsely either time. Again, if a person swears one thing at one time and another at another you cannot convict where it is not possible to tell which is the true and which is the false." GURNEY, B., also took a similar view in the case of *R. v. Wheatland*, 8 C and P., 238, upon which and a decision of the Court of King's Bench in *R. v. Harris*, 5 Barn. and Ald. 926, Mr. Greaves in *Russell on Crimes* (Vol. III, pp. 82 and 23, notes) records some valuable comments. Section 455 of the Criminal Procedure Code is no authority for the form of charge prepared by the Magistrate in the present case, and the word 'alternative' as used in the section means that where the facts which can be proved make it doubtful what particular description of offence an accused person has committed, the charges may be so varied or alternated as will guard against his escaping conviction through technical difficulties."

Being myself of opinion that, under the law of British India, it is not necessary that the charge should allege which of two contradictory statements upon oath is false, but it is sufficient (unless, indeed, some satisfactory explanation of the contradiction should be established, to warrant a conviction of the offence of giving false evidence to show that an accused person has made one statement upon oath at one time, and a directly contradictory statement at another, I directed the case to be laid before a Division Bench.

This has been done, and I have now to set out the grounds of my opinion as stated above. For reasons which shall be detailed [47] hereafter, I think that English cases are irrelevant to the matter under discussion; but as they have been cited, and are relied on by my learned colleague, I will briefly consider them.

The question immediately before us appears to have been first raised about a century after perjury in a witness became an offence punishable by the common law. The point is thus stated by CHAMBRE, J. (I quote from the foot-note in *R. v. Harris*, at p. 938 of 5 Barn. and Ald.):—"It has been doubted whether, if the same person swears contrary ways at different times, he can legally be convicted of perjury without some further proof to falsify that testimony on which the indictment assigns the perjury. For it is said that on whichever of his contradictory oaths the perjury be assigned, that oath must be taken to be true unless disproved by two other witnesses. On the other hand, some have thought that if the indictment states the two contradictory

oaths, and then concludes, that 'so the defendant committed wilful and corrupt perjury,' without any averment to falsify the facts sworn on either of the oaths, it is sufficient to warrant a conviction. Perhaps an indictment in that form might be sufficient; but even upon the common indictment assigning the perjury upon one of the oaths only, and averring the falsity of the facts there sworn (in the usual form), it seems that the defendant may justly be convicted without any other proof of the perjury than producing and proving the other deposition which the defendant had made in contradiction to that on which the perjury is assigned; for its being the defendant's own deposition, he cannot be admitted to say that deposition was false, for *nemo allegans turpitudinem suam est audiendus*, and, if that be true, the other on which the perjury is assigned must of course be false. The reason why, in other cases, the perjury must be proved by witnesses that outweigh the testimony of the defendant is because, where there is only oath against oath, it stands in suspense on which side the truth lies. But when the same person has, by opposite oaths, asserted and denied the same fact, the one seems sufficient to disprove the other, and, with respect to the defendant (who cannot contradict what he himself has sworn), is a clear and decisive proof, and will warrant the jury in convicting him on either, for whichever of them is given in evidence to disprove the other, it can hardly lie in the defendant's mouth to deny the truth of that evidence, as it came [48] from himself. Upon this principle, YATES, J., convicted a man, at Lancaster Summer Assizes, 1764. He had first made his information on oath before a justice of the peace, that three women were concerned at a riot at his mill (which was dismantled by a mob, on account of the price of corn), and afterwards at the Sessions, when the rioters indicted, he was examined concerning those women, and (having been tampered with in their favour) he then swore that they were not in the riot. There was no evidence on the trial of the defendant for this perjury to prove that the women were in the riot (which was the perjury assigned), but the defendant's own original information on oath being produced and read, whereby he had sworn they were in the riot, the Judge thought it sufficient to convict him. He was accordingly found guilty, and transported. And afterwards Lord MANSFIELD, C.J., and WILMOT and ASTON, JJ., to whom YATES, J., stated the reasons of his judgment, concurred in his opinion."

So the law stood till the Westminster sittings after Michaelmas term 1821, when two precisely similar cases, growing out of the same transaction, and in which the indictments were drawn in the same form—*R. v. Knill*, 5 Barn. and Ald., 929, and *R. v. Harris*, 5 Barn. and Ald., 926,—were tried on the same day. In *R. v. Knill*, 5 Barn. and Ald., 929, no evidence was given, except simply the proof of the contradictory oaths of the defendant on the two occasions, and the jury convicted the defendant on those counts of the information which charged the perjury specifically to have been on one of the two occasions. A rule to show cause why there should not be a new trial was asked upon the ground, among others, that mere proof of a contradictory statement by the defendant on another occasion was not sufficient without other circumstances showing a corrupt motive, and negating the probability of any mistake. But the Court held that the evidence was sufficient, the contradiction being by the party himself, and that the jury might infer the motive from the circumstances; and they refused a rule *nisi* for a new trial. In *R. v. Harris*, 5 Barn. and Ald., 926, the jury acquitted the defendant upon the counts of the information which charged the perjury as specifically committed on one of the two occasions, but convicted him on those counts which we should call alternative charges; and the Court [49] granted a rule *nisi* for arresting the judgment, on the ground that those

counts were insufficient. The judgment of the Court of King's Bench was delivered by ABBOTT, C.J., who, after stating that the procedure by alternative charges was new, which the foot-note to the case shows that it was not, went on to say:—"The next and 'most material objection is the injury to which a defendant may be exposed. For we think it impossible to say, consistently with any known rule of law, that a person, acquitted or convicted on an indictment in this form, could plead such acquittal or conviction as a bar to an indictment charging perjury in the usual way on either of the depositions. The answer to such a plea would be:—'You have never been tried on the charge now preferred against you,' and such an answer would undoubtedly be true in fact, and we think good in law. So that a defendant might betwice put in peril of the punishment of perjury, and perhaps twice convicted and punished on the same subject-matter, if an indictment like the present could be sustained. It is not necessary to say whether an indictment charging contradictory depositions, together with other charges and averments not found in the present information, would be good as an indictment for a misdemeanour. The difficulty of showing on which of two occasions a party swore falsely, may perhaps enable a person to escape punishment, whose conduct, like that of the present defendant, may plainly appear to be in the highest degree reprehensible." But we think it better that such a person should escape than that an indictment should be held good, which is liable to the material objection of putting a person twice in peril of the pains of perjury on the same subject-matter, and we know of no election to adopt this or that mode that can be binding on the Crown, as was suggested in the argument at the bar in support of this information."

As *R. v. Harris*, 5 Barn. and Ald., 926, is still the leading English case on the subject, I may be allowed to remark regarding it, that its *ratio decidendi* is inapplicable in this country, for—

(1) The procedure by alternative charges is, as I shall show in detail hereafter, not new in India, and is expressly sanctioned by the law.

[50] (2) With reference to the terms of s. 403 of the Code of Criminal Procedure, and to the form of alternative charge prescribed by the Code, "the alternative conviction becomes," to use the words of the learned Judges in *Palany Chetty's case*, 4 Mad. H. C. Rep., 51, "a legal bar to any other criminal proceeding against the same person on either of the charges to which the conviction relates."

(3) The distinction between *felonies* and *misdemeanors* does not exist in India.

R. v. Harris, 5 Barn. and Ald., 926, has been followed in *Mary Jackson's case*, 1 Lewin C. C., 270, in *R. v. Wheatland*, 8 C. and P., 238, in *R. v. Hook*, D and R., 606, and in other cases. As regards all these cases, I would remark generally that the law of England as to the necessity of calling at least two witnesses to support an assignment of perjury, and of showing that the oath taken was material to the question depending, is not law in India. As regards the remark of HOLROYD, J., in *Mary Jackson's case*, 1 Lewin C. C., 270, as to the possibility of conflicting statements being made without criminal intention, I would say that it's beside the point now at issue; for unless the two contradictory statements are so absolutely opposed as to exclude the possibility of any hypothesis than that of the prisoner's guilt, there can be no conviction upon an alternative charge, 1 L.R., 10 Cal. 405. And as regards *R. v. Hook*, D. and R., 606, I would note that although *R. v. Harris*, 4 Mad. H. C. Rep., 51, and *R. v. Wheatland*, 8 C. and P., 238, were followed in it, yet *R. v. Knill*, 5 Barn. and Ald., 929, was referred to with modified approval by two of the five Judges (POLLOCK, C.B. and BYLES, J.); and POLLOCK, C.B., remarked that though *R. v. Knill*, 5 Barn. and Ald., 929, is

"not now quite safe to be acted on," yet it is supported by the judgment of the Court of Queen's Bench in Lord TENTERDEN's time and in that of Lord MANSFIELD."

But we have, as it seems to me, nothing to do with English cases in the matter before us. Their Lordships of the Privy Council have in *Trimble v. Hall*, L. R., 5 Ap. Cas., 342, and in *Kathama Natchiar v. Dorasinga Tever*, L. R., 2 Ind. Ap., 169, laid down the principle that where a Colonial Legislature has passed an Act in the same terms as an Imperial Statute, and the latter has been authoritatively construed by a Court of Appeal[51] in England, such construction should be adopted by the Courts of the Colony. But when the Indian Legislature has deliberately rejected, or intentionally declined to follow, the law of England upon a particular point, the case is altogether different. And as regards the offence of "giving false evidence," the framers of the Indian Penal Code, for reasons stated in Note G. to their Report dated the 14th October 1837 (Parl. Papers, 3rd August 1838, Indian Penal Law Commission, 673), thought proper to discard the English law of "perjury," and to draft the provisions of the Indian Penal Code in this respect upon the lines of the French *Code Penal* regarding "*faux témoignage*." The Indian Law Commissioners were afterwards pressed to at least allow the words "perjury" to be retained in their Code, as being one familiar to the people of India and long in use; but they refused to give way (para. 130 of their Report, dated the 24th June 1847, Parl. Papers, 16th May 1848, Indian Law Commission, 330) on the ground that "the authors of the Code thought inexpedient to use the technical terms of the English law where they did not adopt its definitions, and so materially departed from it in substance."

Before the enactment of the Indian Penal Code, the penal law of Bengal and Madras was the Muhammadan law, unless varied by Regulations. In the Bombay Presidency, the penal law was entirely contained in the Regulations. I have been unable to find anything in the Bombay Regulations bearing upon the point at issue. In the Madras Presidency a Regulation (III of 1826) was passed on the 17th October 1826 (probably upon the doctrine of *R. v. Harris*, 5 Barn. and Ald., 926, becoming generally known), cl. (i), s. 1 of which provided as follows:—"If a party or witness shall wilfully and deliberately give two contradictory depositions on oath, or under a solemn declaration taken instead of an oath, on a matter or matters of fact material to the issue of a judicial proceeding, such party or witness shall be liable to be committed for trial before the Court of Circuit for wilful and corrupt perjury; provided that the contradiction between the two depositions be direct and positive, and that, upon the whole circumstances of the case, there be strong grounds to presume the corrupt intention of the party or witness."

[52] In Bengal and the N.-W. P., the law was not finally settled till 1831, when the *Kazi-ul-Kazaat* and the *Mufis* of the Calcutta Sudder Court were called upon (Constructions S. D. A. and N. A., ed. 1839, vol. ii, p. 19) to state the Muhammadan law as to the proof required on charges of perjury. On the 2nd September 1831, these gentlemen delivered an elaborate opinion, the material portion of which, so far as our present purpose is concerned, ran thus:—"Where there exists a contradiction in the evidence of a witness before one or more Courts, and the difference be such that the two statements can in no way be reconciled with each other; for instance, if a witness depose that he saw *A* kill *B*, mentioning the time and place in which the murder was committed, and afterwards, in the same Court or some other, shall state that he did not witness the transaction, this is a direct retraction of his former evidence, and he cannot make the plea of forgetfulness: on the contrary,

he must acknowledge what he first stated to have been erroneous, and if this retraction be made, under a proper sense of repentance and contrition, he is not liable to *tazeer*; but if with contempt and boldness he is liable to *tazeer*; and the Hakim is left to decide upon his own discretion what were the man's motives."

• This settled the law upon the point in these Provinces for the next thirty years, and in 1847 (Carrun's Circular Orders of the Court of Nizamat Adawlut, ed. 1855, p. 422) a form "to be used in cases of statements directly at variance with each other" was promulgated in the following terms:—"Perjury, in having, on the 1st January 1847, intentionally and deliberately deposed, under a solemn declaration, taken instead of an oath, before the
of , that (here enter the first statement), and in having on the 13th February 1847, again intentionally and deliberately deposed, under a solemn declaration, taken instead of an oath, before the said
(or any other Court), that (here enter the second statement), such statements being contradictory of each other, on a point material to the issue of the case."

The question of proof of the offence of giving false evidence by contradictory statements was considered by the Indian Law [53] Commissioners in 1847, and was noticed by them in para. 154 of their second and concluding Report on the Indian Penal Code (Parl. Papers, 16th May 1848, Indian Law Commission, 330) in these terms:—"By Regulation III of 1826 of the Madras Code, a person wilfully and deliberately giving two contradictory depositions on oath is liable to be convicted of perjury, and to suffer the punishment prescribed for that offence. It has been decided (*Russell*, vol. ii., p. 542) that, under the law of England, perjury cannot be legally charged and assigned by showing that the defendant did on two different occasions make certain depositions contradictory to each other, with an averment that each of them was made knowingly and deliberately, but without averring or showing in which of the two depositions the falsehood consisted; and we apprehend that under similar circumstances the offence of giving false evidence could not be so charged under clause 168. We are strongly of opinion that 'whoever in any stage of a judicial proceeding, being bound by an oath, or by a sanction tantamount to an oath, to state the truth, gives a statement touching any point material to the result of such proceeding which directly and positively contradicts a statement touching the same point, given by him on oath, or under a sanction tantamount to an oath, in any stage of a judicial proceeding, at another time,' should (failing any satisfactory explanation of the contradiction to negative the inference of a corrupt intention) be liable to punishment. Under such circumstances, it is morally certain that the party has given a false statement on one or other of the two occasions, though it may be impossible to show positively which of the contradictory statements is false. Both statements may perhaps be false, but one only can be true. It is possible, indeed, that the first statement may have been false through an error or mistake, which has been corrected by subsequent information, and that the second contradicts the first because it contains the truth which had come to the knowledge of the party in the meantime. But when there is no such allegation, nor any explanation of the contradiction to negative the inference that the party at one time or the other has been guilty of stating on oath (or as it may be) as true what he knew to be false in order to deceive a Court of Justice, on a point material to the question to [54] be decided by the Court, we think the law should be so framed that he should not be able to escape from the punishment he would well deserve. In the case in question we do not see why the party who has given contradictory

statements might not be charged with the offence of false evidence upon each of them successively—first, upon that which from the circumstances there is reason to think is most probably the false one, giving the other in evidence against him, which would throw upon him the *onus* of proving it to be false, and if he succeeded in defending himself against that charge by means of such proof, then upon that other statement as proved to be false by the evidence he had himself adduced. By this mode of proceeding a really guilty person could hardly escape. And a person who had such a defence as before supposed, being able to show, for instance, that his second statement differed from the first because he had ascertained in the meantime that the first statement was incorrect, would have an opportunity of clearing himself by given proof to that effect. If necessary, a special rule might be enacted to sanction this mode of procedure."

The preparation of the Code of Criminal Procedure went on (under the same hands) *pari passu* with that of the Penal Code, and although the former Code was not passed till nearly a year after the latter, the two Codes came into force on the same day, the 1st January 1862. The Code of Criminal Procedure contained in its 242nd section a provision which satisfied the requirements of the Indian Law Commissioners as cited above. The provision was in these terms:—"When it appears to the Magistrate that the facts which can be established in evidence show the commission of one of two or more offences falling within the same section of the Indian Penal Code, but it is doubtful which of such offences will be proved, the charge shall contain two or more heads charging respectively each of such offences accordingly." And effect was further given to the terms of s. 242 by the terms of ss. 381 and 382 of the Code. What happened in Bombay in the matter now before us I have been unable to discover; but the Madras Court of Sudder Nizamat, in April 1862, (the Madras Regulation III of 1826 having been repealed as from the 1st January 1862, by Act XVII of 1862), the Calcutta Court in May [55] 1862, and the Agra Court in June 1862, failing apparently to notice the effect of ss. 242, 381 and 382 of the Code of Criminal Procedure, issued Circular Orders, informing the Courts subordinate to them that the mere making of contradictory statements upon oath would not now constitute the offence of "giving false evidence," or, as the Calcutta Court still called it, "perjury." The Calcutta Sudder Court was merged in the High Court in 1862, and cases soon afterwards began to be decided contrary to the terms of the Circular Order of May 1862. At length, in 1866, a case in point, *R. v. Zumeerun*, 6 W. R., Cr., 65, came before a Bench of two Judges (NORMAN and CAMPBELL, JJ.), which was inclined to support the view of the law taken in the Circular Order, and was by them referred to a Full Bench for an authoritative ruling; and the Full Bench (NORMAN and CAMPBELL, JJ., doubting) held that where a witness intentionally makes two contradictory statements upon oath, and it is doubtful which of the two statements is false, he may be convicted of the offence of giving false evidence upon an alternative finding. PEACOCK, C.J., remarked:—"I have no doubt that there may be an alternative finding as well in a case in which the evidence proves the commission of one of two offences falling within the same section of the Penal Code, and it is doubtful which of such offences has been proved, as in one in which the evidence proves the commission of an offence falling within one of two sections of the Penal Code, and it is doubtful which of such sections is applicable."

"This appears to me to be quite clear when s. 381 of the Code of Criminal Procedure is read together with s. 242 and clause (5), s. 382 of that Code.

"A swears before a Magistrate that he saw the prisoner kill B. The prisoner is committed to the Sessions for trial for murder. A on the trial swears.

that he did not see the prisoner kill *B*, and the prisoner is acquitted. *A* is, in consequence, committed for trial for giving false evidence, and two charges are framed against him under s. 242, Code of Criminal Procedure:—

"1st.—That he intentionally gave false evidence before the Magistrate by swearing that he saw the prisoner kill *B*.

[56] "2nd.—That he intentionally gave false evidence before the Sessions Judge by swearing that he did not see the prisoner kill *B*.

"The Sessions Judge finds that the prisoner intentionally gave false evidence, but that it is doubtful whether the statement made before the Magistrate, or that made before the Sessions Judge, was the false one. If the prisoner was innocent, and the statement before the Magistrate was false, the prisoner has, in consequence, been improperly committed for trial on a charge of murder, and has suffered all the degradation, annoyance, and anxiety of being committed on a false charge. If the prisoner was guilty, and the witness, in consequence of bribery or other cause, has sworn falsely before the Sessions Judge, the administration of justice has been defeated, and a murderer has been acquitted. It is clear that, unless the law is very defective, or we are to trifle with the administration of justice, *A* ought to be punished. It appears to me that the law is not deficient, and that the case is provided for by the Code of Criminal Procedure, whether it be read according to the strict letter or according to its spirit.

"In such a case it would seem clear that the Magistrate was right in framing a charge containing two heads, under s. 242.

"The Sessions Judge would also be strictly within the letter as well as the spirit of ss. 381 and 382 (clause 5) in finding that *A* is guilty of the offence of intentionally giving false evidence, and that he is guilty either of the offence specified in the first head or of the offence specified in the second head of the charge, and is convicted of an offence punishable under s. 193 of the Penal Code. The words in clause (5), s. 382, which follow the word 'namely,' are clearly given only as an example, and it is clear that without an example of a case falling within the latter branch of s. 242, such a case falls within the strict letter of clause (5), s. 382".

And SETON-KARR, J., said:—"I entirely concur with the learned Chief Justice. Indeed, I had always understood that our Court and the subordinate Courts acted on the principle laid down in the judgment with which I concur; and until this reference was made, I was not aware that there existed any very serious doubts on the point. Indeed, unless Courts did and could return an alternative [57] finding in such cases of false evidence, the most disastrous consequences to the administration of justice would ensue. Violent crime and crime of all kinds would go unpunished, and the witnesses who had been bought off to deny their statements implicating the perpetrators of such violent or other crimes would go unpunished also. I can conceive nothing more detrimental to society."

The same point was raised in the Madras High Court in May 1868; and that Court (SCOTLAND, C.J., and COLLETT, J.) came to the same conclusion. The head-note of the case, *R. v. Palany Chetty*, 4 Mad., H. C. Rep., 51, runs thus:—

"Proof of contradictory statements on oath, or solemn affirmation, without evidence as to which of them is false, is sufficient to justify a conviction, upon an alternative finding, of the offence of giving false evidence under s. 72 of the Indian Penal Code, and ss. 242, 381 and 382 of the Criminal Procedure Code."

Proposals for the amendment of the Code of Criminal Procedure were shortly afterwards under discussion by the Legislature, and it is to be presumed

that the circumstances which have been set out above were before the Council, and were considered by it. Act X of 1872 was passed in April 1872. In that Act, the provisions of s. 242 and the alternative form of finding given in s. 382 of the old Code were not re-enacted; but in place of them was enacted a section (455), which provided that—"If a single act, or a set of acts, is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused person may be charged with having committed any such offence, and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some-one of the said offences,"—and a section (442) which provided that the charge might be in the form given in the third schedule to the Act, or to the like effect. That schedule contained a form for alternative charges on s. 193, which runs thus:—"That you, on or about the day of at , in the course of the inquiry into , before , stated in evidence,

that and that you, on or about the day of [58] at , in the course of the trial of ; , before , stated in evidence that "

One of which statements you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under s. 193 of the Indian Penal Code, &c."

In his note to s. 461 of Act X of 1872, which took the place of s. 381 of Act XXV of 1861, Mr. *Prinsep* wrote (ed. 1873, p. 311) as follows:—"This section does not provide for an alternative finding in a case in which it is doubtful of which of two offences under the same part of the same section the accused person is guilty; for instance, a case in which a person is charged with having intentionally given false evidence in making one statement, and again with the same offence in making a diametrically opposite statement. It has been usual to enter each of these offences in a separate head of the charge, and for some attempt to be made by the prosecution to prove one or other of these offences, and for the Court of Session, if not satisfied with the evidence as to the truth or falseness of other statement, but still being satisfied from the contradiction that the accused is guilty of having intentionally given false evidence, to convict in the alternative form of finding. But though s. 461 does not expressly provide for this procedure, it will be seen from a reference to the last form of charge given in schedule iii, that it is contemplated that such charges should be made in one charge, and not in two separate heads as heretofore. Probably, therefore, if any evidence is offered, or is likely to be offered in proof of the falseness or truth of one of such contradictory statements, a separate head of the charge will be made so as to provide for such offence, and the alternative form of charge will also be given."

The changes made by the new Code led to its being doubted in Bengal whether *R. v. Zumeerun*, 6 W. R., Cr., 65, would stand, and the whole matter was therefore again fully considered by the Calcutta Court in April 1874. It was then held—*R. v. Mahomed Hoomayoon Shaw*, 13 B. L. R., 324, by a majority of the Court (COUCH, C.J., KEMP, MARKBY, GLOVER, AINSLIE, PONTIFEX, BIRCH, and MORRIS, JJ.) (JACKSON and PHEAR, JJ., dissenting) that a conviction of giving [59] false evidence upon an alternative charge is good, although it be not found which of the two statements charged is false; and COUCH, C.J., remarked:—"It is material to notice that the charge does not allege that the statement made on the 23rd of January 1873, was known or believed to be false, or not believed to be true. Nor does it allege that the statement made on the 13th of

February 1873, was known or believed to be false, or not believed to be true." It merely alleges that one of the two statements set out in it was known or believed to be false by the accused, or not believed by him to be true."

"Upon this charge he was tried, and in the summing up of the Judge, the jury were told, and very properly — 'Before you can find him guilty, you must be satisfied that he made one or other of the statements, contained in the charge, knowing that such statement was false, and deliberately intending to make a false statement.' The majority of the jury found that the accused was guilty of the offence specified in the first and second heads of the charge, the offence specified being an offence punishable under s. 193 of the Penal Code. After such a summing up, calling the attention of the jury so plainly to the necessity of their being satisfied that one or other of the statements was known to be false, and that the accused deliberately intended to make a false statement, I think there can be no doubt that the offence of giving false evidence within the meaning of s. 191 of the Penal Code was committed on one or other of the occasions specified in the charge. Then it appears to me that the only question is, was it necessary, in order to make the conviction legal, that the jury should find on which of the two occasions the offence was committed? Does the law in this country render that essential to a conviction for giving false evidence?"

"The 439th section of the Code of Criminal Procedure now in force requires that 'the charge shall state the offence with which the accused person is charged', and the 440th, that 'the charge shall contain such particulars as to the time and place of the alleged offence, and the person against whom it was committed, as are reasonably sufficient to give notice to the accused person of the matter with which he is charged.' The charge in this case does that. It states what the offence is, namely, that the accused [60] committed an offence punishable under s. 193 of the Penal Code, and it contains such particulars as to the time and place as give sufficient notice to the accused of what he is charged with. He is told that by making the two statements, one of which it is alleged he knew or believed to be false, or did not believe to be true, he committed an offence punishable under s. 193.

"Section 442 says that the charge may be in the form given in the 3rd schedule to the Act. In that schedule there is such a form of charge as was made against the accused in this case, and it appears to me that unless a conviction upon a charge so framed is allowed by law to be valid, the putting this form of charge in the schedule was not only useless, but is also inconsistent with saying that the jury is required by the law to find and to state upon which of the two occasions mentioned in the charge the false evidence was given." If the jury is required to state that, then two charges in the form No. 10 in the schedule would be proper. One would state that evidence was given on the 23rd of January, 1873, which the accused either knew or believed to be false, and the other would state that evidence was given on the 13th of February 1873, which the accused either knew or believed to be false. If it is required by the law that the jury or the Court, while the trial is with assessors, should find distinctly on which of the occasions the false statement was made, the alternative charge given in the schedule is perfectly useless.

"Again if it is necessary for the jury, in order that the conviction shall be valid, to say which of the two statements is the false one, it is requiring the jury to find what is not alleged in the charge. All that the charge alleges is, that one of the statements was known or believed to be false, or not believed to be true, and that thereby the offence was committed. Such a charge being authorized by the law, it appears to me that all which the Court has to find

to sustain a conviction for giving false evidence is that the allegations in it are proved.

"In considering what the intention of the Legislature was in making these provisions in the new Code of Criminal Procedure, and giving in the schedule this form of charge, I think it is important to see what, at the time this Act was passed, was the acknowledged state of the law. It had been decided by a Full Bench of [61] this Court that a conviction upon a charge of this description was legal. That view of the law had been acted upon, undoubtedly, for some years in this Presidency. In Madras, as appears from the case of *R. v. Palany Chetty*, 4 Mad. H.C. Rep., 51, the same view of the law was adopted, and it cannot be doubted that this decision was acted upon in that Presidency. We have no reported case in the Bombay High Court, and I do not desire to speak merely from memory as to what was the practice in that Presidency. But in Madras and in Calcutta, and, my belief is, in Bombay also, the law was considered at the time this Act was passed to be, that a conviction of a person who was found to have intentionally made contradictory statements on oath or solemn affirmation was legal. I cannot think that the Legislature intended, by the way in which the new Code has been drawn, by the omission of certain sections which are in the old Code and the substitution of others, which probably were supposed to be an improvement in the wording or arrangement of it, to alter the law as to the offence of giving false evidence. That this charge, although called an alternative charge, and being so far alternative that two statements are set out in it when one offence only is alleged, namely, that the accused thereby, that is by making statements, one of which he knew or believed to be false, committed the offence, should be considered as a charge of but one offence, and was to be dealt with by the jury as such, I think is shown by s. 452, which says that there shall be a separate charge for every offence.

"It was argued that it would prejudice the accused in respect of his subsequently pleading an acquittal or a conviction, if a conviction were allowed upon a charge framed as this is, and that he might be tried again for making one or other of the statements which are the subject of the present charge. Section 460 provides for a person who has once been tried for an offence, and convicted or acquitted of such offence, not being liable to be tried again on the same facts for the same offence, nor for any other offence for which a different charge from the one made against him might have been made under s. 455. If the question should ever come before me—What is the effect of a conviction or an [62] acquittal upon such a charge as this, I should hold that the accused could not be tried again for giving the evidence on either occasion which is set out in the charge, for then he would be tried again on at least a part of the same facts as he had been tried upon before.

"I concur with my learned colleagues in thinking that the second part of s. 461 does not apply to this case. This is a charge of but one offence, and the conviction is a conviction of that offence, and need not specify more than the offence of which the person accused is convicted. Here the jury found upon the facts proved before them that the accused committed an offence punishable under s. 193. It appears to me that this finding is a good finding; nor do I see that s. 257 as to the duties of the jury interferes with it, or prevents the finding being as it is. Section 257 says that it is the duty of the jury to decide which view of the facts is true, and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned.' I understand this to mean that it is the duty of the jury to find whether the view of the facts that the accused made the two statements, that

they were such that they could not both be true, and that he knew or believed one of them to be false, is true. I do not understand it as meaning that the jury have to select from a part of the charge some of the facts, and say whether they are true. What is meant is the whole view of the facts alleged against the accused, the view taken by the prosecution which leads to the conclusion of his guilt or the view which is set up on his behalf, and which would make him innocent. I do not feel at all pressed by the provisions of s. 257. It appears to me that this was a charge authorized by the law, and that the allegations in it, which are sufficient to support a conviction, have been found by the jury to be proved. If it is a good charge, nothing more is necessary to be found by the jury than that the allegations contained in it are true. I cannot say that it is an illegal charge, finding it, as I do, deliberately allowed by the Legislature, and inserted in the schedule which is referred to in s. 442."

As regards the point at issue, there is no material difference between the present Code of Criminal Procedure (Act X of 1882) and the superseded Code (Act X of 1872). Sections 439 and 440 of [63] Act X of 1872 have become ss. 221 and 222 of Act X of 1882. Section 554 of Act X of 1882, as compared with s. 442 of Act X of 1872, stands thus. —

Section 442, Act X of 1872.

Section 554, Act X of 1882.

The charge may be in the form given in the 3rd schedule of the Act, or to the like effect.

The forms set forth in the 5th schedule, with such variation as the circumstances of each case require, shall be used for the respective purposes therein mentioned.

The form of charge [No. XXVIII (4) of schedule V, Act X of 1882] corresponds with the form given in the 3rd schedule of Act X of 1872.

The sum of the matter I take to be this — Every possible presumption in favour of a reconciliation of the two statements should be made, and it must be found that they are absolutely unreconcilable before a conviction can be had upon the ground that one of them is necessarily false. But when this is found, and if the person making the two absolutely contradictory statements is of sound mind, it seems to me plain that one of the two statements must be false, and that the person making them cannot believe both of them to be true, but must know one of them to be false, and if when making them he was legally bound by an oath, or by any express provision of law, to state the truth, he must, as it seems to me, be guilty, as regards one or the other of the two statements, of the crime of "giving false evidence." And looking to the course which the law upon the subject has taken in India during the past sixty years, and to the evident intention of the Legislature, I cannot doubt that the Code of Criminal Procedure has dispensed with the necessity of finding which of the two statements is false, and has empowered the Courts to convict alternatively.

In the case now before us, Ghulet before Munshi Behari Lal, a Magistrate of the first class in the Azamgarh District, on the 13th December 1883, deposed as follows. —

"When the *panchayat* was removed from the road to the *kothara*, five carts were standing near the large well, and the *nim* tree. The cartmen were cooking their food. They were naked. They had nothing but *dhotis* on. I could not see their purses, as they had their *dhotis* tied high. When the *panchayat* broke up, all of us came and [64] stood on the road. Harpal, *chaukidar*, the accused, here present, asked the *panches* to listen to him. He then proposed that we should take our food, and then assemble in the '*shisham*' grove, and rob the cartmen of their money. Sacha and I went home to the

chauki to take our food. Tehal went to Bipat, his '*samdhi*'s' house. The rest went northwards to Sarai Mohan with Harpal, where Sheopal and Harpal live. At seven *gharis* after nightfall, Sacha and I, after taking our dinner, went to the *shisham* grove. When I got there, I found Harpal, Bikanu, Sheopal, Dhuman, Sheo Tehal, Paltu and Bipat in the grove. We left that place and came and stood near the road at a distance of 6 or 7 *hiswas* to the west of the village of Bhira. Harpal then told us to wait while he went to see whether the carts had gone on or not. He went and brought Gulzar and Sahai, and said that the carts had gone on. We all went after the carts; Harpal would not let us have anything to do with the carts while they were within his *chaukidari* circle, as he said he would be called to account for it. After this, we beat the cartmen with clubs near Barda. We all of us beat them. I did not strike any one. The cartmen were knocked down. I saw two cartmen knocked down Harpal, Bikanu and Gulzar took the cartmen's money It was 5 or 6 *gharis* before dawn when the attack was made, and the money taken. The police station is less than a mile from the spot where the occurrence took place. The cartmen went there, but no one came. After robbing the money, we all left the main road and went by the road on the east to Banjari Pokhri in the village of Bhira. There we shared the money. Harpal, accused, gave me Rs. 5, Sacha 5, and Sahai 6, and Harpal, Bikanu and Sheopal took Rs. 20 each Sacha and I took the money and went away. I left the other persons on the spot. The time was 3 *gharis* or a *pahar* before dawn. Thana Barda is a *kos* from Banjari Pokhri. The place where the cartmen were beaten is less than a mile north of the *shisham* grove. The grove is three *rassis* from the road. The money was taken out of three purses, of which Harpal had two, and Bikanu one, and the division was made at Banjar Pokhri. The persons named took away the purses with them. These men (pointing to the accused) were the dacoits. I was standing at a distance of seven or eight paces from the carts on the north side. All the carts were in front of [65] me. The accused took the money from the two last carts. My house is a *kos* from Bhira. To the west of Bhira and to the right of the road to the *chauki* is a tank. I stayed at my house one *ghari*. The night was dark. I can see 50 paces on a dark night. Banjari Pokhri is less than a mile on the north of Bhira Gulzar and Tehal struck at the cartmen with their *lathis*. They struck the cart drivers in the front carts, and did not molest the behind ones. I purchased grain, and spent the Rs. 5 which I had received. I purchased it from several shops." And in a deposition made in the Sessions Court at Azamgarh on the 20th March 1884, Ghulet said:—"I was not concerned in the dacoity which took place near Barda. I know nothing about that dacoity." I know nothing about the matter charged against the accused now in Court."

Sahai, before the said Magistrate, on the 13th December 1883, deposed as follows:—

"In the evening at sunset, the *panchayat* rose, and proceeded to *kothara* Padarath Singh. On the road we saw five carts standing After coming to the road, Chirkut, Jaipal, Dhuman Siddhu, and Sur went away home, all the others remained. Harpal, *chaukidar*, accused now present, told all of us that the cartmen had money and that we might rob them of it if we met in the *shisham* grove after taking our food. Mazhar and Gulzar went home, and so did Sacha and Ghulet. Bipat went with Tehal to his house; the others went north in the direction of Sarai Mohan, where Harpal lives. Dhuman, Paltu, Sheo Tehal and Harpal went away. Then at midnight Harpal came to the place, and first took Gulzar and Mazhar to the road towards west from

Bhira. Tehal, Bipat, Ghulet, Sacha, Dhumman, Paltu, Sheo Tehal, Bikanu and Sheopal were standing there. Harpal and Bikanu said that the carts were moving on, and we had all better start. On the way, at the Siwana chauki, it was suggested that the robbery should take place there. Gulzar said that they would get into trouble, and that there must be no plundering at that place. We went on to the confines of Barda, and then the robbery began. We all used our sticks at once. All of us were armed with sticks. The cartmen were beaten. Ghulet did not strike any one. I also [66] beat a cartman with my stick. Bikanu, Harpal, Gulzar, and Sheopal robbed the cartmen of their money. Having plundered the money, they ran to the east, and passing by the outskirts of Bhira, they went to Banjari Pokhri. There the money was divided. Harpal and Bikanu divided the money. I received Rs. 6, which were given me by Bikanu. One rupee was taken back again. Rs. 5 were given to Ghulet, and Rs. 5 to Sacha. All the other persons got Rs. 6 each. Harpal, Bikanu, Sheopal, and Gulzar said that they would take Rs. 20 each. I asked them why they had given me less. They said that we were labourers, while they were road chaukidars and would be held to be responsible for what had happened. Then I went home alone. The whole money was in three network purses, two of which were in the hands of Bikanu and one was with Harpal.....The scene of the occurrence must be one *kos* from the *shisham* grove, or a little more. I left first.....When I left, it must have been about a *pahar* before daybreak. When the attack took place, it must have been about 6 *gharis* before daybreak. The sheet now shown me belongs to me. It is stained with the oil of my head, and it was stained somewhat with the oil of the carts at the time of the attack. The red stains on the sheet were caused by blood at the time of assault. Banjari Pokhri must be one *kos* to the north of the place where the attack took place and less than a mile from mauza Bhira. I took my money from Banjari Pokhri and went away first. At the time of the attack, Ghulet was ten paces behind all the carts." And in a deposition made in the Court of Session on the 20th March 1884, Sahai said:— I know nothing of the Barda dacoity. I know nothing about the matter charged against the accused in Court."

Prima facie these statements are absolutely irreconcilable. I would therefore sanction the prosecution of Ghulet and Sahai on alternative charges for the offence of giving false evidence on the occasions and in the statements set out above.

Straight, Offg. C.J.—The elaborate and exhaustive order of my brother DUTHOIT satisfies me that my judgment in *Empress v. Niaz Ali*, I.L.R., 5 All., 17, was erroneous. In expressing the views I gave utterance to therein, I enunciated what I believed to be and still believe [67] to be the rule of English law upon the subject. Unfortunately, my attention was not called either to the rulings of the Courts of India, to which my brother DUTHOIT has referred at length, nor was it directed to the form in the schedule of the Criminal Procedure Code which expressly provides for the forming of alternative charges of giving false evidence. It goes without saying, that had I been aware of the two Full Bench decisions of the Calcutta Court, I should have hesitated before differing with such high authorities, and should have felt bound, had I differed to enter fully and explicitly into my reasons for doing so. No useful purpose would be served by my now discussing the rulings of the English Courts which were present to my mind at the time I gave judgment in the case of *Niaz Ali*, I.L.R., 5 All., 17. As I agree with my brother DUTHOIT, that they are inapplicable in this country, it is enough for me to say that I concur in the order he proposes.

NOTES.

[The gist of the offence of perjury is that the two contradictory statements, of which one is alleged to be false, must be irreconcilable—(1910) 8 M.L.T., 86; (1911) 13 I.C., 315; 5 S.L.R., 129; (1904) 28 Bom., 533; 6 Bom. L.R., 379 (note also the remarks of ASTON, J. at p. 554).

The conviction was held legal, even though the two contradictory statements were in one and the same deposition:—(1902) 26 Mad., 55. But see also the dissenting judgment of Sir V. BHASHYAM AYYANGAR, J. in that case.]

[7 All. 67]

The 7th August, 1884.

PRESENT:

MR. JUSTICE MAHMOOD AND MR. JUSTICE DUTHOIT.

Queen-Empress
versus
Kandhaia and others.

Arrest of person required to give security for good behaviour—Escape from such arrest—Conviction for such escape illegal—Act XLV of 1860 (Penal Code),

ss. 40, 224, 225—Criminal Procedure Code, ss. 55, 110, 117, 118.

An order was issued to a police officer directing him to arrest K under s. 55* of the Criminal Procedure Code, as a person of bad livelihood. K, with the assistance of three others, resisted apprehension and escaped.

Held, that K was not charged with an "offence" within the meaning of that term as defined in s. 40 of the Penal Code, and that consequently no offence made punishable by s. 224† or s. 225 of the Penal Code had been committed in connection with his evasion of arrest. *Empress v. Shasti Churn Nayak*, I. L. R., 8 Cal., 331, followed.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

The Junior Government Pleader (Babu Dwarka Nath Banerji), for the Crown (Appellant).

Mr. Simeon, for the Respondents.

The Court (MAHMOOD and DUTHOIT, JJ.) delivered the following judgment:—

Duthoit, J.—This is an appeal under the provisions of s. 417 of the Code of Criminal Procedure.

Arrest of vagabonds, habitual robbers, &c. * [Sec. 55 :—Any officer in charge of a Police-station may, in like manner, arrest or cause to be arrested—

(a) any person found taking precautions to conceal his presence within the limits of such station, under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence; or

(b) any person within the limits of such station who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself; or

(c) any person who is by repute an habitual robber, house-breaker or thief, or an habitual receiver of stolen property knowing it to be stolen, or who by repute habitually commits extortion or in order to the committing of extortion habitually puts or attempts to put persons in fear of injury.

† [Sec. 224 :—Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he is charged or of which he has been convicted, or escapes or attempts to escape from any custody in which he is lawfully detained for any such offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both.

Explanation.—The punishment in this section is in addition to the punishment for which the person to be apprehended or detained in custody was liable for the offence with which he was charged, or of which he was convicted.]

[68] For its purposes the facts may be thus stated :—

On various dates in September and November 1883, the police authorities of the Banda district represented that in mauza Khandia there resided Kandhaia and other persons of bad livelihood, and that unless measures for restraining those persons were taken, serious offences against property in the neighbourhood were to be apprehended.

On the 8th December 1883, an order was issued by Saiad Sadik Husain, a Magistrate exercising first class powers, to the officer in charge of the Police Station of Khunna in the following terms :—

"Charge s. 55, Act X of 1882.—*Government v. Kandhaia, Brahman, and Bhawani, Nair, residents of mauza Khandia.*

"After perusal of the Special Diary noted above, and of the order of the Magistrate of the District of Banda, dated the 1st December 1883, you are hereby directed to send up (*chalan*) the case in due form (*hasb zabta*) with proof in support of it."

On receipt of this order, on the 9th December 1883, the Head Constable in charge of the Police Station of Khunna gave to Salig Ram, one of the constables of the station, an order in writing directing him to arrest Kandhaia. Armed with this document, Salig Ram arrested Kandhaia. Kandhaia resisted his apprehension, and, with the assistance of Mohan, Paltu, and Sewak, escaped from the grasp of the constable and fled. This is admitted by the learned pleader who has defended the appeal. The evidence for the prosecution goes to show—this, however, is denied by the learned pleader for the respondents—that, in the course of the escape and rescue, Kandhaia struck the constable with a stick, and Mohan, Paltu, and Sewak hustled him. Later in the day, Kandhaia's arrest was effected by a party which came from the police station for the purpose.

On the 17th December, the Magistrate (Saiad Sadik Husain) held that there was no sufficient reason for requiring security for good behaviour to be furnished by Kandhaia and Bhawani. Kandhaia and Bhawani were therefore discharged. But proceedings were immediately afterwards taken against Kandhaia, Mohan, Paltu, and Sewak, with reference to the events of the 9th December 1883. Evidence on behalf of the prosecution was recorded, and charges were framed in these terms :—

"I, Saiad Sadik Husain, Magistrate, First Class, hereby charge you Kandhaia, Paltu, Mohan, and Sewak, with the following offences :—

"On or about the 10th December 1883, at mauza Khandia, you Kandhaia committed an offence under s. 224, Indian Penal Code, viz., the offence of escaping from lawful custody, and you Paltu, Mohan, and Sewak, an offence under s. 225, viz, the offence of rescuing Kandhaia from lawful custody, and of offering resistance. Therefore you Kandhaia have committed an offence punishable under s. 224, and you Paltu, Mohan, and Sewak, an offence punishable under s. 225 of the Indian Penal Code, and these offences are triable by my Court, and I hereby," &c.

The witnesses named by the accused persons for their defence were not summoned, but, on the 25th December 1883, the case was disposed of by a finding, the substantial portion of which is to the following effect :—

"The police had on former occasions made inquiries regarding Kandhaia, accused under s. 55, Act X of 1882, and the Court ordered that the accused should be arrested and sent up with the evidence against him. The police deputed Salig Ram, constable, for the purpose. Kandhaia, accused, after having been arrested by Salig Ram, constable, escaped from custody, and Paltu,

Mohan, and Sewak, rescued him. The proceedings instituted under s. 55, Act X of 1882, were struck off by the Court for want of proof, and the accused were acquitted. The pleader for the accused in this case has raised the legal objection that, under ss. 224 and 225, it is necessary that the accused should have been charged with, or convicted of, some offence. Had the accused committed any offence and escaped from lawful custody, or given assistance in rescuing offenders, they could be charged under ss. 224 and 225 of the Indian Penal Code; otherwise they cannot be so charged; and as, under s. 40, Act XLV of 1860, the charge under s. 55, Act X of 1882, does not come within the definition of an offence, it is no offence if Kandhaia accused escaped from custody, or Paltu, Mohan, and Sewak rescued him, even supposing that they [70] did so. Moreover, to require a man to enter into recognizances or to furnish security for good behaviour, under s. 55, Act X of 1882, is not one of the punishments prescribed by the Indian Penal Code, nor is it a punishment under any special or local law. This point was discussed on two days. After due consideration, I am also of opinion that the charge under s. 55, Act X of 1882, may result in calling for security for good behaviour, or in requiring a man to enter into recognizances to keep the peace, and this is not one of the punishments prescribed by the Indian Penal Code. Moreover, the charge under s. 55, Act X of 1882, was not proved against Kandhaia accused; the investigations made by the police were useless, and their report was wholly false. When the accused were not charged with or convicted of any offence, no charge can be brought against them under s. 224 or s. 225 of the Indian Penal Code. It is therefore ordered that the accused be acquitted, and the case be struck off the list."

In appeal to this Court, it is contended that the Magistrate was wrong in holding that Kandhaia and the other accused persons did not commit offences punishable under ss. 224 and 225 of the Indian Penal Code respectively, and that, at any rate, they should have been convicted of the offence made punishable by s. 353 of the Indian Penal Code a section which had been alleged against them by the prosecution.

"Section 225 of the Indian Penal Code provides that "whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of any other person for an offence . . . shall be punished." &c. Unless, therefore, Kandhaia was charged with an offence, there could be no valid conviction of him under s. 224 of the Indian Penal Code, nor of his companions under s. 225.

For the purposes of ss. 224 and 225 of the Indian Penal Code, "offence" is defined in s. 40 of that Code (as amended by s. 2, Act XXVII of 1870) as "a thing punishable under this Code, or under any special or local law as hereinafter defined"; and s. 41 defines a "special law" as "law applicable to a particular subject."

Act X of 1882 is therefore a "special law," and it has been suggested that inasmuch as to require security to be furnished in [71] the terms of s. 118 of Act X of 1882 is to cast upon a man a burden which not infrequently compels him to pay money by way of interest or otherwise, and, in default of discharge of the burden, renders him liable to imprisonment, an order directing a person to furnish security for good behaviour is equivalent to declaring such person guilty of an offence; and that the requirements of s. 40 of the Indian Penal Code are therefore satisfied in the case of a person who has been arrested in the terms of s. 55 of the Code of Criminal Procedure.

We are of opinion that this argument is erroneous, for the Penal Code defines an offence as a "thing punishable;" and (a) a "thing" (cf., ss. 32 and

33 of the Code) must be an *act*, or a series of illegal *acts*, or an illegal *omission*, or a series of illegal *omissions*; or, to use the words of Mr. Bentham, "we give the name of *offence* to every act which we think ought to be prohibited by reason of some evil which it produces or tends to produce;" (b) "*punishable*" must mean that the commission or omission of the act, the commission or omission of which is prohibited, renders the person who commits or omits it liable to the sanction of the law,—i.e., to "*punishment*."

But, for the purposes of an order under s. 118 of the Code of Criminal Procedure, evidence of the commission or omission of an act is not necessary—proof of general repute (s. 117 of the Code) is all that is required—and the order calling upon a person to furnish security is, what Mr. Bentham calls a "preventive remedy," as contrasted with a "penal remedy" or a "punishment." Mr. Bentham defines "*punishment*" as "an evil resulting to an individual from the direct intention of another, on account of some act that appears to have been done or omitted;" and he adds:—"An evil resulting to an individual, although it be from the direct intention of another, if it be not on account of some act that has been done or omitted, is not a 'punishment.'" Section 110 of the Code of Criminal Procedure does not set out any act, the omission or commission of which renders the person committing or omitting it liable to punishment; nor ought a Magistrate, when passing an order in the terms of s. 118 of the Code of Criminal Procedure, to have any direct intention of inflicting punishment; for the object [72] of s. 118 of the Code of Criminal Procedure is, to use the words of MACPHERSON, J., in *Umbica Proshad's case*, 1 Cal. L. R., 271, "the prevention, not the punishment, of crime; and, with that object, it authorizes Magistrates to take from certain persons good and sufficient security for their good behaviour. But it is solely for the purpose of securing good behaviour that" the section "can be used; and any attempt to use it for the purpose of punishment for past offences is wrong, and not sanctioned by the law."

We must hold, therefore, that Kandhaia was not charged with an *offence* within the meaning of that term as defined in s. 40 of the Indian Penal Code, and consequently that no offence made punishable by s. 224 or s. 225 of the Indian Penal Code was committed in connection with his evasion of arrest. With the apparent anomaly of providing in s. 55 of the Code of Criminal Procedure for the arrest of the persons described in (b) and (c) of that section, and of making no provision similar to those of s. 651 of the Code of Civil Procedure, and of s. 225-A of the Indian Penal Code (s. 9, Act XXVII of 1870), for punishing them for breaking their arrest, we are not here concerned. Our duty is to administer the law as it stands; and we have the satisfaction of noting that the Calcutta Court—*The Empress v. Shasti Churn Napat*, I. L. R., 8 Cal., 331—has taken the same view of the law as we do.

So much as regards the acquittal under ss. 224 and 225 of the Indian Penal Code.

As regards the omission to try the accused persons on a charge under s. 353 of the Indian Penal Code, we observe that if, in the terms of s. 56 of the Code of Criminal Procedure, an order for the arrest of Kandhaia was given to Salig Ram by his superior officer, and if, in the execution of his duty in carrying out that order, criminal force was used to him, an offence made punishable by s. 353 of the Indian Penal Code was committed by the persons who used such force. We think that the Magistrate should have tried the accused persons under s. 353 of the Indian Penal Code. But the record is at present incomplete, as the witnesses for the defence have not been examined. We reverse the finding of acquittal, and direct a re-trial of the accused on a charge under s. 353 of the

• [73] Penal Code by the Magistrate of the Banda District, or by such other competent Magistrate of that district, other than Saiaa Sadik Husain, whom the Magistrate of the District may nominate for the purpose.

NOTES.

[Approved in (1886) 9 All., 452.]

• [7 ALL. 73]

APPELLATE CIVIL.

The 7th August, 1884.

PRESENT:

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE,
AND MR. JUSTICE MAHMOOD.

Ghazidin.....Decree-holder

versus

Fakir Bakhsh.....Judgment-Debtor.*

Execution of decree—Civil Procedure Code, ss. 243, 244 (c), 515—Order in stay of execution a matter "relating to execution" of decree—Order appealable—Order restoring judgment-debtor to possession after execution—Order illegal.

The provisions of s. 244† of the Civil Procedure Code govern equally the procedure of the Court which passed the decree, when executing such decree, and the Court to which the decree is sent for execution. *Cooke v. Hiseba Beebe*, N.-W. P. H. C. Rep., 1874, p. 181, referred to.

All orders staying execution of decrees, whether passed by the Court which passed the decree, or by the Court to which it is sent for execution, are "questions arising between the parties to the suit in which the decree was passed, and relating to the execution" thereof, within the meaning of s. 244 (c) of the Civil Procedure Code, and, as such, appealable, irrespective of the provisions of s. 588. *Kristomohiny Dossee v. Rama Churn Naq Chowdhury*, I. L. R., 7 Cal., 733, and *Luchmееput Singh v. Sita Nath Doss*, I. L. R., 8 Cal., 477, followed.

* First Appeals Nos. 24 and 25 of 1884, from orders of Babu Ram Kali Chaudhri, Subordinate Judge of Allahabad, dated the 4th March and 18th March 1884.

† [Sec. 244 :—The following questions shall be determined by Court executing decree. by order of the Court executing a decree and not by separate suit (namely)—

(a) questions regarding the amount of any mesne profits as to which the decree has directed inquiry;

(b) questions regarding the amount of any mesne profits or interest which the decree has made payable in respect of the subject-matter of a suit, between the date of its institution and the execution of the decree, or the expiration of three years from the date of the decree;

(c) any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree.

Nothing in this section shall be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein, where such profits are not dealt with by such decree.]

The widest meaning should be attached to clause (c) of s. 244 of the Civil Procedure Code, so as to enable the Court of First Instance and the Court of Appeal to adjudicate upon all kinds of questions arising between the parties to a decree and relating to its execution.

There is no provision in the law which empowers the Court passing a decree to set aside the proceedings under which the decree-holder has already been placed in possession in execution of his decree. The provisions of s. 243 of the Civil Procedure Code have no reference to a case in which execution has already been carried out, and the decree-holder placed in possession of the property decreed to him.

ON the 24th December 1883, Chauharja Bakhsh Singh and others, mortgagors, obtained in the Court of the Subordinate Judge a decree against Fakir Bakhsh, mortgagee, for redemption of mortgage and possession of the mortgaged lands, conditioned on their depositing in Court Rs. 3,328 within one month from [74] the date of such decree. The decree-holders fulfilled the above-mentioned condition by paying the required amount into Court on the 8th January 1884, and on the 22nd February 1884, they applied to execute their decree by giving them possession. On the same day, an order was passed for delivery of possession, and, on the 4th March 1884, the Amin forwarded a *dakhaldama* reporting that possession had been given to the decree-holders, which reached the Court on the 6th of the same month. Meanwhile, on the 29th February, the judgment-debtor, intimating his intention to appeal to the High Court from the decree of the 24th December 1883, and expressing his readiness to furnish security, had applied to the Court for stay of execution "till the expiry of the time allowed for appeal, or the final disposal of the appeal," and on the 4th March 1884, the following order was passed:—"That under s. 545 of Act XIV of 1882 the execution-proceedings be stayed, provided that the applicant furnishes security to the extent of one year's profits on or before the 14th March 1884, and that as an order has already been issued for the execution of the decree, a second order be issued directing the Amin to stay the proceedings of the delivery of possession till further orders, and to submit a report to the effect that these orders have been carried out." It will be noticed that this order was made on the same day as that on which the Amin reported to the Court that possession had been given to the decree-holders. The second order reached the Amin on the 8th March 1884, and he reported what had already been notified, namely, that he had already given possession. On the 18th March, that is, four days beyond the time named in the order of 4th March, the judgment-debtor deposited Rs. 370-6-0 as representing one year's profits; and thereupon the Subordinate Judge ordered that the judgment-debtor be restored by the Amin to possession. From this order of the 18th of March, and the former order of the 4th of March, Ghazideen, one of the decree-holders, now appealed to the High Court.

Munshi Hanuman Prasad and Munshi Ram Prasad, for the Appellant.

Pandit Ajudhia Nath and the Junior Government Pleader (Babu Dwarka Nath Banarji), for the Respondent.

[75] The Court (STRAIGHT, OFFG. C.J., and MAHMOOD, J.) delivered the following judgment:—

Mahmood, J.—We have not yet entered upon a consideration of the pleas, as a preliminary objection to our entertaining the appeal has been taken by the learned pleader for the respondent. His contention in substance is that the orders of the 4th and 18th March having been passed in advertence to the second paragraph of s. 545 of the Code, and not being orders in execution, but in stay of execution of the decree, were not within s. 244, and not being specially appealable under s. 588 are not appealable at all. And it is further urged by him that an application to stay execution is in terms a prohibition

to the applicability of s. 244, and, it is said, how can such an application involve any question "relating to the execution" of the decree within the meaning of clause (c) of that section, when its very object is to suspend execution?

We have taken time to consider the contention, which at first sight seemed somewhat plausible, but, on consideration, we think its force is more apparent than real. It seems to us that the argument rests upon an erroneous construction of the expression "Court which passed the decree" in s. 545 of the Code, and a too limited view of the scope of s. 244.

The chapter on execution of decrees in the Civil Procedure Code begins with s. 223, the first paragraph of which lays down the general rule that "a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution;" and s. 228 lays down that "the Court executing a decree sent to it under this chapter shall have the same powers in executing such decree as if it had been passed by itself." It is clear from these provisions that the functions of "*the Court executing a decree*" may be discharged either by the Court which passed it or by the Court to which the decree has been transferred for execution; and, in order to prescribe the scope of those functions, s. 244 defines the questions to be "determined by order of the Court executing a decree, and not by a separate suit." The provisions of the section are general, and they certainly do not aim at drawing a distinction between "the Court which passed the decree" [76] and "the Court executing it," for both qualifications may be possessed by the same Court.

The subject of staying execution of decree is dealt with in the Code in two separate places; but this circumstance does not involve the soundness of the proposition relied upon by the learned pleader for the respondent, that an order staying execution does not fall within the purview of the general section 244, which as we have shown, governs equally the procedure of the Court which passed the decree, when executing such decree, and the Court to which the decree is sent for execution. In connection with this subject, ss. 239, 240, 242, and 243 must be read with ss. 545 and 546, and indeed they might perhaps have more properly appeared together and in the same part of the Code. The use of the phrase "Court which passed the decree" in s. 545 does not of itself necessarily exclude the Court executing the decree, for it may itself be such Court; but it does exclude the Court to which execution of a decree has been transferred, for that Court is not the Court which passed the decree. In other words it does not follow as a necessary consequence from the application under the second paragraph of s. 545 for stay of execution, having to be made to the "Court which passed the decree," that such application must be something other than a matter "relating to the execution" within the meaning of s. 244 (c). And this construction is supported by the fact that s. 239 of the Code provides for cases in which, though a decree has entered upon the stage of execution, after its transfer to another Court, the Court that passed it, *quâ* such Court, has still power to order stay of execution, or to make any order relating to the decree or execution, which might have been made by itself if it had issued execution, or if application for execution had been made to it; and any order it may pass "in relation to the execution of such decree" shall be binding on the Court to which the decree was sent for execution (s. 242). To put the matter briefly, it may be said that the transfer of a decree to another Court for execution, amounts to a *qualified* delegation of the powers possessed by the Court that passed the decree, in discharging its functions relating to the execution of that decree. Such delegation is, however, not complete, nor does it entirely divest the Court which transfers the decree of its powers and functions "in relation to the execution of such decree," for under ss 239

and 242, the higher authority in some matters still rests with that Court, notwithstanding the transfer. Indeed a comparison of the various sections shows that the powers as to stay of execution conferred by ss. 545 and 546 upon the Court which passed the decree are analogous to similar powers conferred by ss. 239 and 240 upon the Court to which the decree is sent for execution, both such Courts having in common the qualification of being "the Court executing a decree," within the meaning of s. 244. The powers are similar in kind, though different in minor details. Indeed, so strong is the analogy, that the provisions of s. 243, which relate to stay of execution, pending suit between the decree-holder and the judgment-debtor, would seem to be common both to the Court which passed the decree and the Court to which it is sent for execution. Such was the ruling of this Court in the case of *Cooke v. Hiseeba Beebe*, N.-W. P. H. C. Rep., 1874, p. 181.

For these reasons, the argument of the learned pleader for the respondent fails, so far as it aims at drawing a generic distinction between orders staying execution passed by the Court which passed the decree and similar orders passed by the Court to which the decree is sent for execution. Nor do we think that the second part of the learned pleader's argument is sound. It is true that the object of an order staying execution is to *suspend* execution, but this circumstance is far from showing that such an order is not a question "relating to the execution" of the decree within the meaning of s. 244 (c) of the Civil Procedure Code. If the argument were sound, *a fortiori* would the proposition be true that an order dismissing an application for execution as barred by limitation is a matter not "relating to the execution of the decree," for whilst, in the one case, execution of the decree is temporarily suspended, in the other it is absolutely prohibited; and, whilst the learned pleader does not go to the extent of contending that the latter proposition is tenable, his argument falls short of explaining the anomaly which the logical consequence of his reasoning involves.

We have, therefore, no hesitation in holding that all orders staying execution of decrees, whether passed by the Court which [78] passed the decree, or by the Court to which it is sent for execution, are "questions arising between the parties to the suit in which the decree was passed, and relating to the execution" thereof, within the meaning of s. 244 (c), and, as such, appealable, irrespective of the provisions of s. 588 of the Civil Procedure Code. Such was the view taken by the Calcutta High Court in *Kristomohiny Dossee v. Bama Churn Nag Chowdhry*, I. L. R., 7 Cal., 733, in connection with an order staying execution under s. 243; and again in *Luchmeeput Singh v. Sita Nath Dass*, I. L. R., 8 Cal., 477, which was an appeal from an order made by the Court which passed the decree, and in which the execution was pending, requiring the decree-holder to give security under the provisions of s. 546 of the Civil Procedure Code. It is hardly necessary to add that the *ratio decidendi* of these two rulings is equally applicable to a case like the present, wherein the orders under appeal purport to have been made under s. 545 of the Code.

We are of opinion that the widest meanings should be attached to clause (c) of s. 244, so as to enable the Court of First Instance and the Court of Appeal to adjudicate upon all kinds of questions arising between the parties to a decree, and relating to its execution. And as a result of this view, we shall hear these cases on the merits of the pleas urged in appeal.

[The Court, after hearing the cases, was of opinion that the pleas urged in appeal must prevail, and continued as follows:—]

It appears that before the order of the 4th March 1884 was passed, the order of the Subordinate Judge, dated the 22nd of February 1884, had already been carried out by the Amin, and possession of the decreed property had

already been delivered to the decree-holder-appellant. The decree had, therefore, been already executed, and the order of the Subordinate Judge, dated the 18th March 1884, directing that the judgment-debtor be restored to possession, was therefore illegal. There is no provision in the law which empowers the Court passing the decree to set aside the proceedings under which the decree-holder has already been placed in possession in execution of the decree. The provisions of s. 243 of the Civil Procedure Code are limited to staying [79] execution of decrees, and they have no reference to a case like the present, in which execution had already been carried out, and the decree-holder placed in possession of the property decreed to him. The same principle would apply to the case of a money-decree which had already been satisfied in execution. Indeed, an order such as the order of the 18th March in this case cannot be described as an order *staying* execution of a decree, for the execution had already taken place.

Upon the application of the decree-holder-appellant this Court, by its order of the 20th March 1884, stayed the Subordinate Judge's order of the 18th March, and the decree-holder is therefore still in possession, and the decree under which he obtained possession is the subject of an appeal which is now pending in this Court.

Under the circumstances of this case, we decree both the appeals, and set aside the lower Court's orders, dated the 4th and 18th March 1884, costs in both the Courts to be paid by the judgment-debtor-respondent.

Appeals allowed.

NOTES.

[The ruling in this case has been approved in the following cases :—20 Mad., 366; 18 Mad., 26; 14 Mad., 99; 16 All., 129; 11 Bom., 57; 12 Cal., 624; 13 Cal., 111.]

[7 All. 79]

FULL BENCH.

The 14th July, 1884.

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, MR. JUSTICE OLDFIELD,
MR. JUSTICE BRODHURST, MR. JUSTICE MAHMOOD, AND
MR. JUSTICE DUTHOIT.

Damodar Das.....Plaintiff

versus

Gokal Chand and others.....Defendants.*

Practice—Civil Procedure Code, s. 53—Rejection, etc., of plaint at a date subsequent to first hearing.

Held, (OLDFIELD, J., dissenting), that, under s. 53 of the Civil Procedure Code, a plaint can be rejected, returned for amendment, or amended by the Court of First Instance only at or before the first hearing of the suit, and not after the first hearing thereof.

Modhe v. Dongre, I. L. R., 5 Bom., 609, dissented from.

* Second Appeal No. 1274 of 1883, from a decree of J. C. Leopolt, Esq., District Judge of Agra, dated the 26th July 1883, affirming a decree of Babu Mrittonjoy Mukarji, Subordinate Judge of Agra, dated the 6th June 1882.

Soorjmutkhi Koer's Case, I. L. R., 2 Cal., 272; *Burjore v. Bhagana*, I. L. R., 10 Cal., 557; L. R., 11 Ind. Ap., 7; and *Fazul-un-nissa Begam v. Mulo*, I. L. R., 6 All., 250, distinguished by MAHMOOD, J.

Per MAHMOOD, J.—The plaint may, for causes other than those mentioned in s. 53, be amended by the Court after the first hearing.

[80] THIS was a reference to the Full Bench. The facts which gave rise to it were as follows:—The plaintiff claimed to have it declared that a certain house was not liable to be sold in execution of three decrees against one Shadi Lal, from whom he had purchased the house, and to have the property released from attachment in execution of those decrees. When the house had been attached in execution of those decrees, the plaintiff had objected to the attachment, but his objections were disallowed. The defendants in the suit were the holders of the three decrees and the judgment-debtor. The 29th August 1881 was fixed for the first hearing of the suit. On or before that date all the defendants except Shadi Lal filed written statements. The holders of one of these decrees, defendants, set up as a defence to the suit, among other things, that the frame of the suit was bad for misjoinder of causes of action, the causes of action against the holders of each decree being separate. On that date the Court of First Instance framed the following issue on this defence—"Whether this suit is bad for misjoinder?" On this issue it held subsequently, on the 6th June 1882, at the final hearing of the suit, that the frame of the suit was bad for misjoinder of causes of action, and made an order rejecting the plaint on that ground. On appeal by the plaintiff the Lower Appellate Court affirmed the order of the first Court. The plaintiff appealed to the High Court, contending, *inter alia*, that "after a plaint had been admitted, and the written statements of the defendants filed, the plaint could not be rejected."

The Divisional Bench (STRAIGHT, OFFG. C.J., and DUTHOIT, J.) hearing the appeal, by an order dated the 21st April 1884, referred the following question to the Full Bench—

- "May a plaint be rejected on any date subsequent to the first hearing?"

Mr. T. Conlan and Pandit Ajudhia Nath, for the Appellant.

Munshi Hanuman Prasad and Shaikh Maula Bakhsh, for the Respondents.

The following opinions were delivered by the FULL BENCH:—

Oldfield, J.—In my opinion, the words "at or before the first hearing" in s. 53 of the Civil Procedure Code are directory [81] only, and allow of a discretion of course to be properly exercised, of rejecting or amending a plaint after the first hearing.

In *Burjore v. Bhagana*, I. L. R., 10 Cal., 557. L. R., 11 Ind. Ap., 7, the Privy Council ruled that the words in s. 602 of the Civil Procedure Code, directing that security for costs shall be given within a certain time specified in the section, are only directory, and that the Court has a discretion to extend the time, and this ruling was followed by the Full Bench of this Court in *Fazul-un-nissa Begam v. Mulo*, I. L. R., 6 All., 250.

The question raised in those cases is analogous to the one now before us, which was decided by the Bombay High Court in *Modhe v. Dongre*, I. L. R., 5 Bom., 609, and I concur in the view of the law expressed by that Court.

Straight, Offg. C.J., and Brodhurst and Duthoit, JJ.—In our opinion the question referred to us must be answered in the negative. We think that the words "at or before the first hearing" in s. 53 of the Civil Procedure Code are mandatory and not directory, and that a plaint cannot be "rejected," "returned for amendment," or "amended then and there" by a Court after

the first hearing. It will be convenient in dealing with the point before us, to see how the law stood with respect to the same subject-matter under Act VIII of 1859. By ss. 29 and 32 of that statute, it was provided that "if the plaint do not contain the several particulars hereinbefore required to be specified therein, or if it contain particulars other than those required to be specified, whether relevant to the suit or not, or if the statement of particulars be unnecessarily prolix, or if the plaint be not subscribed and verified as hereinbefore required, the Court may reject the plaint, or, at its discretion, may allow the plaint to be amended." Section 32: "If upon the face of the plaint, or after questioning the plaintiff, it appear to the Court that the subject-matter of the plaint does not constitute a cause of action, or that the right of action is barred by lapse of time, the Court shall reject the plaint. Provided that the Court may in any case allow the plaint to be amended, if it appear proper to do so." By ss. 30 and 31 of the same Act, provisions were made similar to those to be found now in ss. 54 and 57 of the present Code, and all orders passed under [82] the sections of the old Code above referred to were appealable as orders, while, under the former, orders returning plaints for amendment, or to be presented to the proper Court, are appealable as such, orders of rejection being appealable as decrees. It will be observed that the language used in s. 29 of Act VIII of 1859 was general and without restriction, and the consequence was that much room was left for doubt, and a diversity of conflicting views were taken as to what was the proper stage at which to reject or return a plaint for amendment. Hence it had become desirable, when Act X of 1877 was in course of preparation, to lay down some clear and imperative rule of practice by which uniformity of procedure in this important respect on the part of the Courts could be secured. Except for a ruling of the late Chief Justice of Bombay, to which we will presently advert, and the opinion now expressed by our honorable colleague, OLDFIELD, J., we should have thought that the language of s. 53 of the present Code is only open to one construction, namely, that it exactly meets the difficulty at which it was aimed: otherwise why not have retained the general terms of the old Code. If the Legislature, in reproducing a provision of a repealed Act into a new law, accompanies it by certain limitations and restrictions, it is, we should think, to be presumed that it did not go out of its way to introduce terms which were intended to have neither meaning nor effect. Let us see what s. 53 says: "The plaintiff may, at the discretion of the Court, and at or before the first hearing, be rejected, &c." Now, as we have already remarked, if the discretion of the Court herein mentioned was meant to be exercisable at any time, why not have adhered to the language of Act VIII of 1859; or, if that required improvement, why not have adopted the same expression as is used in s. 149, "at any time before passing a decree;" or, to go further afield, have adopted the rules of Order 27 of the Judicature Act? It comes to this, that those who contend for the affirmative answer to the question put by this reference, virtually ask us either to run a pen through the words "at or before the first hearing," or to treat them as mere surplusage. But we do not think it is competent for us to construe a section of a legislative enactment in this loose fashion, or to leave out a whole section as having no particular meaning. To do so would be to violate [83] the cardinal rule of construction referred to by COCKBURN, C.J., in *J. v. Bishop of Oxford*, L. R., 4 Q. B., 245, "that a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." But then, it is said, the introduction of the words "may at the discretion of the Court" qualifies the whole of s. 53. To our minds this is a fallacious argument. Used as a term in legislation, there is no special magic about the word "may;" with one context it may be merely directory,

with another absolutely imperative. Nor does the expression "disc----- the Court" carry matters further; and it would have been equally apposite to say "if the Court sees fit." The words "may at the discretion of the Court" were obviously only used for the purpose of conferring a power on the Courts, which without them they would not have had, of determining whether, assuming a plaint to be defective in any of the respects mentioned in clauses (a), (b), (c), (d), (e) and (f), it should be (i) rejected, or (ii) returned for amendment, or (iii) amended then and there, as contradistinguished from the obligation cast upon them to reject or return a plaint in the cases provided for in ss. 54 and 57. Looking to the terms of s. 53, we gather that its object was to enable a Court, according as the plaint was more or less open to objection upon the face of it, either of its own motion or at the instance of the defendant on his first appearance, to summarily deal with it in a preliminary stage by one or other of the above three alternatives. In short, the expression "may at the discretion of the Court" amounts to no more than saying "it shall be lawful for the Court," or the Court "may, if it think fit," and beyond this it has no special significance or effect upon the rest of the section. The discretion of the Court must of course be that discretion which is described in s. 22 of the Specific Relief Act as "not arbitrary, but sound and reasonable, guided by judicial principles, and capable of correction by a Court of Appeal." It cannot, we think, be contended that a Court, except as provided in s. 53, which, by the way, finds its place in the Chapter relating to "Institution of Suits," has any authority to reject or to return a plaint for amendment, or to amend it; and, as far as we are aware, when once a suit has entered upon the stage of [84] trial, it can only be disposed of by judgment and decree. If this be so, then in order to enable us to answer this reference in the affirmative, we must interpret not only the words "may at the discretion of the Court," but those which immediately follow and apparently govern them, "and at or before the first hearing" as conferring a general and unlimited power irrespective of all consideration of time. Surely when a time is expressed *at or before* which a discretion may be exercised, it is only following another well-known rule of construction to hold that this excludes the notion that, save in specially excepted instances, it may be exercised afterwards. If this is not so, then at what stage of a suit may a plaint be rejected, returned for amendment, or amended? for, if no time is provided, then it may be done at any time.

But we can quite understand, indeed we have already explained, why it was considered undesirable to leave the Courts unfettered discretion in such a matter. No doubt the Legislature felt the confusion and inconvenience that had arisen before and would arise again, if no clear and certain time were fixed within which the power conferred by s. 53 could be used. For instance, if there were no limitation, a Court might—though of course such an exercise of its discretion would be most unreasonable—after accepting the plaint, receiving the statement of defence, settling the issues and hearing the witnesses on both sides, reject the plaint, or return it for amendment on the ground of prolixity, or for misjoinder of causes of action, or for nonjoinder or misjoinder of parties, s. 34 notwithstanding, or for not being signed and verified. And with what result? In the one case, the rejection would be appealable as a decree, but such appeal could only deal with the propriety or otherwise of the exercise of the Court's discretion in rejecting; in the other, the return for amendment would be appealable as an order upon like grounds; but, in both instances, the disposal of the suit in the main and upon its merits would be suspended, while these quasi-interlocutory proceedings were pending. We cannot believe that it was ever intended to admit of such a state of things arising

or the contrary, in our opinion, the authority given to the Court was meant to be exercised at a preliminary stage to, and not in the course of the trial of, a suit. Moreover, we are fortified in this view by an examination of the [86] grounds on which a plaint may be rejected, returned for amendment, or amended, as declared in the sub-clauses (a), (b), (c), (d), (e), and (f). It will be observed that these have reference to technical defects in the form of the plaint of a legal character, and are not concerned with the matters in difference between the parties to the suit.

As we have before remarked, when a Court exercises its discretion under s. 53, the appeal from its decision must be confined to the question of whether, looking to the plaint itself, such discretion has been properly exercised, and the merits of the case cannot be examined. We may perhaps not inappositely add that in the later section of the Code (513), which deals with the rejection or amendment of a memorandum of appeal, no limitation as to the time when that may be done is provided,—a circumstance that is not without significance.

We have thus briefly given the reasons that induce us to regard the language of s. 53 as imperative, and to hold that a plaint cannot be rejected, returned for amendment, or amended, after the first hearing. But before closing our judgment we feel bound to make one or two remarks with regard to a ruling of the Bombay Court, which, as an expression of opinion by the late Chief Justice of Bombay, demands attention. With deference to that learned Judge, we confess we do not feel ourselves pressed by the main argument on which he proceeds, namely, that the adoption of our view brings cl. (f) of s. 53 and the second paragraph of s. 32 into conflict. No doubt it is right to presume that the Legislature did not intend to make two provisions in the same Act which contradict one another. But is such the case in the two sections before us? Paragraph 2 of s. 32 gives a general power to a Court at any time, of its own motion, or on application, to order "that any plaintiff be made a defendant," or *vice versa*, "and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added." Section 53, on the other hand, provides that a Court may, in its discretion and at or before the first hearing, reject or return for amendment or amend [86] a plaint which, upon the face of it, shows nonjoinder or misjoinder of parties. These seem to us to be two totally different things; in the one case, the Court, so long as it does so "at or before the first hearing," must, if it properly exercises its discretion, either reject or return for amendment, or then and there amend the plaint, if it presents the defects mentioned in s. 53; in the other, it only alters the position of a party or parties to the suit, or adds a plaintiff or defendant, and, in such last mentioned instance, as the person appears for the first time, if the plaint is amended, so far as he is concerned, under s. 33, any such amendment as regards him will be "at the first hearing." But, even if there be a conflict, which we do not concede, it does not appear to us that, because the provisions of paragraph 2 of s. 32 are *pro tanto* inconsistent with those of s. 53, it necessarily follows that the words "at or before the first hearing" in the latter section are robbed of their significance and importance, any more than the same words in paragraph 4 of s. 32 are to be treated as surplusage. But as we have said, it seems to us that a distinction is to be drawn between rejecting, returning for amendment, or amending a plaint at or before the first hearing for nonjoinder or misjoinder of parties, patent on the face of it, or then known to the plaintiff or the Court, and another to change the position of a plaintiff or defendant, or to add a party inadvertently omitted, or whose presence

is necessary for the object mentioned in s. 32. Giving the terms of s. 53 the best consideration we can, we find ourselves unable to coincide in the construction placed upon them by the two learned Judges of the Bombay Court. We think it more reasonable to suppose that when the Legislature introduced the words "at or before the first hearing" into the section, they were intended to have some meaning, and that the meaning they would ordinarily bear in the English language.

As to the ruling of their Lordships of the Privy Council referred to by OLDFIELD, J., we have had the advantage of perusing the remarks made in reference thereto by MAHMOOD, J., and we entirely concur in his observations and in the distinction he draws between ss. 602 and 53 of the Code. It is therefore unnecessary for us to say anything further on the subject, and it only remains for us to add that the question put by the reference must be answered in the negative.

[87] **Mahmood, J.**—The question put to us in this case, though expressed in general terms, is whether, under s. 53 of the Civil Procedure Code, a plaint may be rejected at any time subsequent to the first hearing of the suit; and, in considering this question, I have arrived at the same conclusion as the learned Chief Justice.

The words of s. 53, important for the consideration of the question, are:—"The plaint *may*, at the discretion of the Court, *and at or before the first hearing*, be rejected or returned for amendment within a time to be fixed by the Court, or amended then and there," &c. Did the Legislature intend the words which I have emphasized to be merely directory or mandatory? It has been said that when a time is fixed by a statute for the performance of any act or the exercise of any power, such fixation of time must be taken to be only directory, unless followed by express words prohibiting the performance of such act or the exercise of such power after the expiry of the time so fixed. And for this contention certain passages to be found at pp. 207-9 of Mr. Wilberforce's work on Statute Law have been referred to. One of the passages quoted by FIELD, J., in the case of *Abasu Begam v. Umda Khanum*, 1. L. R., 8 Cal., 724, in support of the view that the provisions of s. 492 of the Criminal Procedure Code of 1872, relative to the form of summons, were merely directory and not imperative. But neither the passage cited nor the ruling seems to me to be applicable to the present case, for the question before us is not one of mere form, nor does it relate to the manner in which official acts are to be performed. The point before us is one of much greater importance, for the interpretation of the statute in this case cannot be determined merely by the consideration that substantial compliance may be taken as full compliance.

By what considerations then should the interpretation of the statute be guided and determined in the present case? Before entering into the main question, I wish to premise that I take it as a sound explanation of law that "enactments regulating the *procedure in Courts* seem usually to be imperative, and not merely directory. If, for instance, an appeal from a decision be given, with provisions requiring the fulfilment of certain conditions, such as giving notice of appeal and entering into recognizances, or transmitting do-[88]cument within a certain time, a strict compliance would be imperative, and non-compliance would be fatal to the appeal." (Maxwell on the Interpretation of Statutes, 2nd ed., 456). The rule of interpretation which governs the construction of words conveying a directory meaning was comprehensively stated by Lord SELBORNE in *Julius v. Lord Bishop of Oxford*, (L. R., 5 App. Cas., 214, see p. 235): "The question whether a Judge or a public officer, to whom a power

is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved *abunde*, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects of the enactment conferring the power." Such then is the broad principle of interpretation, and, to use the language of MARCEY, J., "the general rule is that where a statute specifies the time within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered as directory merely, unless the nature of the act to be performed or the language used by the Legislature show that the designation of the time was intended as a limitation of the power of the officer." Such an inference as is suggested in the last lines of the passage first quoted was drawn by the Court where a time was appointed for the taxation of costs upon petitions against private bills, and for the approval by the quarter sessions of the table of fees to be taken by clerks to justices. In both these cases, the provision as to time was held to be imperative, and non-compliance with it rendered the taxation of costs and the table of fees invalid. (Wilb., Stat. Law, p. 208.)

I agree with my brother OLDFIELD, so far as to concede that the words of the section, if interpreted regardless of any other consideration, would not necessarily import an absolutely imperative signification so as to invalidate the rejection of a plaint by the Court after the first hearing of the suit. But, in my opinion, the question cannot be so decided, and, as Lord SELBORNE said, it must be solved *abunde* and with reference to the general scope and objects of the enactment. And, taking the *dictum* of the learned Lord with the rule laid down by MARCEY, J., I formulate three questions as steps leading to the determination of the point now before us—

(i) What does the *language* and context of s. 53 indicate?

[89] (ii) What are the general scope and objects of the particular provisions contained in that section?

(iii) Is the nature of the act, that is, the power conferred upon the Court by the section, such as would warrant the conclusion that the phrase "*at or before the first hearing*" was intended to be a limitation of the power so conferred?

First, then, as to the *language* and context of the section. The word "*may*," as a general rule, no doubt, imports a permissive meaning, but the rule is not universally applicable regardless of the context of the statutory provisions, and the objects with which they have been enacted. "Where a statute directs the doing of a thing for the sake of justice or public good, the word '*may*' is the same as the word '*shall*.'" Such was the rule laid down by COCKBURN, C.J., in *R. v. Bishop of Oxford*, L. R., 4 Q. B., 245. Again, to use the words of JERVIS, C.J., in the case of *Macdougall v. Paterson*, 11 C. B., 773: "When a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises. The word '*may*' is not used to give a discretion, but to confer a power." (Wilb., Stat. Law., pp. 196-7). In enacting that they "*may*," or "*shall, if they think fit,*" or "*shall have power,*" or that "*it shall be lawful*" for them to do such acts, a statute appears to use the language of mere permission; but it has been so often decided as to have become an axiom that in such cases such expressions may have—to say the least—a compulsory force, and so would seem to be modified by judicial exposition." (Max. on Int. of Stat., 2nd ed., p. 287.) What, then, should be the judicial exposition of the meaning of the word "*may*" as it occurs in s. 53 of our Civil Procedure Code? Having considered the question, I hold that the word, as it occurs in the section, does not mean more or less than the equivalent phrase "*it shall be lawful*."

that is, the word is used to confer a power which the Court would not otherwise have, and the phrase "at the discretion of the Court" precludes an absolutely imperative signification being attached to the word. But is the discretionary power so conferred to be wholly unrestricted either as to the *circumstances* under which, or as to the *time* within which, it is to be exercised? My answer to the question is, that s. 53 does not [90] contemplate the discretionary power to be so unrestricted in either of these respects. There is no question that in respect of one of these considerations, *cls. (a) to (f)* of the section limit the scope of the discretionary power, for it is not contended that the Court could summarily reject a plaint under circumstances other than those specified in the clauses. But it is said that the absence of the words "but not afterwards" must be taken to imply that no such restriction as to time was contemplated by the Legislature. But if the Legislature intended to impose restrictions as to the *circumstances*, why should the discretionary power be regarded as unrestricted as to *time*? For, it seems to me, the argument based upon the absence of negative words, is applicable alike to the one limitation as to the other, and if the word "*may*" and the phrase "*at the discretion of the Court*" are allowed to impair the limitation as to time contained in the phrase "*at or before the first hearing*," they should also, as a logical consequence, be allowed to reduce the limitation as to *circumstances* contained in the various clauses of the section, from being essential conditions for the exercise of the discretionary power, to mere suggestions which the Court may exceed or disregard. I am unable to place any such construction upon the words of the section, for, as I shall presently show, such an interpretation would be inconsistent with the very objects of the enactment.

But it is contended that a phraseology similar to that of s. 53 has been employed in ss. 110 and 111 of the Civil Procedure Code, and that, in both those cases, the only reason why the tendering of written statements, as a matter of right, is restricted to the first hearing is, that s. 110 is qualified by negative words contained in s. 112, and that s. 111 employs the words "*but not afterwards*." The argument has only apparent force, for it seems to me that, in both the cases so pointed out, the introduction of the negative words was necessary, not because the main propositions as to limitation of time absolutely needed such negative words, but because the exigencies of drafting required the employment of those words in order to facilitate the introduction of the qualifications which s. 112, on the one hand, and the latter part of the first paragraph of s. 111 on the other, were intended to attach to the rules contained in those sections. In both cases, the right of [91] the parties to tender written statements after the first hearing is taken away, in both cases discretionary power is expressly conferred upon the Court to relax the rule. The exigencies of s. 53 required no such provisions, and no argument based upon the wording of the sections to which I have referred can apply to the interpretation of the section we are called upon to construe. There are, however, other sections of the Code which may more appositely be referred to for the purposes of comparison, for s. 53 is not the only clause of the Code which would bear the kind of interpretation which I am disposed to place upon that section. Similar restriction as to time is to be found in s. 328, which relates to the right of the decree-holder to complain of resistance or obstruction to the execution of his decree. The words are: "the decree-holder *may* complain to the Court at any time within one month from the time of such resistance or obstruction." Is the limitation of time in that section to be understood as merely directory or as mandatory? Is it to be considered as directory merely because the words "but not afterwards" are absent from

the section? It seems to me that, notwithstanding the use of the word "may," and notwithstanding the absence of negative words, the restriction as to time must be taken to be imperative—imperative in the sense of prohibiting the adoption of the procedure provided by that section for the decree-holder, if he allows the specified period to elapse. The limitation of time in that section is perhaps misplaced, but, in support of my view, I resort to the well recognized rule of interpreting statutes by comparison of statutory provisions *in pari materia*, and I find that art. 167, sch. ii of the Limitation Act (which relates to the same matter), taken with the provisions of s. 4 of the Act, leaves no room for doubting the proposition that applications under s. 328 of the Civil Procedure Code cannot be entertained after the expiration of the period of one month therein specified, unless indeed the rules of computing the period of limitation in themselves permit an extension of the time. I wish to refer to another section of the Civil Procedure Code which, whilst employing the word "may," specifies a limitation of time within which parties to a case are allowed to exercise a right conferred upon them by the statute. Section 567 provides that either party to an appeal "may, within a time to be fixed by the Appel-[92]late Court, present a memorandum of objections to the finding" recorded by the lower Court upon remand of issues. In interpreting the corresponding s. 354 of the old Code (Act VIII of 1859), which was similarly worded, a Full Bench of this Court in *Ratan Singh v. Wazir*, I. L. R., 1 All., 165, held that, after the expiry of the period fixed for filing objections, neither party could as a matter of right claim to be heard, but that the Court had discretion to allow such objections even after that period. The rule so laid down has never been departed from by this Court, and the same interpretation has been placed upon s. 567 of the present Civil Procedure Code. But it is suggested that the interpretation so placed upon the section, far from supporting my view, is calculated to support the contrary opinion; because there the Court was held to have discretion to extend the period. In answer to this, I have only to say that the limitation of time in that section was obviously meant to be a restriction upon the rights of the parties, and not upon the discretion of the Court; and I say with emphasis that the ruling is a distinct authority for the proposition that such restriction of time was held to be imperative, notwithstanding the use of the word "may," notwithstanding the absence of words which could import the meaning of the phrase "but not afterwards." In that section, there was nothing to show that any restriction as to time was intended to be imposed upon the discretion of the Court—the Court that could fix the time could also extend it. But the distinction which I have thus drawn leads me to the consideration of another section of the Code to which my brother OLDFIELD has referred, and in which limitation of time is specified for the performance of certain acts to be done by the party preferring an appeal to Her Majesty in Council. The section is 602 of the Civil Procedure Code, the *ipsissima verba* of s. 11 of Act VI of 1874. The section provides that "if the certificate be granted, the applicant shall, within six months from the date of the decree complained of, or within six weeks from the grant of the certificate, whichever is the later date, give security for the costs of the respondent," and do certain other acts mentioned in the section. In the case of *Soorj mukhi Koer*, I. L. R., 2 Cal., 272, a Bench consisting of the learned Chief Justice and two other learned Judges of the Calcutta High Court, interpreting [93] the words which I have quoted, held that the phrase "shall within six months" did not import an absolutely imperative meaning, and the time named in the section was subject to extension by the sound discretion of the Court. The rule so laid down was adopted by the Lords of the Privy Council in *Burjore v. Bhagana*, I. L. R., 10 Cal., 557: L. R., 11 Ind. Ap., 7, which was

followed by a Full Bench of this Court, in *Fazul-un-nissa Begam v. Mulo*, I. L. R., 6 All., 250. The rulings are undoubtedly strong authorities that the limitation as to time within which a party to the suit had to perform certain acts was merely directory, and did not exclude the discretion of the Court to extend the time, even though the words of the statute importing such limitation were preceded by the word "shall"—a word which is usually interpreted to be imperative, whilst "may" is of course ordinarily taken to be permissive only. The ruling of the Privy Council, so far as the interpretation of the limitation as to time in s. 602 is concerned, has undoubtedly settled the law. The observations of their Lordships upon the point, as well as of the learned Judges of the Calcutta Court in the case approved by the Privy Council, are briefly expressed, and I confess that the rulings kept my mind in suspense for some time in regard to the question whether they did not absolutely govern the interpretation of s. 53 also. But having given my earnest consideration to the subject, I am unable to agree with my brother OLDFIELD in thinking that they solve the difficulty now before us. I distinguish the wording of s. 53, relating to the limitation of time, from the language of s. 602, and my reasons for the distinction are similar to those which I have expressed in connection with the interpretation of s. 567 by this Court. The restriction as to time contained in that section, as also in s. 602 of the Code, are restrictions upon the rights of the parties, and the rulings to which I have referred are therefore consistent with the principle whereon the Full Bench ruling of this Court proceeded in interpreting s. 354 of the Code of 1859. In neither of the sections does the language of the statute employ any phrase which could be taken to be a restriction imposed upon the powers of the Court, whilst in s. 53 the adverbial clause "at or before the first hearing," if it has any meaning, must refer to the power of the Court—it certainly cannot refer to anything else. But this is not [94] the only reason why I distinguish the present case from the Privy Council ruling in *Burjore v. Bhagana*, I. L. R., 10 Cal., 557 : I. R., 11 Ind. Ap., 7. I have already said that the scope and objects of particular statutory provisions, and the nature of the act to which they relate, are essential considerations for arriving at correct conclusions in construing the language of the Legislature. That those considerations affect the present question, I shall presently endeavour to show. But I may here say in passing that, both in the case before the Calcutta Court and in that before the Privy Council, there had already been substantial compliance with the spirit and objects of the statute. In the former case, deposit of costs within time could not be made, because the day for making the deposit fell at a time when the Court was closed, and, in the case before the Privy Council, a deposit within time had already been made or was attempted to be made within time, but it was by a *bona fide* mistake wrongly made in the Court of First Instance—a state of things which even the rigid rules of the law of limitation recognize as reasons for extending the period of limitation. That under such circumstances the intention of the Legislature had been substantially complied with, so as to entitle the party affected by the limitation of time to the discretionary indulgence of the Court, is a proposition naturally justifiable by the rules of interpreting statutes, for it neither defeats the object of the limitation of time, nor is it productive of any injustice, hardship, or inconvenience. And I cannot help thinking that in placing such interpretation on s. 602 of the Code, the scope and objects of the section, the nature of the act to which the limitation of time refers, the absence of restricting words regarding the powers of the Court, are circumstances which could not have been ignored. And I cannot help thinking that, bearing these considerations in mind, there is scarcely anything in common between s. 602 and s. 53 of the Code. My answer, then, to the first

question formulated by myself is that there is nothing in the language of s. 53 to lead us to the conclusion that the limitation of time to the first hearing was intended by the Legislature to be subject to extension or variation at the discretion of the Court. And I shall presently endeavour to show that every other consideration supports the conclusion that the limitation of time is intended to be imper-[96]ative. This leads me to the other two points enunciated by me at the outset.

The general scope of the section, as the words of the statute clearly show, is to confer a power upon the Court, which power it would otherwise not possess, and to lay down rules for guiding and restricting the exercise of that power, by indicating the conditions under which it may be exercised. Those conditions consist of two distinct elements: one relating to the time or the occasion when the power is to be exercised, the other relating to the cases to which that power is applicable. The former is expressed in the phrase "at or before the first hearing," the latter are enumerated in the various clauses which form an essential part of the section, and the whole section is rendered subject to the limitations contained in the proviso, the last part of the section being unimportant for the present discussion. Such, then, is the general scope of the section. Its primary object, in common with other rules of adjective law, is to secure, as far as practicable, uniformity of procedure to be adopted by the Courts. Further, the object is to enable the correction of technical errors in the plaint at the earliest possible stage, and to prevent the prolongation of a litigation which, by reason of some intrinsic defect, must, if that defect is not cured, finally end in the dismissal of the suit, or introduce an element of confusion. Such, then, in my opinion, are the general scope and objects of the provisions contained in s. 53 of the Code.

As to the nature of the power conferred upon the Court by s. 53, I need not say much, for it seems to me obvious that the power of rejecting plaints under that section is essentially a discretionary power, exercisable summarily by the Court *suo motu* in regard to matters which, as the clause of the section shows, are such as can be fully considered and decided by reading the plaint itself. Therefore the nature of the power certainly does not require that the time for its exercise should be extended to a later stage of the trial than the first hearing of the suit. And it seems to be an essential element of the nature of such a discretionary power that it should be exercised promptly and on the earliest possible occasion. For, if the power be held to be exercisable at any time, we have to face the contingency that a plaint may be rejected for [96] some one or other of the reasons mentioned in the various clauses of the section at a stage when the entire evidence in the case has been taken, when the final argument of the parties has been heard, and nothing more remains to be done by the Court than decreeing or dismissing the suit.

I have dwelt so much upon the general scope, objects and nature of the section, because, regardless of these considerations, neither the word "may," nor the word "shall," nor the fixation of time, nor the absence of prohibitive words, can in themselves furnish an unerring guide to the interpretation of a statutory provision like the one now under consideration. If such were not the rule of construction, almost every other section of the Penal Code, many sections in the Evidence Act, and in other statutes wherein the word "may" occurs without being followed by negative words, would be obviously misunderstood. To illustrate what I mean, I take s. 379 of the Penal Code which, in providing punishment for theft, lays down "imprisonment of either description for a term which may extend to three years," &c. Now, in this section the word "may" occurs, and the limit of punishment is described without

any negative words to indicate that, the punishment shall not be more than what is provided. I take it, that the limitation contained in that section, is undoubtedly a restriction upon the power of the Court, and that, notwithstanding the absence of express prohibition, such limitation cannot be disregarded or exceeded. I now take one section from the Evidence Act. Section 61 of that Act provides that "the contents of documents *may* be proved either by primary or by secondary evidence." Here again is the word "*may*" used without being followed by any prohibitive words importing the meaning of the phrase "but not otherwise." Yet the section can hardly be understood to mean that the contents of documents can be proved by a third kind of evidence which is neither primary nor secondary.

After what the learned Chief Justice has said, I need say no more as to the conclusions derivable from the comparison of the language of ss. 29 and 32 of the Code of 1859 with that of s. 53 of the Code of 1877, reproduced in the present Code. But I wish to add that Mr. Broughton, in his note to s. 53 of the Code of 1877, has interpreted the introduction of the phrase "at or before the first [97] hearing" to be mandatory and restrictive of the discretion of the Court. The learned Chief Justice has also pointed out the uncertainty of practice, inconvenience to parties, delay in the disposal of litigation, which would result from any such interpretation as would leave the Court in possession of a discretionary power of rejecting plaints summarily exerciseable at any stage of the suit without any definite restriction, or subject to a restriction such as would practically be no restriction at all. Such could hardly have been the intention of the Legislature in framing s. 53 of the Civil Procedure Code. No doubt, WESTROPP, C. J., in *Modhe v. Dongre*, I. L. R., 5 Bom., 609, expressed views opposed to the opinion which I have formed in this case, and my brother OLDFIELD has adopted the ruling. In regard to that ruling, however, it is hardly necessary for me to say more than has already been said here by the learned Chief Justice; but with due deference to my brother OLDFIELD's views on the subject, and with all the profound respect which I have always felt for any exposition of the law by Sir MICHAEL WESTROPP, I must confess that the reasons upon which his ruling proceed do not convince me that the interpretation which I have placed on s. 53 would render that section inconsistent with any other part of the Code. There seems scarcely more reason for holding that, if the limitation as to the first hearing contained in s. 53 be understood in the imperative sense, cl. (f) of that section would become inconsistent with the second paragraph of s. 32, than there would be for saying that the provisions of s. 110 are inconsistent with the provisos to s. 112. My own view is, that the powers of the Court under the second paragraph of s. 32, as under s. 112, are intended to be applicable to special cases, and that the very fact that such extensive powers are given to the Court, in those cases tends to show that the omission in regard to the powers conferred by s. 53 was intended to limit the exercise of the discretionary power, thereby conferred, to the first hearing. But out of respect for the dicta of WESTROPP, C. J., I must explain the difficulties I have in accepting his view. The most important part of the *ratio decidendi* whereon his judgment proceeds is that by understanding the limitation of time of s. 53 as imperative, "we should bring cl. (f) of s. 53 into direct conflict with the second [98] passage of s. 32." Now, if this is so, the argument is undoubtedly strong in favour of placing a permissive meaning on s. 53. But I cannot help feeling that this is not so. Under s. 32, there are two distinct powers given to the Court. The first is the power of *striking out* the name of a party "improperly joined" in the suit. The second power contained in the second paragraph of the

section relates to the transposition and the *addition* of parties. Now the exercise of the first power is limited to the first hearing, the second power is not so limited, and so far I concur with WESTROPP, C.J. But this is so because the law says so; and I confess that I fail to see how this interpretation brings s. 32 in conflict with s. 53, if an imperative meaning is placed upon the limitation of time contained in the latter section. For I am unable to hold that the summary *return* of the plaint for amendment, or its *rejection* for reasons mentioned in cl. (f) of s. 53, are matters synonymous or convertible with the action of the Court under the second paragraph of s. 32, which relates to the *addition* of parties, and says nothing as to the summary *rejection* of the plaint or its *return* for amendment. The power of a party to amend the plaint after it has been once returned to him under s. 53 is practically unrestricted, and restricted only by the terms of the proviso to that section. On the other hand, the *addition* of parties under the second paragraph of s. 32 is limited to persons whose presence the Court that has to decide the suit considers necessary "to adjudicate upon and settle all the questions involved in the suit." Nor indeed can there be amendment of the plaint in the same extensive sense as under s. 53; for the amendment contemplated in consequence of the action of the Court under the second paragraph of s. 32 must be limited to such matters as are necessary to show the connection which the new party has with reference to the scope of the suit. Under s. 53 the plaint may be either *returned* for amendment or *rejected* altogether; under s. 32 neither of these can happen, and it seems to me that the powers exercisable under the two sections are of distinct characters, which can hardly be called consistent or inconsistent with each other. The second paragraph of s. 32 enables the Court to transpose parties and to cure defects in the frame of a suit, so far as the nonjoinder of parties is concerned,—defects which, if they had become apparent at the first hearing, might have led to the [99] rejection of the plaint, or to its being returned for amendment under s. 53. But if the plaint is not so *rejected* or *returned* at the first hearing, then, the Court having no longer the power either to *return* or *reject* the plaint, the provisions of ss. 32 and 33 are still available. So that, according to my view, the provisions of s. 53, as I understand them, are not inconsistent with the terms of s. 32, which deal neither with *rejecting* plaints nor *returning* them—a circumstance which tends to show that the exercise of the discretionary power conferred by the former section is limited to the first hearing of the suit. If this were not so, the greater portion of s. 32 would be superfluous, for s. 53 itself would meet the contingencies for which s. 32 provides. I repeat that I cannot ignore the fact that under s. 32, whatever order the Court may pass to cure defects arising from nonjoinder of parties, it is not at liberty either to *return* the plaint or to *reject* it. In the one case the plaintiff is put out of Court *pro tem*, in the other case the Court orders that to be done which he might himself have done if he had been properly advised. That there is a distinction between the action of the Court under s. 53 and that under s. 32 is recognized by the Code itself, for orders rejecting the plaint are appealable as decrees within the meaning of s. 2, and orders returning plaints for amendment are appealable under a cl. (6) of s. 588, different to the cl. (2) under which orders passed under s. 32 are appealable. The nature of the action of the Court under the two sections is thus distinguishable, and, in this view of the law, there is no conflict between cl. (f) of s. 53 and the second paragraph of s. 32. Nor does the difficulty contemplated by WESTROPP, C. J., arise with reference to s. 34 of the Code. It may be that that section "limits in point of time the right of the defendant to object for want of parties, but it does not limit the right of the plaintiff to add parties." But this view does not clash with the interpretation which I have placed upon s. 53; for, if the

exigencies of a case require the addition of a party as defendant after the first hearing of the suit is over, s. 32 meets the case. The name of the new defendant could be added under the conditions which s. 32 provides, and the Court would direct the necessary amendment of the plaint under s. 33.

[100] Indeed, it seems to me that the tendency of the other provisions of the Code points to conclusions in favour of the view which I have taken. Section 31 lays down that "no suit shall be defeated by reason of the misjoinder of parties, and the Court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it." This is a general and imperative rule, and the next section (32), whilst confining to the *first hearing* the power of the Court to *strike out* parties from the plaint, gives the Court power to *add* parties whose presence it deems necessary "to adjudicate upon and settle all the questions involved in the suit." Then follows s. 33, which gives liberty to the Court to amend the plaint when the action under s. 32 renders such amendment necessary. The next section (34) imperatively lays down the rule that objections as to nonjoinder or misjoinder of parties "shall be taken at the earliest possible opportunity, and in all cases before the first hearing." Leaving the intermediate sections alone, Chap. IV deals with the frame of the suit, and in that chapter occurs s. 45, which gives discretionary power to the Court to order separate trials of the causes of action included in one suit. The power so conferred is clearly limited to "*any time before the first hearing*," unless "the parties agree" that the same may be done "at any subsequent stage of the suit." In keeping with these provisions is s. 46, which enables the defendant to apply "*at any time before the first hearing*, or, where issues are settled, before any evidence is recorded" to confine "the suit to such causes of action as may be conveniently disposed of in one suit." Here again the limitation as to time is clearly imperative, though the negative words are absent. Then comes s. 47, which allows such amendment as may be necessitated by adoption of the procedure provided by the immediately preceding section. The law having so far laid down that, as far as possible, technical difficulties as to the plaint must be dealt with at the earliest possible stage of the suit, confers a distinct power, in s. 53, which is not conferred by any preceding section. If I may use the expression, the really important "catch words" of the power are "*reject*" and "*return*"—words which are not to be found in s. 32 or any other sections, to which I have referred. And though the word "*amend*" also occurs in [101] s. 53, it must, by reason of the context, be necessarily taken to refer to the amendments arising from any of the causes described in the section, and not from causes already provided for. Again, so far as the word "*amend*" is concerned, the adverbial phrase "*then and there*" necessarily limits the power to the first hearing, that is, amendments for any of the *particular* causes mentioned in the section must be made at *that* stage. This corroborates my view, for I fail to see how "*then and there*" can be taken to refer to any stage of the suit other than that mentioned in the section. At least such is my interpretation of a phrase which is not a phrase of the language that is my own. But, as I said before, the main difficulty relates to the words "*return*" and "*reject*." In this case we are concerned only indirectly with the power of the Court to *return* the plaint for amendment, and we are directly concerned with the power of the Court to *reject* the plaint for any of the reasons described in s. 53. So far as the ruling of WESTROPP, C.J., is concerned, I may say that if the *ratio decidendi* of his judgment had been limited to the simple proposition that the plaint may, under certain circumstances, be amended by the Court after the first hearing, (e.g., cases contemplated by ss. 32, 33 and 47), for causes other than

those described in s. 53, I should not necessarily have regarded that ruling as an authority against the view which I have taken on the particular point we are called upon to determine in this case. But upon the exact point directly before us, I hold that the limitation of time contained in the phrase "at or before the first hearing," as it occurs in s. 53 of the Code, was intended by the Legislature to be imperative, so as to prohibit the exercise, after the specified period, of the power conferred by the section regarding the rejection of plaints. What I have said does not, of course, apply to rejection of plaints under s. 54, wherein no words importing a limitation of time occur—a circumstance which again favours the conclusion at which I have arrived. And I wish to add that, because the question is not now before us, nothing that I have said here must be taken to lay down any rule, one way or the other, respecting the powers of the appellate Court in such matters.

My answer to the question now before us is in the negative.

NOTES.

[The C. P. C., 1908, O. 6., r. 17 makes provision for the amendment being permitted at any time. This decision was followed in (1885) 7 All., 860; (1889) 12 All., 553 at 555; (1907) P. R., 71. See also (1886) 6 A. W. N., 248.]

[102] PRIVY COUNCIL.

PRESENT :

LORD WATSON, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH,
AND SIR. A. HOBHOUSE.

Beni Ram and another.....Decree-holders

versus

Nanhu Mal.....Judgment-debtor.

[On Appeal from the High Court for the North-Western Provinces.]

Execution of decree—Finality of order made in execution-proceedings construing decree.

In reference to an application for execution of a decree, a Court made an order between the parties, construing the decree to award interest at a certain rate till payment.

Held, that no contrary construction could be placed upon the decree in a subsequent application in the execution-proceedings.

Ram Kirpal v. Rup Kuari, I. L. R., 6 All., 269 : L. R., 11 Ind. Ap., 37, referred to and followed.

APPEAL from a decree (10th January 1881) of the High Court reversing a decree (18th August 1880) of the Subordinate Judge of Aligarh.

This appeal arose out of a dispute as to the true construction of a decree for money and interest, made by the Subordinate Judge of Aligarh on 7th May 1875, which contained the terms of a compromise come to by the father of the present appellants, on the one hand, and the father of the respondent, on the other. The decree was for Rs. 78,700, as due up to 4th May 1875, to be paid by the defendant in two years, with interest at twelve annās per cent. per mensem.

The question as to the period during which the decree-holder was to get interest at the rate mentioned in the decree had been, previously to the filing of the petition out of which this appeal arose, raised between the parties in the petitions stated in their Lordships' judgment.

On an objection filed by the judgment-debtor on the 30th August 1878, the Subordinate Judge of Aligarh made an order, on the 25th January 1879, against which no appeal was preferred, declaring that interest was payable at twelve annas per cent per mensem to the date of payment; and the main question on this appeal was whether the order of 25th January 1879 had not become final between the parties.

[103] On a petition for execution, filed by the decree-holder on the 5th December 1879, the Subordinate Judge stated in his order that, on a proper construction of the decree, interest at twelve annas per cent. per mensem was payable until realization; and that this point had been definitely settled by the Court on the 25th January 1879.

The judgment-debtor having appealed to the High Court, a Divisional Bench (STRAIGHT and OLDFIELD, JJ.) reversed the decision of the Subordinate Judge, and remanded the proceedings.

The material part of the judgment of the High Court was stated by their Lordships in giving their opinion.

On this appeal,

Mr. J. G. Whitehorne, Q.C., and Mr. W. A. Raikes, appeared for the Appellants.

Mr. J. F. Popham, for the Respondent.

For the appellant it was contended that the question as to the rate of interest and the period for which it was payable, under the decree of May 1875, had been previously determined by a competent Court making an order in execution of the same decree; and, no appeal having been preferred against the order so made on 25th January 1879, it was conclusive between the parties. Reference was made to *Pearth v. Marriott*, L. R., 22 Ch. D., 182, and *Ram Kirpal v. Rup Kuari*, 1. L. R., 6 All., 269; L. R., 11 Ind. Ap., 37.

For the respondent it was argued that the terms of the order of 25th January 1879 were not conclusive; and it was pointed out that the decision of the High Court in this case followed on the Full Bench ruling that had been given in *Ram Kirpal v. Rup Kuari*, 1. L. R., 6 All., 269; L. R., 11 Ind. Ap., 37.

At the conclusion of the arguments on behalf of the parties, their Lordships' judgment was delivered by

Sir R. Couch.—The question in this appeal arises in the execution of a decree of the Court of the Subordinate Judge of Aligarh, dated the 7th May 1875. It was on a compromise, the claim in [104] the suit being to recover Rs 60,000, principal, and Rs. 14,715, fixed sum of Rs. 78,700, as due up to the 4th May 1875, be given to the plaintiff against the two defendants under the terms of the compromise; that this sum be paid by the defendants in two years, with interest at 12 annas per cent. per mensem." The claim was upon a bond of the 10th July 1872 which stipulated for interest at 12 annas per cent. Execution-proceedings appear to have been taken upon this decree, but the actual application for the execution is not on the record. It would appear, however, that some villages were sold on the 20th December 1877, and were purchased by the decree-holder; and a petition was presented by the judgment-debtors on the 20th April 1878, in which it was said that they were willing to pay interest according to accounts.

On the 17th May 1878, they presented another petition, in which the statement was made that the decree-holder should not get the interest which

he then claimed, the question apparently being as to the interest beyond the two years. On the 30th August 1878, the question between the parties was more distinctly raised. Then, in a petition of the judgment-debtors, it was stated that the plaintiff had filed an application for execution of the decree in the sum of Rs. 38,000 on the 6th August 1878, "and charged interest at 12 annas per cent. after the lapse of the term of two years, contrary to the terms of the decree. Prior to this, on 18th July 1878, an objection was filed regarding the same, which was rejected without due consideration. The petitioner therefore prays that an order, after inquiry, may be passed for deducting the excessive interest which the decree-holder has charged contrary to the terms of the decree." On this it was ordered that the case should be brought forward for decision on the 1st November 1878. It appears from the list of papers that have not been forwarded with the record that the case was twice adjourned and on the 25th January 1879, an order was made in these terms: "In my opinion the objection is not tenable. The decree of the Court of the Subordinate Judge, dated 7th May 1875, clearly provides that under the terms of the compromise a decree for the payment of a fixed sum of Rs. 78,800 be made in favour of the plaintiff against both the defendants as due up to the 4th May 1875, and that defendants should pay the amount with interest at 12 annas per cent. per [105] mensem." The decree was in these terms: "That a decree for interest * *. Hence the plea of the defendants cannot in any way be held to be a reasonable one." Then it states what the plea of the defendant was:—"That if the said amount had been paid within two years the interest would have been paid to the decree-holder, and that the interest on the decree money could not be recovered after the expiry of the term fixed for payment." Looking at the dates which have been given, it seems clear that this order must have been made in the execution-proceedings in which the petition of the 30th August 1878, had been presented. It is an order by the Judge deciding against the objection which had been made by the judgment-debtor, that the decree-money could not be recovered after the expiry of the two years. The next step appears to have been an application for the execution of this decree on the 5th December 1879, in which an account was made up claiming the interest at the rate of the 12 per cent. up to the time of the execution; and upon that the Judge made this order. As to the first objection,—which was this: "The judgment-debtor has the following objections to the whole of the demand made under the decree: (1) From the date of the decree the decree-holder cannot, under any circumstances, get more than eight annas per cent. interest on the decree-money according to law, especially when the decree does not provide for any interest after two years, nor has any rate been fixed in it,"—the Judge says: "The Court is of opinion that the decree-holder should get the same interest on the decretal money which has been awarded to him in the Court's decision in the regular suit. It is 12 annas per cent. In the execution department the Court cannot, contrary to the decision in the regular suit, reduce the rate of interest from 12 annas per cent. to 8 annas per cent. in any way. The objector's statement, that the decree does not provide any rate of interest subsequent to two years, is altogether wrong. The two years' period in the decree is for the payment of the judgment-debt, not for the payment of interest at 12 annas per cent." Then comes this: "Before this also this very objection had been raised on behalf of the objector, and rejected by the Court on the 25th January 1879. No appeal has been preferred from that order." From that decision there was an appeal to the High Court, which says in its judgment: "It [106] was urged before us that the decree-holder is not entitled to any interest after the expiry of two years from the date of the decree; and this seems to us to be the case. The decree is for a sum of Rs. 78,700 only. The decretal order

proceeds to direct that this sum shall be paid in two years, with interest at 12 annas per cent. per mensem, but there is no order as to payment of interest after two years." The High Court took no notice of the ground upon which the Subordinate Judge decided,—that the question had been concluded by his order of the 25th January 1879, and their Lordships think it should be remarked, in justice to the High Court, that this may be accounted for by the fact that not long before this the Full Bench of that Court had held that the law, which they call the law of *res judicata*, was not applicable to execution proceedings. The question now for their Lordships' decision is, whether the order of the 25th January 1879, was not conclusive between these parties? It was an order made in the execution proceedings in this very suit; and the decision of this Board in *Ram Kirpal v. Rup Kuari*, I. L. R., 6 All., 269; L. R., 11 Ind. Ap., 37 is exactly in point. The only question that could be raised, and was raised by the learned counsel for the respondent, was that there might be some difficulty as to the construction to be put upon the words of the order of the 25th of January 1879. But looking at the terms of that order, although it may not be so clearly expressed as it might have been, there appears to be no doubt that what was decided on that occasion was the same right to recover the interest, after the expiration of the two years which was fixed by the decree for payment, as is now put in question in the present execution-proceedings.

Under these circumstances their Lordships will humbly advise Her Majesty that the order of the High Court be reversed; and the respondent will pay the costs of this appeal, and also pay the costs of the proceedings in the High Court.

Solicitors for the Appellants: Messrs. *Oehme and Summerhoys*.

Solicitors for the Respondent: Messrs. *Wilkinson and Son*.

NOTES.

[The construction, though erroneous, placed by a previous order in execution proceedings is final during the subsequent stages:—(1895) 19 Mad., 54; (1912) 36 Mad., 553; (1912) 37 Mad., 314; (1900) P. R., 48; see also (1887) 11 Bom., 537; (1890) 10 A. W. N., 9; (1908) 14 Bom. L. R., 35; (1911) 14 C. L. J., 481; (1910) 12 C. L. J., 312; (1910) 11 C. L. J., 501; (1909) 14 C. W. N., 114; (1909) 10 C. L. J., 420. This principle was not applied to the proceedings in Mamlatdars' Courts in (1894) 19 Bom., 675 as the ordinary rules of procedure did not apply to them.]

[107]-APPELLATE CIVIL.

The 7th August, 1884.

PRESENT:

MR. JUSTICE MAHMOOD AND MR. JUSTICE DUTHOIT.

Ram Sahai.....Judgment-debtor

versus

Gaya and others.....Decree-holders.*

Pre-emption—Conditional decree—"Finality" of decree—Holiday—Act XV of 1877 (Limitation Act), s. 5, sch. ii, No. 156—Execution of decree—sale of property by decree-holder before obtaining possession—Decree-holder's right not forfeited.

A decree in a suit to enforce a right of pre-emption directed that the purchase-money should be paid within a certain period from the date the decree became "final". The period

* First Appeal No. 36 of 1884, from an order of Rai Raghunath Sahai, Subordinate Judge of Gofakhpur, dated the 21st January 1884.

of limitation prescribed for an appeal from this decree expired on a day when the Court was closed. Held, that the decree did not become "final" before the day the Court re-opened. *Shaikh Ewas v. Mokuna Bibi*, I. L. R., 1 All., 132 followed.

The holder of a decree enforcing a right of pre-emption who subsequently to the date of the decree sells the property to a "stranger" and permits the latter to pay the purchase-money decreed into Court, does not by such conduct debar himself from obtaining possession of the property in execution of the decree.

Rajjo v. Lalman, I. L. R., 5 All., 180 and *Sarju Prasad v. Jamna Prasad*, S. A. from Order No. 45 of 1883, decided the 21st November 1883, not reported, distinguished.

THE respondents in this case obtained a decree for pre-emption on the 30th June 1883, under the terms of which the purchase-money was to be paid into Court within two months from the date of the decree becoming "final." This decree was appealable to the High Court, but before the expiry of the period of limitation prescribed by law for the appeal, the High Court was closed on account of the long vacation and did not reopen till the 19th November 1883, when no appeal was preferred. On the 29th November 1883, the respondents executed a sale deed conveying the property (to which the decree of the 30th June 1883, related) to one Ambika Prasad. On the same day, the respondents filed an application for execution of the decree, and, after reciting that they had sold the property included in the decree to Ambika Prasad, prayed that the latter might be allowed to deposit the purchase-money, and that they (the decree-holders) might be placed in possession, in order that they might make over possession of the property to the new vendee. The Court below accepted the deposit, and allowed execution of the decree in the manner prayed.

[108] On appeal, the judgment-debtor raised the same objections which had been urged unsuccessfully in the lower Court. In the first place it was contended that the deposit of the purchase-money, with the application of the 29th November 1883, was not made within the time allowed by the decree, which must therefore be taken to have become incapable of execution at the instance of the pre-emptor, under the provisions of s. 214 of the Civil Procedure Code. In the second place, it was contended that the action of the respondents in executing the sale-deed of the 29th November, before having obtained possession under the decree, invalidated their pre-emptive right, rendering the decree incapable of enforcement. In support of this contention, the appellant relied upon *Rajjo v. Lalman*, I. L. R., 5 All., 180.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the Appellant.

Mr. T. Conlan and the Senior Government Pleader (*Lala Juala Prasad*), for the Respondents.

The Court (MAHMOOD and DUTHOIT, JJ.) delivered the following judgment:—

Mahmood, J.—(After stating the facts, continued):—We have no hesitation in holding that the first part of the argument addressed to us on behalf of the appellant is unsound. Reading s. 5 with art. 156, sch. ii, of the Limitation Act (XV of 1877), there can be no doubt that the period of limitation for preferring an appeal from the decree of the 30th June 1883, did not expire till the 19th November 1883, when this Court re-opened, and the decree cannot before be regarded as having become final before that date. The point before us is governed by the principle laid down by this Court in *Shaikh Ewas v. Mokuna Bibi*, I. L. R., 1 All., 132, and following that ruling, we disallow the two first grounds of appeal.

The second question, however, which forms the subject of the remaining grounds of appeal, is a point of some nicety. In the case of *Rajjo v. Lalman*,

I. L. R., 5 All., 180, this Court laid down the principle that when a pre-emptor, in anticipation of the success of his pre-emptive claim, transfers the pre-emptional property in any manner inconsistent with the object of the suit for pre-emption, such transfer operates as forfeiture of the pre-emptive right, and the suit [109] for pre-emption must, therefore, be dismissed. Again, in the unreported case of *Sarju Prasad v. Jamna Prasad*, S. A. from Order No. 45 of 1883, decided the 21st November 1883, STRAIGHT and TYRRELL, J.J., laid down the rule that a decree for pre-emption, being purely personal in its character, could not be transferred so as to entitle the purchaser to execute the decree. The learned pleaders for the appellant contend that the principles laid down in these two rulings govern the present case, because the action of the pre-emptor-decree-holder, in transferring the pre-emptional property (included in the decree), by executing the sale-deed of the 29th November 1883, virtually amounted to transfer of the decree itself, and should therefore operate in defeasance of the pre-emptor-decree-holder's right to execute the decree.

We are of opinion that this contention, though plausible, has no real force. In the case of *Rajjo v. Laiman*, I. L. R., 5 All., 180, the transfer had been made by the plaintiff-pre-emptor before his suit was decreed, and in the case of *Sarju Prasad v. Jamna Prasad*, S. A. from Order No. 45 of 1883, decided the 21st November 1883, the person who was seeking to execute the decree was not the pre-emptor-decree-holder, but the person to whom the decree had been transferred. We agree with the rules laid down in both these cases; but they are distinguishable in principle from the case now before us. In the former of these cases, the question was whether the plaintiff-pre-emptor, who had himself infringed the right of pre-emption in connection with the property in suit, should be allowed to obtain a decree for pre-emption; and the effect of the latter ruling was to uphold the principle, that no decree of Court passed in a suit for pre-emption can be so transferred as to invest the transferee with the right of obtaining possession of the pre-emptional property by executing that decree. The case now before us is one in which the pre-emptor's right of pre-emption had already been established by a decree which had become final before the sale-deed of the 29th November 1883, was executed. That sale-deed did not transfer the decree, but the property, to the proprietary possession of which the pre-emptor-decree-holder was entitled, subject only to the payment of the purchase-money within time. It is not necessary for the purposes of this appeal to determine whether the sale-deed was valid. The question is one which, if it ever arises, [110] can be finally determined only in a suit between the pre-emptor-decree-holder and his vendee, Ambika Prasad. So long as the latter does not seek execution of the decree, the matter cannot be regarded as a question relating to the execution of the decree, such as would fall under the purview of s. 244 of the Civil Procedure Code. The parties to the decree are bound by the terms of the decree itself, and the Court executing the decree has no power to go behind it, to declare it annulled, or to enter into any questions which are beyond the scope of the decree. The rules of procedure, therefore, precluded the Court below from entertaining the objections of the judgment-debtor-appellant so far as they were based upon the sale-deed executed by the pre-emptor-decree-holder, who, in praying for execution of the decree, was obeying its terms. Nor can the decree be regarded as annulled by reason of the fact that the money was deposited on behalf of the pre-emptor-decree-holder by Ambika Prasad under the terms of the decree. All that the appellant was entitled to was the right of receiving the purchase-money before delivering possession of the pre-emptional property to the decree-holder. That decree-holder, and not Ambika Prasad, is the person who, in the proceedings from which this

appeal has arisen, is seeking to obtain possession of the property, and it is of no consequence that the purchase-money was deposited by the latter on behalf of the former. For it is clear that the pre-emptor-decree-holder, and not Ambika Prasad, is the person to whom possession must be delivered in execution of the decree, and that if Ambika Prasad has any valid rights under the sale-deed, he can enforce them only by a separate suit.

This last circumstance distinguishes the present case in principle from the ruling in the case of *Sarju Prasad v. Jamna Prasad*.* If in the present case Ambika Prasad were the transferee of the pre-emptive decree, seeking by virtue of that decree to obtain possession of the pre-emptional property, we should have disallowed his application for execution. But such is not the case, and the authority referred to does not therefore govern this case.

The distinction which we have thus drawn is not merely technical, but is based on fundamental principles of the law of pre-emption. [111] The sole object of the right of pre-emption is the exclusion of such strangers as are objectionable to the pre-emptive co-sharers of the vendor. And if a decree for pre-emption were capable of transfer, so as to enable the transferee to obtain possession of the pre-emptional property in execution of that decree, it is clear that the object of the right of pre-emption would be defeated, for the transferee of the decree may be as much a stranger as the vendee against whom the decree was obtained, or that the latter may be a pre-emptor of a lower grade than the pre-emptor who originally obtained the decree.

A decree once passed cannot, as we have already said, be questioned by any of the parties thereto when the decree is being executed, and if a decree for pre-emption could be validly transferred, the effect would be to place the transferee in possession without the trial of the question whether such transferee had the pre-emptive right in preference to the vendee against whom the decree was obtained. Nor could the sale of a pre-emptive decree be regarded as giving rise to a fresh cause of action for a separate suit to enforce pre-emption, and it follows that, not only the rights of the vendee-judgment-debtor, but also those of other co-sharers, might be injured by allowing the transferee of a pre-emptive decree to take out execution. On the other hand, in a case like the present, where the pre-emptional property and not the decree has been transferred, the effect of executing the decree can only be to place the pre-emptor-decree-holder in possession of the pre-emptional property, and the sale-deed executed by him, if valid, would give rise to a separate cause of action for a pre-emptive suit to be instituted by any person or persons who may consider the sale as having infringed their pre-emptive right. In the present case, whether the sale-deed of the 29th November 1883, be valid or invalid, it must necessarily remain in abeyance till the pre-emptor-decree-holder obtains possession of the pre-emptional property under the decree; and, under this view, the present case is analogous to one in which the pre-emptor-decree-holder, immediately after obtaining possession under the decree, sells the property.

For these reasons, and without prejudice to any rights that may arise out of the sale-deed of the 29th November 1883, we hold [112] that the Court below was right in allowing the execution of the decree at the instance of the plaintiff-pre-emptor, and we dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[As regards when a decree becomes final, see also (1889) 11 All., 346; (1908) 5 A. L. J., 186. As regards the effect, on executability, of alienation subsequent to the decree, see also (1901) P. L. R., 125; (1902) P. R., 94; (1901) 24 All., 119; (1907) 33 All., 28.]

* Not reported; S. A. from Order No. 45 of 1883, decided the 21st November 1883.

[7 All. 113]

The 11th August, 1884.

PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE DUTHOIT.

The Maharaja of Benares.....Plaintiff

versus

Angan.....Defendant.*

Jurisdiction—Act XII of 1881 (N.-W. P. Rent Act), ss. 10, 95 (a)—Suit by landlord to determine nature of tenant's tenure.

The cognizance of the Civil Courts of a suit by a landholder for a declaration that a tenant is not a tenant at fixed rates, or an occupancy-tenant, but a tenant at will, is barred by the provisions of s. 95 (a) of the N.-W. P. Rent Act, 1881.

THE plaintiff, the Maharaja of Benares, let certain land to the defendant, for purposes of cultivation. Subsequently desiring to eject the defendant from his holding, the plaintiff's lessee caused a written notice of ejectment to be served on him under s. 38 of the N.-W. P. Rent Act (XII of 1881). The defendant objected that he was a tenant having a right of occupancy, and eventually this objection was allowed by the Board of Revenue, and the notice of ejectment set aside.

The plaintiff then brought the present suit for possession of the land, and for a declaration that the defendant had no right thereto. The lower Courts (Munsif and District Judge of Benares) concurred in dismissing the claim, on the ground that, as the plaintiff admitted the defendant's tenancy, the sole question in the suit was as to the nature and class of the tenure, and that such a question was, by the provisions of s. 95 of the Rent Act, excluded from the cognizance of the Civil Court. The plaintiff appealed to the High Court.

Munshi Hanuman Prasad and Babu Sital Prasad, for the Appellant.

Lala Lalta Prasad, for the Respondent.

The Court (OLDFIELD and DUTHOIT, JJ.) delivered the following judgment:—

[113] Oldfield, J.—The only question raised in appeal is whether the suit is cognizable by the Civil Court, and we are clearly of opinion that the Courts below have rightly held that it is not.

The plaintiff admits that the defendant is his tenant, but asserts that he is a tenant-at-will, and he seeks to have it declared that the defendant is neither a tenant at fixed rates nor a tenant with rights of occupancy, but a tenant-at-will, and he further seeks to eject him.

The pleader for the appellant is unable to support the plea that a suit on the part of the plaintiff to eject the defendant will lie in the Civil Court. Such a suit is clearly barred by the provisions of s. 95 of the Rent Act, the remedy being by application to eject under s. 35, or to have notice of ejectment served under s. 38. Suits for ejectment have only been allowed in a Civil Court in cases in which the plaintiff has denied that the relation of landlord and tenant has existed, and in which the Court has been asked to decide the question of title between the parties; and in such cases, when the defendant was found to

* Second Appeal No. 257 of 1884, from a decree of D. M. Gardner, Esq., District Judge of Benares, dated the 24th November 1883, affirming a decree of Shah Ahmad-ulla, Munsif of Benares, dated the 2nd July 1883.

be the tenant of the plaintiff, the latter has been left to seek his remedy for ejectment in the Revenue Court.

But it has been contended that the Civil Court may determine the nature and class of a tenant's tenure in a suit brought by the landlord, notwithstanding anything contained in s. 95 of the Rent Act, and the ground for this contention is that, although a tenant can make an application in a Revenue Court for determination of the nature and class of his tenure, there is no provision enabling a landlord to do so, and he would therefore be without remedy.

To this, however, it might be replied that where there is a dispute as to the nature and class of a tenants' tenure, the landlord can always bring the question to trial in a Revenue Court, by enforcing against the tenant his asserted rights as landlord.

But, however this may be, the terms of s. 95 (a) are clear, and do not allow of the Civil Court's jurisdiction in such matters. Revenue Courts alone have cognizance of any dispute or matter in which an application to determine the nature and class of a tenant's tenure under s. 10 might be made. The dispute or matter here is as to the nature and class of the defendant's tenure as [114] a tenant, and is one on which the latter might make an application under s. 10. It does not affect the question that the plaintiff as landlord may not be able to make an application under s. 10, for the dispute or matter is none the less one contemplated by s. 95, which deals with the character of the dispute between the parties suing, and has for its object to leave to the Revenue Courts the determination of all disputes between landlord and tenant as to the nature and class of the tenant's tenure.

Were it otherwise, we should have applications made by a tenant in the Revenue Court under s. 10 and decided by that Court, and the same questions re-opened on the part of the landlord in the Civil Court. In the present case, indeed, we find that the plaintiff's lessee put into force against the defendant, in the Revenue Court, the provisions of s. 36 of the Rent Act, but without success, and that the defendant has obtained a decision from the Revenue Court in respect of the nature and class of his tenure.

The appeal is dismissed with costs.

Appeal dismissed

NOTES.

[See also (1893) 15 All., 387 at 389.]

[7 All. 114]

The 15th August, 1884.

PRESENT:

MR. JUSTICE MAHMOOD AND MR. JUSTICE DUTHOIT.

Ram Piyari.....Defendant

versus

Mulchand.Plaintiff.*

Hindu Law—Mitakshara—Hindu widow—Estate inherited by two Hindu widows from deceased husband—Alienation by one widow

When their Lordships of the Privy Council have seen fit to place a definite construction upon any point of Hindu Law, the High Court is bound by such construction until such time as their Lordships may think fit to vary the same.

* Second Appeal No. 1709 of 1883, from a decree of Maulvi Mahmud Bakhsh, Subordinate Judge of Mainpuri, dated the 12th September 1883, modifying a decree of Shaikh Bakhawat Ali, Munsif of Etah, dated the 9th July 1883.

According to the Mitakshara Law, the estate which two Hindu widows take by inheritance from their deceased husband is not several, but joint. The senior of two such Hindu widows is not a manager of such estate, and competent, for purposes of legal necessity, to alienate it, without the consent of the other. *Bhugwandeem Doobey v. Myma Bae*, 11 Moo. I. A., 487, and *Gajapathi Nilamani v. Gajapathi Radhamani*, I. L. R., 1 Mad., 290, referred to.

THE facts of this case and of S. A. No. 1756 (cross-appeals) are sufficiently stated for the purposes of this report, in the judgment of DUTHOIT, J.

Mr. A. H. S. Reid and Shah Asad Ali, for the Appellant.

[115] The Senior Government Pleader (Lala, Juala Prasad) and Munshi Hanuman Prasad, for the Respondent.

The Court (MAHMOOD and DUTHOIT, JJ.) delivered the following judgment:—

Duthoit, J.—This appeal and appeal No. 1756 are cross-appeals from a single decree of the Subordinate Judge of Mainpuri. They may be conveniently disposed of together.

The facts, so far as our present purpose is concerned, may be thus stated :—Badridayal was the owner of a house in *kasbeh* Patiali. He died in March 1881, leaving two widows, Chandan Kuar (senior) and Ram Piyari (junior), and a daughter by Chandan Kuar. On the death of Badridayal his estate passed to his widows, between whom there has been no partition. On the 29th November 1882 Chandan Kuar sold the house in *kasbeh* Patiali to Mulchand for Rs. 200. The house is described in the deed of sale as part of the estate left by Badridayal, and now the sole and exclusive property of the vendor : and the reason for the sale is stated to be the need of money to defray the expenses of the marriage of Badridayal's daughter—a pious duty.

Mulchand did not succeed in obtaining delivery of the property so purchased by him, and he therefore, on the 28th May 1883, sued his vendor and others for possession of it. He did not implead Musammat Ram Piyari, but she was made a defendant at her own request, and, as the cause now stands, she and Mulchand are the only parties to it.

The Lower Appellate Court has found that the alleged necessity for the sale did not in fact exist; that each of the widows was entitled to a moiety of the house; that the sale by Musammat Chandan Kuar was to that extent effectual, but that, as regards Musammat Ram Piyari's moiety, the sale was void and of no effect. It has therefore decreed the plaintiff's claim as regards one-half of the house, and has dismissed it as regards the other half.

Both Mulchand and Ram Piyari have appealed.

It is contended on behalf of Musammat Piyari (appeal No. 1709) that the estate of Badridayal's widow was a single joint estate, with an inherent right of survivorship to the surviving widow; [116] that, consequently, as Ram Piyari was not a party to the alienation, and in no way consented to it, the deed of sale was void, and of no effect, and could not be effectual even had circumstances of necessity existed, which, however, did not exist, and have been found not to have existed; and that the entire claim of the plaintiff should therefore have been dismissed.

On behalf of Mulchand, plaintiff (appeal No. 1756), it is contended that the entire claim of the plaintiff should have been decreed. The argument of the learned pleader for the defendant is based upon two propositions, viz. :—

(a) That the law enunciated by their Lordships of the Privy Council as to the nature of the estate which two Hindu widows take by inheritance from

their deceased husband, is at variance with the law as stated in the text, and that, upon a true view of the Mitakshara Law, that estate is not joint, but several, and that the house in dispute was the sole property of the vendor Musammat Chandan Kuar.

(b) That even supposing the nature of the estate which two Hindu widows take by inheritance from their deceased husband to be joint, yet the senior widow is manager of such estate, and is competent for purposes of legal necessity to alienate it, and that such circumstances did in this case exist.

In support of the former of these positions the learned pleader has cited the *Viramitodaya*, Chapter III, Part i, ss. 2 and 10 (ed., Calcutta, 1879, pp. 132 and 153); Norton's *Leading Cases* (ed., Madras, 1871, p. 509); the *Tagore Law Lectures*, 1879, p. 304; West and Bühler's *Hindu Law*, 3rd ed., pp. 89 and 651; and two decisions of the Courts—one of the Calcutta High Court,—*Judohunsee Koer v. Gubhuran Koer*, 12 W. R., 158,—the other of the Madras High Court,—*H. H. M. Jijoyamba Bayi Saiba v. H. H. M. Kamakshi Bayi Saiba*, 3 Mad. H. C. Rep., 424.

In support of the latter position he has cited a passage from Mr. Mayne's work on *Hindu Law and Usage* (s. 469, ed. 1878, p. 470), which runs thus:—

"On the same principle of joint tenancy with survivorship, no alienation by one widow can have any validity against the others without their consent, or on established necessity."

[117] As regards the former proposition, I observe that, although I cannot deny that it appears to be well founded, yet, I find myself precluded from entertaining it. When their Lordships of the Privy Council have seen fit to place a definite construction upon any point of Hindu Law, this Court is bound by such construction until such time as their Lordships may think fit to vary the same.

As regards the latter proposition, I remark that the only authority which Mr. Mayne has cited in support of the suggestion that, in case of necessity, one of two widows may alienate the property without the consent of the other, is the case of *Bhugwandeem Doobey v. Myna Bae*, 11 Moo. I. A., 487, and that, after careful perusal of the judgment of the Lords of the Privy Council in that case, I am unable to find that their Lordships ruled to the effect stated.

In *Bhugwandeem Doobey v. Myna Bae*, 11 Moo. I. A., 487, their Lordships stated the law upon the point at issue in the following terms at p. 515:—

"The estate of two widows who take their husband's property by inheritance is one estate. The right of survivorship is so strong that the survivor takes the whole property to the exclusion of daughters of the deceased widow. They are, therefore, in the strictest sense, co-parceners, and between undivided co-parceners there can be no alienation by one without the consent of the other."

And in *Gajapathi Nilamani v. Gajapathi Radhamani*, I. L. R., 1 Mad., at p. 300, their Lordships remarked:—

"It was held there (i.e., in *Bhugwandeem's Case*) that there was no objection to a transaction which was merely an arrangement for separate possession and enjoyment, leaving the title to each share unaffected, although the widows nevertheless remained co-parceners, with a right of survivorship with them, and there could be no alienation by one without the consent of the other." They think it sufficiently appears in this case (i.e., in the case then before their Lordships) that the state of things contemplated by the *Tanjore Case* exists; that these widows could not go on peaceably in the joint enjoyment of property, and that they have acted as if they had agreed that they [118] are separately to enjoy, in the manner above indicated

their respective shares. Therefore their Lordships, guarding themselves against being supposed to affirm by their order that either widow has power to dispose of one-fourth of the estate allotted to her, or that they have any right to partition in the proper sense of the term, are not disposed to vary the form of the order under which one-fourth of the profits of the estates will go to each widow during their joint lives, their respective rights by survivorship and otherwise remaining unaffected."

It seems to me that these *dicta* of their Lordships of the Privy Council, both of which are expositions of the Mitakshara Law, negative the contentions of the learned pleader for the plaintiff, and support the contentions of the learned counsel for the defendant Ram Piyari.

I would therefore decree the appeal of the defendant Musammat Ram Piyari, and dismiss the appeal and the suit of the plaintiff with all costs in all the Courts.

Mahmood, J.—I concur.

Appeal allowed.

NOTES.

[As regards the binding nature of an alienation for legal necessity by a co-widow after partition, see (1906) 33 Cal., 1079; see also (1911) 33 All., 443 as regards the right of partition *inter se*. As regards the effect of a Privy Council decision, see also (1899) 3 O. C., 129.]

[7 All. 118]

The 15th August, 1884.

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, AND
MR. JUSTICE BRODHURST.

Harjas.....Plaintiff
versus

Kanhya.....Defendant.*

Pre-emption—Joint purchase by co-sharers and stranger—Pre-emptor not compelled to pre-empt share purchased by co-sharers.

If a co-sharer associates a stranger with him in the purchase of a share, another co-sharer is entitled to pre-empt the whole of the property sold, but it is not obligatory upon him to impeach the sale, so far as the co-sharer vendee is concerned.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Pandit Nand Lal, for the Appellant.

Munshi Sundar Lal and Babu Ratan Chand, for the Respondent.

The Court (STRAIGHT, OFFG. C.J., and BRODHURST, J.) delivered the following judgment:—

Straight, Offg. C. J.—On the 22nd June 1882, Musammat Sujano sold a moiety of her zamindari share in a village, consist-[119] ing of 17 bighas, 15 biswas, 10 biswansis of land, with all the rights pertaining thereto, to five persons, namely, Umrao, Ram Prasad, Sarjit, Kanhya, and Dalpet, in equal

* Second Appeal No. 1675 of 1883, from a decree of Rai Bakhtawar Singh, Subordinate Judge of Meerut, dated the 7th September 1883, affirming a decree of Lala Baij Nath, Munsif of Meerut, dated the 21st July 1883.

shares, for a consideration, so the sale-deed recites, of Rs. 1,300. The vendees Nos. 1, 2, 3, and 5 are co-sharers, but No. 4 is admittedly a stranger. The plaintiff-appellant's suit, which was instituted on the 15th June 1883, was brought to establish his right of pre-emption as against Kanhya, in respect of the one-fifth share purchased by him, and to obtain possession thereof upon payment of what might be deemed to be the proportionate price of such fifth. Both the lower Courts dismissed the claim, following, as they considered, a ruling of this Court, in *Manna Singh v. Ramadhin Singh*, I. L. R., 4 All., 252. The plaintiff has preferred the special appeal before us, and the grounds taken by him substantially are—first, that the case relied on by the lower Courts is inapposite; and next, that it was competent for him to maintain his suit in the present form. There seems to be no doubt that the plaintiff is a co-sharer; that he has a right of pre-emption over the whole of the property passed by the sale-deed of the 22nd June 1882, and consequently over the whole of the one-fifth of which Kanhya was the purchaser. In his plaint he has asked for the declaration of his pre-emptive right as to the whole of such one-fifth, and the only question is, whether he can do so. The lower Courts proceeded on the view that he is not entitled to impeach the sale of the 22nd June 1882, except in its entirety, and they appear to have thought that the converse of the rule laid down by this Court in the case already adverted to was necessarily binding on them. This was an error, probably due to misapprehension of the principle upon which a co-sharer who has associated a stranger with him in the purchase of a share, is not allowed to assert his own pre-emptive right to defeat a suit by another co-sharer who impeaches the sale as a whole. The grounds upon which this rule rests are pointed out by MAHMOOD, J., in *Bhawani Prasad v. Damrua*, I. L. R., 5 All., 197. In the present case, the plaintiff-appellant might have attacked the entire sale in respect of all the five vendees, and have treated the four co-sharers as strangers, but there was no obligation on him to do so, for the right of pre-emption which gives a co-sharer the first call, so as to enable him to [120] exclude a stranger from the co-parcenary, does not compel him to exercise his right, and he may relinquish it if he thinks proper. If, however, he does exercise it, then the obligation rests upon him to do so as to all that the stranger has purchased.

Hence, if a co-sharer associates a stranger with him in the purchase of a share, another co-sharer is entitled to pre-empt the whole of the property sold, but it is not obligatory upon him to impeach the sale so far as the co-sharer-vendee is concerned, for it may well be that he has no desire to exclude such co-sharer. We think that the plaintiff-appellant was entitled to prefer his present claim in respect of the one-fifth purchased by Kanhya, upon payment of his proportion of the purchase-money. In this view of the case, we decree the appeal, and, reversing the decision of the Lower Appellate Court, remand the case for trial on its merits.

Appeal allowed. . .

NOTES.

[This was followed in (1897) 15 Cal., 224 ; see also (1889) 12 All., 234.]

[7 All. 120]

The 15th August, 1884.

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, AND MR. JUSTICE DUTHOIT.

Muhammad Zaki and others.....Defendants

versus

Chatku... ..Plaintiff.*

Act XV of 1877 (Limitation Act), sch. ii., No. 132—Suit for money charged upon rents and profits—Suit for money charged upon immoveable property.

K borrowed from C a sum of Rs. 571, and at the same time executed a bond whereby he mortgaged usufructually to his creditor his "entire right and share" in a particular estate, in lieu of the above-mentioned sum; and it was agreed that C might realise the debt from the rents and profits of two years, and that, as soon as it had been realised, his possession should cease.

Held that the money borrowed by K was "money charged upon immoveable property it being charged upon rents and profits in *alieno solo* which, in English Law, would be classed as "incorporeal hereditaments," but which by the law of India are included in immoveable property; and that therefore the limitation applicable to a suit for the recovery of the money was that provided in No. 132, sch. ii of Act XV of 1877 (Limitation Act). *Dulli v. Bahadur*, N.-W. P.H. C. Rep., 1875, p. 55, and *Pestonji Besonji v. Abdool Rahiman*, I.L.R. 5 Bom., 463, dissented from. *Maharana Fullehsangji Jaswantsangji v. Desai Kullianraji Hakoomutraji*, 13 B. L. R., 254, referred to. *Lallubhai v. Naran*, I. L. R., 6 Bom., 719 followed.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

[121] Munshis *Kashi Prasad* and *Hanuman Prasad*, for the Appellants.

Pandit *Ajudhia Nath*, for the Respondent.

The Court (STRAIGHT, Offg. C.J., and DUTHOIT, J.) delivered judgment as follows :—

Duthoit, J.—This is an appeal from a decree of the Judge of Jaunpur, reversing a decree of the Subordinate Judge of Jaunpur, and decreeing the plaintiff's (respondent's) suit for the recovery from the estate of Kazi Ahmad Husain,

*Second Appeal No. 157 of 1884, from a decree of W. Barry, Esq., District Judge of Jaunpur, dated the 3rd October 1883, reversing a decree of Maulvi Nasrulla Khan, Subordinate Judge of Jaunpur, dated the 14th June 1883.

† [No. Art. 132 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
To enforce payment of money charged upon immoveable property. <i>Explanation.</i> The allowance and fees respectively called <i>malikana</i> and <i>haqq</i> s shall, for the purpose of this clause, be deemed to be money charged upon immoveable property.	Twelve years.	When the money sued for becomes due.]

in the hands of the Kazi's heirs, the defendants for appellants), and from the profits of taluka Dandari, of Rs. 1,129-10-0, with costs and future interest.

The facts may be thus stated:—Chatku Misr acted, as *karinda* of Kazi Ahmad Husain for the management of taluka Dandari, and the Kazi was in the habit of taking advances of money from him. On the 2nd October 1874 Rs. 271 were found to be due to Chatku Misr. On that date the Kazi took a further loan of Rs. 300 in cash, and executed in favour of his creditor a bond by which he covenanted as follows:—

“I mortgage usufructually to the aforesaid *karinda* my entire right and share in taluka Dandari, in lieu of the aforesaid amount (Rs. 571-1-0), that he may realise the same from the profits of the year 1282 fasli, and from the arrears due by the tenants during the time of his incumbency, the liability for which he has accepted. On a settlement of accounts, should any money be found to remain due after deduction of the aforesaid amount, he may recover it from the profits of the year 1283 fasli. As soon as it is recovered, the mortgage possession will cease, and no excuses or pretexts will be allowed.”

The Court of First Instance (Subordinate Judge) held that the suit ought to have been brought within six years from the end of 1283 fasli (3rd September 1876) and dismissed it as time-barred.

The finding of the Lower Appellate Court was in the following terms:—

“Plaintiff says the mortgage-money was not redeemed by the end of 1283 fasli, and that he was evicted on the 14th November 1876, after the end of the fasli year 1283, which finished on the end of *Bhadon*, i.e., 3rd September 1876, that is to say, that [122] plaintiff remained in possession for nearly six weeks after the end of the fasli year 1283, I think that art. 132, sch. ii of the Limitation Act is applicable. It is clear that the mortgagor mortgaged his rights and interests.—‘*Taman wakamul hak wa hissa rahn pat bandhak karte hain.*’ I do not find that he mortgaged merely the profits. The explanation that the plaintiff may realise the mortgage-money from the profits of 1882 and 1883 is superfluous; if he were not to realise from the profits, what else could he realise from? And plaintiff was put in possession. I think the suit is not barred by limitation. The limitation is twelve years by art. 132.”

It is contended in second appeal that the suit is time-barred, as not having been instituted (art. 116, sch. ii, Act XV of 1877) within six years from the 3rd September 1876; and, in support of this contention, *Dulla v. Bahadur*, N.-W. P. H. C. Rep., 1875, p. 55, is cited. To which it is replied on behalf of the respondent:—

(a) That the bond of the 2nd October 1874, created a charge upon immoveable property, and that art. 132, not art. 116 of sch. ii, Act XV of 1877, is therefore the limitation law applicable.

(b) That even if art. 116 be the limitation law applicable, the suit is still within time, having been instituted on the first day on which, after the expiry of six years from the 14th November 1876 (the date of the cause of action), the Court was open.

The Civil Courts were closed in 1883 from the 15th October till the 26th November, both days inclusive, and the suit was therefore instituted on the first Court day after the vacation; but this fact will not assist the respondent's case unless the 14th November, and not the 3rd September 1876, be the date of the accrual of the cause of action; or, in other words, only if, as is assumed in the plaint, but is denied by the defendants (appellants), the plaintiff (respondent) was, upon a true interpretation of the bond of the 2nd October 1874, entitled, if the loan was not previously satisfied, to retain possession of the mortgaged property after the end of the year 1283 fasli.

Two points therefore arise for our decision, viz. :—

(1) Did, or did not, the bond of the 2nd October 1874, convey to the plaintiff (respondent) a right to hold the mortgaged pro-[123]perty subsequently to the 3rd September 1876, if the debt should not have been previously satisfied from the usufruct?

(2) Did, or did not, the bond of the 2nd October 1874, create a charge upon immoveable property?

As regards the former of these points, we see no reason to doubt that the terms of the bond have been rightly interpreted by the Subordinate Judge; that the expression "*wa jis wakt pat jawe, bila hechak uzr dahkl murtahinana kaladam tasawar kiya jawe*" refers to an event contemplated as occurring before, not after, the end of 1283 fasli; that no right to hold property after the 3rd September 1876, was conferred upon the plaintiff by the bond; and that the 3rd September, not the 14th November 1876, was the date of the accrual of the cause of action.

As regards the latter point, we remark that the appellant's contention that the suit is not governed by the limitation provided in art. 132, sch. ii, Act XV of 1877, does certainly receive support from the decision of a Division Bench of this Court in *Dull v. Bahadur*, N.-W. P. H. C. Rep., 1875, p. 55, and from a judgment of SARGENT, J., in *Pestonji Bezonji v. Abdool Rahiman*, I.L.R., 5 Bom., 463. But we venture to doubt the soundness of the principle upon which the decision of the learned Judges of this Court (PEARSON and SPANKIE, JJ.) in *Dull v. Bahadur*, N.-W. P. H. C. Rep., 1875, p. 55, proceeded; and the decision of SARGENT, J., in *Pestonji Bezonji v. Abdool Rahiman*, I.L.R., 5 Bom., 463, has been overruled by a Full Bench decision of the Bombay Court in *Lallubhai v. Naran*, I.L.R., 6 Bom., 719, to which SARGENT, C.J., was himself a party. We follow and approve the view of the law taken by the learned Judges of the Bombay High Court in the case last cited. Their Lordships of the Privy Council in *Maharana Futtehsangji Jaswantsangji v. Desai Kullian-rari Hakoomutriaji*, 13 B.L.R., at p. 265, ruled that the expression "immoveable property," as used by the Indian Legislature, comprehends certainly all that would be real property according to English law, and possibly more. "In some foreign systems of law," their Lordships go on to say, "in which the technical division of property is into moveables and immoveables, as, e.g., the Civil Code of France, many things which the law of England would class as 'incorporeal hereditaments' fall within the latter category." And effect has been [124] given to this dictum of their Lordships in the Explanation to art. 132, sch. ii, Act XV of 1877. Even, therefore, if the words "the whole of my right and share in taluka Dandari," used in the bond of the 2nd October 1874, could be treated as mere surplusage—a position which we must by no means be taken to admit—we should still be of opinion that the money borrowed by Kazi Ahmed Husain on the date in question was "money charged upon immoveable property:" for it was undoubtedly money charged upon rents and profits *in alieno solo*, which, in English law, would be classed as "incorporeal hereditaments," but which by the law of this country are included in "immoveable property." We are of opinion, therefore, that the law of limitation applicable to this suit is that provided in art. 132, sch. ii, Act XV of 1877, and that, as having been instituted within twelve years from the 3rd September 1876, it was not time-barred.

The appeal fails, and is dismissed with costs.

Appeal dismissed.

NOTES.

[In (1886) 9 Mad., 218 it was pointed out that 7 All., 120, and 6 All., 551 were consistent with each other.

See also (1903) 26 Mad., 686.]

[7 All. 124]

The 15th August, 1884.

PRESENT:

MR. JUSTICE MAHMOOD AND MR. JUSTICE DUTHOIT.

Ramghulam and another.....Defendants

versus

Janki Rai.....Plaintiff.*

Contract—Consideration—Uncertified adjustment of decree—Civil Procedure Code, ss. 244 (c), 258—Act IX of 1872 (Contract Act), ss. 2, 10, 23, 28.

The consideration for a mortgage consisted partly of the amount of two decrees held by the mortgagee against the mortgagor. The mortgagee having sued to enforce the mortgage, the mortgagor pleaded failure of consideration as a bar to the enforcement of the mortgage. This plea was based on the allegation that the mortgagee had not certified the adjustment of the decrees, as provided by s. 258 of the Civil Procedure Code, and they were still in force under the terms of that section.

Per DUTHOIT, J., that the failure of the mortgagee to certify the adjustment of the decrees did not constitute a failure of consideration, because he did not covenant to certify such adjustment, and it was not, in fact, necessary for him to do so; because he could not seek execution of the decrees on the ground that, though unsatisfied, they were still in force under s. 258 of the Civil Procedure Code, without becoming liable to penalties; and because, if the mortgagor considered the entering up of the adjustment of the decrees to be imperative, he had his remedy by application to the Court in the terms of s. 258.

[125] *Per MAHMOOD, J.*, that the adjustment of a decree out of Court, if never certified to the Court, is, under s. 258, ineffectual only so far as the execution of the decree is concerned; that there is nothing in the Contract Act to make such an adjustment invalid as the consideration for an agreement; that an agreement founded on such consideration may be enforced without defeating the objects of s. 258; and that consequently there was, in respect of the amount of the decrees, valid consideration for the mortgage.

Gunamani Dasi v. Pran Kishori Dasi, 5 B. L. R., 223; 13 W. R., F. B., 69; *Meer Mahomed Kazem Jowharry v. Khetoo Bebee*, 20 W. R., 150; *Guni Khan v. Koonjo Behary Sein*, 3 Cal. L. R., 414; *Davlala v. Ganesh Shastri*, I. L. R., 4 Bom., 295; *Shadi v. Ganga Sahai*, I. L. R., 3 All., 538; and *Sita Ram v. Mahipal*, I. L. R., 3 All., 533, followed. *Patanka v. Devji*, I. L. R., 6 Bom., 146, and *Pandurang Ramchandra Chowghule v. Narayan*, I. L. R., 8 Bom., 300, dissented from.

ON the 20th June 1831, Ramghulam and Prayag executed in favour of Janki Rai a document by which they acknowledged a debt of Rs. 700, on account of two unsatisfied decrees, and the receipt of Rs. 700, in cash; declared that in consideration of these two items, aggregating Rs. 1,400, they mortgaged usufructually to Janki Rai certain lands situate in mauzas Sagaripatti and Khizupur; and covenanted at once to repay the entire amount, with interest at the rate of 2 per cent. per monsom, if they failed to put the mortgagee in possession.

The present suit was brought upon the allegation that there had been such failure. The defence was a denial of that allegation; assertions that the

* Second Appeal No. 1556 of 1883, from a decree of T. R. Rodfern; Esq., Offg. District Judge of Ghazipur, dated the 3rd August 1883, reversing a decree of Hakim Shah Rahat Ali, Additional Subordinate Judge of Ghazipur, dated the 19th December 1882.

consideration was not as stated in the document, but was the satisfaction of four (not two) outstanding decrees, and the payment, in cash, of Rs. 128 (or Rs. 700), and that no part of the consideration had been discharged; and a plea that, as the plaintiff had failed to enter up in Court the satisfaction of the decrees, those obligations were still in force, and the plaintiff ought, therefore, not to be allowed to put his hand in suit.

The Lower Appellate Court (District Judge of Ghazipur), reversing the decision of the Court of First Instance (Subordinate Judge of Ghazipur), decreed the claim. It held that parol evidence at variance with the terms of the document was inadmissible, and found that the Rs. 700 stated in the bond to have been paid in cash were actually paid; that as the plaintiff did not covenant to enter up satisfaction of the decrees, and he would now be unable to execute them without incurring heavy penalties, that part of the [126] consideration also had fully passed, and that the plaintiff's allegations as to failure by the defendants to give possession of the mortgaged property had been established. From this decision the defendants appealed to the High Court.

Mr. T. Conlan and Munshi Hanuman Prasad, for the Appellants.

The Junior Government Pleader (Babu Dwarka Nath Banerji), for the Respondent.

The Court (MAHMOOD and DUTHOIT JJ.) delivered the following judgments:—

Duthoit, J. (After stating the facts, continued):—The only plea now urged before us is the second, viz., that because the respondent has failed to enter up satisfaction of the two decrees, they are still in force, and the respondent, being in breach, is not competent to sue on his bond. The plea is ingenious, but has no real force. The respondent did not covenant with the appellants to enter up satisfaction of the decrees in Court, nor was it, in fact, necessary for him to do so. Were the respondent to seek execution of the decrees upon the plea that, although satisfied, they are still in force under the provisions of s. 258 of the Civil Procedure Code, he would surely be made to suffer in pocket, and probably in person also. Moreover, if the appellants considered the entering up of the adjustment of the decrees to be imperative, they had their remedy by application to the Court in the terms of s. 258 of the Code of Civil Procedure. I would dismiss the appeal with costs.

Mahmood, J.—I am of the same opinion. The real question in the appeal is, whether the decretal amount of Rs. 700 can be considered a valid consideration of the mortgage-deed to that extent, notwithstanding the fact that the plaintiff, who held those decrees, never certified to the Court that the decrees had been adjusted out of Court. The provisions of the law upon which the learned pleader for the appellant relies in support of his contention are contained in the last paragraph of s. 258 of the Civil Procedure Code, which lays down that "no such payment or adjustment shall be recognized by any Court unless it has been certified as aforesaid." And the learned pleader insists that the failure of the [127] plaintiff to certify to the Court the adjustment of the decrees amounts to failure to pay a part of the consideration, for the decrees are still alive and may be enforced and the decretal money realized thereunder, notwithstanding the mortgage, the terms whereof are sought to be enforced in this suit.

It seems to me that the determination of the point so raised depends upon the question whether the contingency contemplated by the argument of the learned pleader for the appellant can actually take place under the law; and, if so, whether the appellant would have any remedies open to him, in the event of his having to pay the decretal money in Court.

Provisions similar to the last paragraph of s. 258 of the Civil Procedure Code existed in s. 206 of the Code of 1859, and, whilst that Code was in force, it was held by a Full Bench of the Calcutta High Court in *Gunamani Dasi v. Pran Kishori Dasi*, 5 B. L. R. 223: 13 W. R. F. D. 69, that if a decree is adjusted out of Court, and the decree-holder, failing to certify such adjustment, executes the decree and realizes the amount thereof, the judgment-debtor can maintain a suit for compensation against the decree-holder. A similar view was taken in *Meer Mahomed Kazem Jowharry v. Khetoo Bebee*, 20 W. R. 150, and even after the passing of the Code of 1877, it was held by the Calcutta High Court in *Guni Khan v. Koongo Beharry Sein*, 3 Cal. L. R. 414, by the Bombay High Court in *Davlata v. Ganesh Shastri*, I. L. R., 4 Bom. 295, and by this Court in *Shadi v. Ganga Sahai*, I. L. R., 3 All. 538, that the law, on the point now under consideration, had undergone no change. The language of s. 258 of the Code of 1877 was, however, altered by s. 36 of Act XII of 1879, and the new section has re-appeared unaltered in the present Code. Upon the new section, a Division Bench of the Bombay High Court in *Patankar v. Devji*, I. L. R., 6 Bom. 146, held, with expression of regret, that the law had been altered, and that a suit for the recovery of money paid to a judgment-creditor out of Court, and not certified, was barred by cl. (c), of s. 214 read with the last paragraph of s. 258 of the Civil Procedure Code. If the law has been so altered, I entirely concur with the regret which the learned Judges expressed in that case. But has the law been so altered? [128] The learned Judges have not assigned any reasons for the conclusion at which they arrived, but there can be no doubt that that conclusion is in direct conflict with the ruling of this Court to which I have already referred, and with another case, *Sita Ram v. Mahipal*, I. L. R., 3 All. 533, in which STRAIGHT, J., explained the phrase, "any Court," as it occurs in the last paragraph of s. 258, to have reference to proceedings in execution, and to the Court or Courts executing a decree. Having considered the question, and with due deference to the ruling of the Bombay Court in the case of *Patankar*, I. L. R., 6 Bom. 146, I find myself unable to concur in the view of the law taken in that case. There can be no doubt that an adjustment of decree out of Court, if not certified according to s. 258, cannot be taken into account in executing the decree. Such was the law under the Code of 1859; it remained unaffected by Act XII of 1879, and it is so under the present Code. In the Code of 1877, the phrase "such Court" occurred, and the word "such" has given place to the word "any" in the last paragraph of s. 258 of the present Code. Perhaps it was in view of this change of language that it was ruled in *Patankar v. Devji*, I. L. R., 6 Bom. 146, that the law had undergone a serious change. I confess, I am unable to entertain any such opinion. The leading case upon the subject is the Full Bench ruling of the Calcutta High Court to which I have already referred, and although the language of s. 258 of the present Code is, in many respects, different from the wording of s. 206 of the Code of 1859, it seems to me that the *ratio decidendi* upon which that ruling proceeds is applicable in principle to the section of the present Code. The section lays down no rule of substantive law relieving parties from the legal consequences of valid contracts, nor, indeed, can the section be regarded as a rule of evidence barring the proof of facts which have actually occurred. The section occurs in a Code regulating civil procedure, in a chapter which relates to execution of decrees, and the only object it can have in view is to remove the inconvenience which would otherwise arise in connection with the execution of decrees in cases in which adjustment out of Court is pleaded. Beyond this it seems to me the section can have no effect. It cannot affect Courts which are not concerned with the question of execution of decree, but with a separate suit [129] in which the cause of action alleged is the breach of a valid contract.

by which the decree-holder has bound himself not to execute the decree. The Court executing the decree is bound to recognize no adjustment of that decree if such adjustment is not duly certified; but this only shows that such uncertified adjustment is expressly declared by the statute to be a question not "relating to the execution, discharge or satisfaction of the decree" within the meaning of cl. (c) of s. 244 of the Code. So that the last paragraph of s. 258, far from rendering the provisions of s. 244 a bar to the entertainment of a separate suit in connection with such uncertified adjustments, has quite the contrary effect. I therefore adhere to the view which the Calcutta Court and this Court have uniformly taken of the rule of law which prohibits uncertified adjustment of decrees from being recognized by the Courts concerned in executing those decrees.

I have considered it necessary to dwell upon this question at such length because if I had taken the same view of the law as was taken in *Patankar v. Devji*, I. L. R., 6 Bom. 146, I do not think that the decretal amount of Rs. 700, which forms a part of the consideration of the mortgage-deed in the present case, could be regarded as a valid consideration in the absence of certifying the adjustment of the decrees to the Court concerned in their execution. Indeed, such a view of the law was actually taken by the Bombay High Court in *Pandurang Ramchandra Choughule v. Narayan*, J. L. R., 8 Bom. 300, wherein SARGENT, C. J., with the concurrence of KEMBALL, J., laid down the rule that "the adjustment of the decree, not having been certified to the Court, was not binding on the plaintiff, and therefore constituted no valid consideration" of the bond on which the suit was based. The ruling is directly applicable to the present case, and necessarily proceeds upon an implied approval of the rule laid down in *Patankar v. Devji*, I. L. R., 6 Bom. 146, from which I have already expressed my dissent. The later ruling is, indeed, the logical consequence of the earlier case. The respect that we owe to the ruling of the Bombay High Court makes it incumbent upon me to explain my reasons for declining to adopt the rule laid down in the later of those cases. The learned Judges in that case went to the length of laying down that "the bond [130] was void without consideration" because an uncertified adjustment of decree "constituted no valid consideration." So far as the question of procedure is concerned, I have already endeavoured to show that the prohibition against the recognition of uncertified payments cannot be understood either as a rule of evidence or as a rule of the law of contract. The Indian Contract Act (IX of 1872) cannot be taken to have been amended or modified by the last paragraph of s. 258 of the Civil Procedure Code; and in the former of these enactments clear rules are laid down as to the validity of consideration and contract. Section 2 of the Act thus defines consideration:—"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise." Then an agreement is defined to be "every promise and every set of promises forming the consideration for each other;" and it is laid down that "an agreement not enforceable by law is said to be void." But "an agreement enforceable by law is a contract." "Contract" therefore includes the element of legality in the sense in which it is used in the Act, and s. 10 provides that "all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void." The only other section which I need quote is s. 23, which provides that "the consideration or object of an agreement is lawful, unless—(1) it is forbidden by law; or (2) is of such a nature that, if permitted, it would defeat the provisions

of any law; or (3) is fraudulent; or (4) involves or implies injury to the person or property of another, or (5) the Court regards it as immoral or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. "Every agreement of which the object or consideration is unlawful, is void." Now, the Bombay ruling which I am considering, lays it down as a settled rule of law that a bond executed in adjustment of a decree, such adjustment not having been certified to the Court, renders such contract void, and the reason assigned is that it must be regarded as "without consideration," for the consideration was invalid. [131] It seems to me that the sections of the Contract Act which I have already quoted justify no such conclusion. The promise or undertaking on the part of a decree-holder not to execute his decree, or the acceptance by him of a bond, a mortgage, or other similar contract as satisfaction of the decree, is undoubtedly a consideration within the meaning of s. 2 of the Contract Act, and the transaction constitutes an agreement which amounts to a "contract" under s. 10, unless it can be shown that the consideration or object of the agreement was unlawful within the meaning of s. 23, which I have already quoted. Is there then anything to show that the consideration or object in such a contract "is forbidden by law?" In the Contract Act itself ss. 24—30 lay down what agreements are void, but none of these provisions applies to a contract such as the one now under consideration. Section 28 might at first sight appear to be applicable, but it seems to me that the prohibition contained in the section is limited to agreements in restraint of legal proceedings for enforcing "rights under or in respect of any contract," which must be understood in the sense in which the Act defines it, and cannot be held to include rights under a decree. If then such contracts are not forbidden by the Contract Act, where is the prohibition to be found? The last paragraph of s. 258 of the Civil Procedure Code contains no such prohibition. It simply lays down that the Court in discharging its duties connected with the execution of decrees shall not recognize any adjustment of those decrees made out of Court and never certified to the Court, but the provision falls far short of justifying the view that all contracts by which decrees are adjusted out of Court are in themselves "forbidden by law," that they are therefore illegal when entered into, but become legal the moment the adjustment is certified to the Court. The paragraph lays down no rule of substantive law; but simply a rule of procedure suggested by considerations of convenience similar in principle to those which form the reason of the rules by which the frame of suits, the right of set-off, and other provisions of adjective law, are governed. And it seems to me that there is scarcely any more reason in principle for saying that uncertified adjustments of decree give no right, because the Courts are prohibited from recognizing them, and the judgment-debtor cannot plead them in execution of those decrees, than there would be for the proposition [132] that, because s. 111 of the Civil Procedure Code does not allow certain obligations of the plaintiff to be pleaded as set-off to his claim, therefore those obligations cannot be enforced by a separate suit.

Referring still to s. 23 of the Contract Act, I proceed to consider whether the adjustment of a decree out of Court, without such adjustment being certified, is an agreement of "such a nature that, if permitted, it would defeat the provisions of any law." I suppose there is no provision of the law except s. 258 of the Civil Procedure Code, which can possibly be taken to be defeated by permitting an uncertified adjustment of decree out of Court to possess the validity of a contract. But I have already stated my reasons for the view that the sole aim and end of s. 258 of the Civil Procedure Code, in common with all other rules of adjective law, is to facilitate the disposal of litigation; and

this object is in no manner defeated by permitting agreements out of Court by which a decree is adjusted. The Court executing the decree will, of course, not recognize them if they are not duly certified, but this circumstance in itself shows that the provisions of the law cannot be defeated. For the view which I have taken does not involve the recognition of such uncertified adjustments by any Court in the exercise of its functions under s. 258 of the Civil Procedure Code. My view is that such adjustments, if made by an agreement, amount to a contract which does not and cannot defeat the objects of s. 258 of the Civil Procedure Code, but gives birth to a new right which may be enforced in a separate suit, and not in the proceedings taken in the execution of the decree adjusted by such agreement.

It is not necessary to consider the remaining clauses of s. 23 of the Contract Act, because it is scarcely conceivable that any arguments can even plausibly be based on any of those clauses against the view which I have taken. And if this is so, I confess I fail to see why an agreement, the consideration and objects of which are not "forbidden by law," which is not "of such a nature that, if permitted, it would defeat the provisions of any law," should be considered as a void agreement, incapable of giving birth to a right the breach of which would constitute a valid cause of action for a separate suit. And I may add that the view which I have taken is [133] consistent with the interpretation placed upon cl. (2) of s. 23 of the Contract Act by the Lords of the Privy Council in *Seth Gokul Dass Gopal Dass v. Murl*, 1 L. R., 3 Cal., 602; L.R. 5 Ind. Ap. 78, which involved a point of law similar in principle to the case now before us.

I hold that the adjustment of a decree out of Court, if never certified to the Court, is ineffectual only so far as the execution of that decree is concerned; but that, if such adjustment is made by an agreement in itself valid, such agreement, like other lawful contracts, becomes the basis of a right, which, if infringed, can afford a cause of action for a separate suit, notwithstanding the provisions of s. 244 of the Civil Procedure Code. There is no provision in our law which renders such agreements void or otherwise illegal; and in the present case, if the plaintiff-respondent attempts, in breach of the contract contained in the mortgage-deed, to execute the decrees the amount whereof has already been included in the consideration of the deed, he will render himself liable to a separate suit by the defendant-appellant, in which full relief could be awarded. What the nature of such relief may be, it is unnecessary for the purposes of this appeal to determine, for it depends upon circumstances which we cannot anticipate. I may, however, add that in the case of *Nujeem Mullick v. Erfan Mollah*, 22 W. R., 298, it was held that a suit to enforce a contract by which a dispute was adjusted between a decree-holder and a judgment-debtor could be maintained; and in *Nubo Kishen Mookerjee v. Debnath Roy Chowdhry*, 22 W. R., 194, it was laid down that the Court could, at the suit of the judgment-debtor, issue an injunction restraining the judgment-creditor from executing his decree. A similar view was taken in *Dhuronidhur Sen v. Agra Bank Limited*, 4 Cal. L. R., 434, and without discussing the rules laid down in the various cases, I may safely say that there is ample authority in the reports to show that in case of breach of the contract by which a decree has been adjusted out of Court, but such adjustment has never been certified, the law does not leave the injured judgment-debtor without a remedy. Indeed, so long as it is conceded that such adjustments are not in themselves illegal, they must be held to give birth to a right, and the law contemplates no rights without a remedy—*ubi jus ibi remedium*.

[134] Applying these principles to the present case, the decretal amount of Rs. 700 was a valid consideration, to that extent, of the deed upon which the suit from which this appeal has arisen was based. The findings of the Lower Appellate Court on the merits preclude us from considering any other question in second appeal, and I therefore agree with my brother DUTHOIT in dismissing this appeal with costs.

Appeal dismissed.

NOTES.

[An uncertified adjustment, merely because it is unenforceable, is not void :—(1889) 16 Cal., 504; (1891) 13 All., 339; (1888) 12 Mad., 61; (1903) 25 All., 317; (1908) 35 Cal., 870. For the contrary view, see (1891) 22 Bom., 693; (1886) 11 Bom., 6.]

[7 All. 134]

CRIMINAL REVISIONAL.

The 28th August, 1884.

PRESENT :

MR. JUSTICE DUTHOIT.

Jhinguri

versus

Bachu and another.

Criminal Procedure Code, ss. 435, 437—Power of District Magistrate to direct further inquiry by Magistrate of the first class—"Inferior Magistrate."

Where a District Magistrate called for the record of a case in which a Magistrate of the first class had discharged certain accused persons, and directed another Magistrate of the first class to make further inquiry into the case, held, following *Nobin Kristo Mookerjee v. Russick Lall Laha*, 1. L. R., 10 Cal., 268, and *Queen-Empress v. Nawab Jan*, 1. L. R., 10 Cal., 551, that the District Magistrate's order was *ultra vires* and illegal.

THIS was a case referred to the High Court for orders, under s. 438 of the Criminal Procedure Code, by Mr. R.J. Leeds, Sessions Judge of Gorakhpur. On the 25th January 1884, one Jhinguri preferred charges, under ss. 379, 427 and 447 of the Penal Code, against two persons named Bachu and Chutkan, in the Court of Munshi Chet Ram, Magistrate of the first class, Basti. After evidence had been taken on both sides, the case was dismissed by an order dated the 28th April 1884.

On the 30th April an application, under s. 435 of the Criminal Procedure Code, was made to the Magistrate of the Basti District by the complainant, Jhinguri, and on the 29th May a further inquiry by another Magistrate of the first class was directed.

The Sessions Judge of Gorakhpur, in his report to the High Court under s. 438, recommended that the order of the Magistrate of the Basti District, directing further inquiry, should be set aside, on the ground, "*inter alia*" that the Court of Munshi Chet Ram, a Magistrate of the first class, whose orders of conviction under the Penal Code were appealable to the Sessions Judge, was not, as [135] regards the particular case in question, "*inferior*" to the District Magistrate, within the meaning of s. 435 of the Criminal Procedure Code, and that therefore the District Magistrate had no authority either to call for the record or to direct further inquiry to be held.

The Court made the following **order** :—

Duthoit, J.—Munshi Chet Ram was, by Government Notification No. 724, dated the 30th May 1882, appointed “to be Magistrate of the first class during such time as he acts as a Deputy Collector ;” and, in answer to an inquiry on the subject, the Sessions Judge of Gorakhpur has reported that Munshi Chet Ram has continuously exercised those powers since the date of the Notification, and has not since ceased to officiate as a Deputy Collector.

Following and approving the view of the law taken by the learned Judges of the Calcutta Court in *Nobin Kristo Mookerjee v. Russick Lall Laha*, I. L. R., 10 Cal., 268, and in *Queen-Empress v. Nawab Jan*, I. L. R., 10 Cal., 551, I am of opinion that the order of the Magistrate of the Basti District, dated the 29th May 1884, was *ultra vires* and illegal. I set it aside accordingly. Let the record be returned.

NOTES

[See also (1885) 12 Cal., 473 ; 7 All., 853.]

[7 All. 135]

The 24th October, 1884.

PRESENT :

MR. JUSTICE DUTHOIT.

Queen-Empress

versus

Sinha.

High Court's powers of revision—Criminal Procedure Code, s. 439—Revision case in which term of imprisonment has been served.

The High Court is competent, in the exercise of its powers of revision under s. 439 the Criminal Procedure Code, to interfere with a conviction, even though, in consequence the expiry of the sentence, it may not be possible to interfere with the latter.

THIS was an application to the High Court for the exercise of its powers of revision under s. 439 of the Code of Criminal Procedure. The applicant had been convicted by a Magistrate of an offence under s. 26 of Act IV of 1879 (Indian Railway Act). The Court called for the record of the case, but before the application came on for hearing, the applicant had served the term of imprisonment to which he had been sentenced.

[136] A preliminary objection was taken on behalf of the Crown to the hearing of the application on the ground that the sentence could not be interfered with.

Mr. A. Strachey, for the Applicant.

The Junior Government Pleader (Babu Dwarka Nath Banerji), for the Crown.

Duthoit, J.—The applicant has served his term of imprisonment, and a preliminary objection is urged by the learned Junior Government Pleader to the effect that as, since the application was filed, the effect of the finding of the Magistrate has become complete, this Court cannot interfere with that finding. I am unable to admit the force of this contention. I can find nothing in the terms of the law to prevent this Court from interfering with a conviction,

even though, in consequence of the expiry of the sentence, it may, not be possible to interfere with the latter. And cases in which such interference should not be summarily refused may easily be supposed, as, for instance, where a man's status is altered by his conviction, (as in convictions under Chapter XII or XVII of the Indian Penal Code, or under the Common Gambling Act), or where, as here, the convict's prospect of future employment depends in a great measure upon the existence or the annulment of the conviction.

(The learned Judge then proceeded to deal with the application on the merits).

[7 All. 136]

APPELLATE CIVIL.

The 4th November, 1884.

PRESENT :

MR. JUSTICE MAHMOOD AND MR. JUSTICE DUTHOIT.

Sohan Lal.....Plaintiff

versus

Aziz-Un-Nissa Begam and others.....Defendants.*

Remand—Appeal from order of remand—Civil Procedure Code, ss. 562, 564, 566, 584, 588 (28), 590.

Where a Lower Appellate Court, instead of remanding a suit under s. 566 of the Civil Procedure Code, erroneously remands it under s. 562, and the party aggrieved by its order appeals to the High Court, under clause (28), s. 588, the High Court cannot deal with the case as if it were a first appeal from a decree. [137] All that the High Court can do is to rectify the procedure of the Lower Appellate Court, and to direct that it decide the case itself on the merits.

Badam v. Imrat, I. L. R., 3 All., 675, distinguished. *Ramnarain v. Bhawanidin* Weekly Notes, 1882, p. 104, and *Sheoamber Singh v. Lallu Singh*, Weekly Notes, 1882, p. 158, referred to.

THE suit in which this appeal arose was one for the sale of certain property mortgaged by the defendants to the plaintiff on the 22nd September 1874. It was stated in the instrument of mortgage that the mortgagors should retain possession. On the 25th September 1874, three days after the mortgage, the defendants gave the plaintiff a lease of the mortgaged property for five years, and the plaintiff subsequently obtained possession. The defence to the suit was that the plaintiff was in possession of the mortgaged property as an usufructuary mortgagee, and the mortgage-money had been repaid from the usufruct of the property. The plaintiff's contention was that the mortgage was only a simple mortgage, and he was not in possession as a usufructuary mortgagee, but merely as a lessee. The Court of First Instance (Munsif) allowed

* First Appeal No. 11 of 1884, from an order of Mirza Abid Ali Beg, Subordinate Judge of Shahjahanpur, dated the 8rd December 1883.

the plaintiff's contention and gave him a decree for the sale of the property, in the terms provided by ss. 86 and 88 of the Transfer of Property Act, 1882. On appeal by the defendants the Lower Appellate Court (Subordinate Judge) was of opinion that the lease "was simply a plan adopted for payment of the mortgage-money," and that further inquiry should be made "whether the plaintiff-mortgagee held possession as a lessee," and "whether the mortgage amount with interest had been paid up from the lease-money." The Court accordingly decreed the appeal, reversed the decree of the Court of First Instance, and remanded the case to the Munsif for the determination of the questions above referred to.

The plaintiff appealed to the High Court, on the grounds that the order of remand by the Lower Appellate Court was opposed to the clear terms of the lease and the mortgage; that it was unsupported by evidence; and that it proceeded on the assumption that oral evidence was admissible to vary or add to the terms of the documents in question.

Pandit *Ajudhia Nath* and *Munshi Kashi Prasad*, for the Appellant.

[138] *Mr. T. Conlan* and the *Junior Government Pleader* (*Babu Dwarka Nath Banerji*), for the Respondents.

The Court (MAHMOOD and DUTHOIT, JJ.) delivered the following judgment:—

Mahmood, J.—This is a first appeal from an order of the Lower Appellate Court, remanding the case to the Court of First Instance under s. 562 of the Civil Procedure Code for trial *de novo*.

Having considered the judgment of the Lower Appellate Court, we have no doubt that the order contravenes the express provisions of s. 562 and s. 564 of the Civil Procedure Code. Under the former of these sections, the only ground for setting aside the decree of the Court of First Instance can be that "the Court against whose decree the appeal is made has disposed of the suit upon a preliminary point, so as to exclude any evidence of fact which appears to the Appellate Court essential to the determination of the rights of the parties, and the decree upon such preliminary point is reversed in appeal." Section 564 expressly prohibits the remand of a case for a second decision except as provided in s. 562.

In the present case, the judgment of the Court of First Instance did not proceed upon any preliminary point, nor did that Court exclude any evidence of fact within the meaning of s. 562. The Lower Appellate Court's judgment is obviously framed in language adapted to an order of remand under s. 566 of the Civil Procedure Code, and the reasons given by that Court could not necessitate a remand under s. 562. The lower Court's order cannot stand; but the learned pleader for the appellant asks us to dispose of the case finally, without sending it back to the Lower Appellate Court. He contends on the authority of the Full Bench ruling of this Court in *Badam v. Imrat*, I. L. R., 3 All., 675, that we are bound, even at this stage, to enter into the merits of the whole case, and to dispose of it finally.

We are of opinion that this contention is not sound. The Full Bench ruling upon which the learned pleader relies does not go to the extent of supporting his contention. All that was ruled in that case was, that an appeal from an order remanding a suit for retrial is not to be confined to the question whether the remand has been made contrary to the provisions of s. 562 of the Civil [139] Procedure Code; but that the question whether the decision of the Appellate Court on the preliminary point is correct or not, may also be raised and determined in such an appeal. In the case before us the judgment of the

Lower Appellate Court does not, as we have already said, proceed upon any preliminary point which we can determine at this stage. The judgment professes to deal with the merits of the case, though the result of the reasons would be a remand under s. 566, and not under s. 562.

It is to be observed that the case from which this appeal has arisen is one which can come up before us only in second appeal, and we are of opinion that the circumstance that this appeal is a first appeal from order under the provisions of cl. (28), s. 588 of the Civil Procedure Code, would not alter the nature of the powers to be exercised by us in second appeals under s. 584 of the Civil Procedure Code. In other words, we cannot deal with the case as if it were a first appeal from a decree. In the case of *Ram Narain v. Bhawanidin*, Weekly Notes, 1882, p. 104, and in *Sheoambar Singh v. Lallu Singh*, Weekly Notes, 1882, p. 158, to both of which one of us was a party, the powers of this Court in its jurisdiction as the Second Appellate Court were discussed. The observations made in those cases appear to us to be applicable in principle to the present case. Section 590 of the Civil Procedure Code renders Chapter XLI of the Code applicable to such appeals as the present only *mutatis mutandis*; and we cannot regard that section as binding us to enter into the merits of the whole case simply because the Lower Appellate Court, instead of remanding the case under s. 566, has erroneously remanded it for new trial under s. 562. In our opinion the functions of this Court in appeals under cl. (28), s. 588, are limited to disposing of such points as properly fall within the scope of s. 562. No such point exists in this case, and all that we are called upon to do is to rectify the procedure adopted by the Lower Appellate Court in the matter of the remand, and to direct that Court to decide the case itself on the merits. The questions raised before us in the memorandum of appeal may be proper questions for disposal after the Lower Appellate Court has pronounced its final judgment and decree; but they cannot be disposed of at this stage. The logical consequence of the contrary view would be, that in every case in which the [140] Lower Appellate Court passes an erroneous order of remand for re-trial under s. 562, and an appeal is preferred to this Court under cl. (28), of s. 588, the functions of this Court, in cases like the present, instead of being confined to matters described in s. 584 of the Code, would be converted into those of the first Appellate Court; in other words, an erroneous order of remand by the Lower Appellate Court would have the effect of converting into a first appeal a case which could only be the subject of second appeal.

For these reasons we decree this appeal, and setting aside the order of the Lower Appellate Court, remand the case to that Court, with directions to restore the case to its own file, and to dispose of it according to law. The costs of this appeal will be costs in the cause.

Appeal allowed.

NOTES.

[This was followed in (1886) 10 Bom., 398; (1892) P. R., 6. See also (1896) 19 Mad., 422.]

[7 All. 140]

The 5th November, 1884.

PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

The Secretary of State for India in Council.....Defendant

versus

Ram Ugrah Singh and others.....Plaintiffs.*

Liability of land to assessment of revenue—Jurisdiction of Civil Court—

Declaratory decree—Act XIX of 1873 (N.-W. P. Land

Revenue Act), s. 241.

The Civil Courts are not debarred by s. 241 of Act XIX of 1873 (N.-W. P. Land-Revenue Act) from taking cognizance of a suit for a declaration that land, which the Revenue officers seek, under the provisions of that Act, to assess to revenue, is included in an area which has already been permanently settled, and is therefore not liable to further assessment.

A title to hold land free from assessment to revenue cannot be acquired by any length of possession revenue free.

The Government v. Rajah Raj Kishen Singh, 9 W. R., 427; *Collector of Futtehpore v. Munglee Pershad*, N.-W. P. S. D. A. Rep., 1854, p. 167; *Rajah Rughonath Suharee v. Bishen Singh*, N.-W. P. S. D. A. Rep., 1855, p. 302; *Zoolfikar Ali v. Ghunsam Baree*, N.-W. P. S. D. A. Rep., 1865, p. 92; and *Sri Uppu Lakshmi Bhayamma Garu v. Purvis*, 2 Mad. H. C. Rep., 167, referred to.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. T. Conlan and the Senior Government Pleader (Lala Juala Prasad), for the Appellant.

Mr. C H. Hill, Munshi Hanuman Prasad, Munshi Sukh Ram, Babu Sital Prasad, and Lalla Jokhu Lal, for the Respondents.

[141] The judgment of the Court (OLDFIELD and MAHMOOD, JJ.) was delivered by—

Oldfield, J.—The suit, which is the subject of this appeal, was instituted on the 26th February 1880, by Babu Ram Ugrah Singh and others, against the Secretary of State for India in Council, through the Collector of Ballia.

The case of the plaintiffs is briefly that the lands, the subject of the dispute, consisting of mauzas Kheru Chapra, Marwatya, and Rampur, belonging to taluqa Kharauni, formed portions of the above mauzas at the time they were leased to them in the decennial settlement made in 1197 fasli,—i.e., 1790 A. D., by Mr. Duncan, afterwards converted into a permanent settlement under Regulation I of 1795; they allege that the boundary of the taluqa was the main channel of the Gogra, situated as it is now, and that the taluqa was south of it, and comprised the lands in dispute; that in 1879 the revenue authorities re-measured the lands of the mauzas, and treated the area disputed as alluvion, accreted since 1790 A.D., and made an assessment upon it in contravention of their right; and the relief sought by the plaint of the plaintiffs, as amended in April 1881, is that a decree be passed in favour of the plaintiffs, who allege themselves to be still in actual possession, for declaration of their

* First Appeal No. 81 of 1881, from a decree of Maulvi Muhammad Abdul Majid Khan, Subordinate Judge of Ghazipur, dated the 28th April 1881.

right to these lands on the ground that they form part of the area in respect of which the permanent settlement was made, and by right of ancient hereditary possession ; and that the orders of the Assistant Collector of Ballia, dated the 3rd April 1879, and of the Commissioner of Benares, dated the 14th October 1879, be declared invalid and ineffectual, so far as they are prejudicial to the plaintiffs' rights.

The first of these orders is by the Assistant Collector, directing that the plaintiffs be asked whether they will accept the assessment, and the second that of the Commissioner's, directing that the plaintiffs' appeal from the Assistant Collector's order, dated 3rd April 1879, be dismissed.

The defence is, that the boundary of the taluqa, which was leased in the decennial settlement in 1790 or 1197, was the nullah Bahera, the southern branch of the Gogra, and these lands are to the north of it, and excluded from the permanently settled area : [142] that the total area of the three mauzas Rampur, Kheru Chapra, and Marwatya, permanently settled with the plaintiffs, was 2,200 bighas, which is still the area south of Bahera nullah ; that the disputed lands, which are called "*Dara*"*, were not in existence then, but accreted subsequently, or, if they did exist at that time, they appertained to the muafi mahal in the Saran district, on the other side of the river Gogra ; that in 1800 or subsequently the stream of the Gogra left the nullah Bahera and began to flow to the north, thus transferring the lands in dispute to the south of the main channel, as accretions to the plaintiffs' mauzas, and such accretions became liable to assessment under s. 104, Act XIX of 1873, and the old Regulations ; that the plaintiffs cannot contest the right of the Government to make a settlement and assess revenue.

The Subordinate Judge, in a very carefully considered judgment, has found that the plaintiffs have proved that the lands in dispute form part of the area which was permanently settled with their ancestors ; and he further considered that, by length of possession free from further assessment, they have established a right to hold these lands free from assessment of revenue ; that there is no law which precludes a Civil Court from entertaining a claim to contest the right of Government to collect revenue from any zamindar in excess of the amount sanctioned by Government, or to fix a new enhanced demand on mahals settled for a term before that term expires, or on permanently settled mahals ; that a Civil Court can at any rate do so much as to declare the zamindar's two-fold right that the land which is being newly assessed is part of the land settled previously, on which an assessment cannot be made, or that, owing to the lapse of a term of sixty years, the zamindar has acquired a right to hold the land for the future in the same way and manner, without paying a new or increased revenue, as he has hitherto held it ; and he adds that the plaintiffs pray only for a declaratory decree regarding the above point and not the other points ; and the Subordinate Judge makes a decree declaring that the land in dispute was not excluded from the true area of plaintiffs' villages, and reference to which has been made in the decennial settlement, at the time of the permanent settlement, but that it is included in the permanent settlement ; that if it be otherwise, the defendant has no longer a right to fix a revenue on the land in dispute owing to lapse of time ; and allows plaintiffs their costs.

The defendant has appealed, and the objections may be summed up to be—

1. In regard to the lower Court permitting the plaintiffs to amend their plaint.

* "*Dara*,"—A tract of alluvial land.

2. That no declaratory decree can be given, especially as the plaintiffs are out of possession, and that the Government has adopted proceedings to realize the revenue assessed.

3. That it is not proved that the land in dispute formed part of the area of taluqa Kharauni, settled with the plaintiffs; but on the contrary it did not form portion of that taluqa, and was not settled with any one.

4. That a decision made in 1839 as to this land has become final.

5. That the plaintiffs cannot obtain a right to hold the land free from assessment of revenue by long possession.

6. That the Civil Court has no power to question or set aside settlements of land & assessments of revenue.

(After disallowing the two first objections, the judgment continued):—The next, in the order in which I have put them, relates to the decision on the merits; and I concur in the conclusions which the Subordinate Judge has arrived at, as the result of his very careful examination of the evidence in the case.

(After referring to and commenting on the evidence, the judgment continued:) The facts above recited sufficiently show, in my opinion, that these lands were part of the area permanently settled with them.

(After a recapitulation of the facts the judgment continued:—)

I think the above facts sufficiently establish the plaintiffs' title. I do not, however, agree with the Subordinate Judge in holding that any length of possession of these lands free from revenue would give plaintiffs a title by prescription to hold them free from assessment with revenue.

[144] The above remarks dispose of the case on the merits.

There are, however, some legal questions to be considered.

(After holding that the fourth objection was clearly untenable, the judgment continued:—)The next point is the jurisdiction of the Civil Court in this suit.

It is to be observed that the Subordinate Judge has not decreed that portion of the claim which seeks to set aside orders of the Revenue authorities, and the decree he has made is confined to a declaration that the land in suit was not excluded from the area of the plaintiffs' villages, but on the contrary was included in the area permanently settled with them; and to a further declaration that, were it otherwise, the defendant has no right to make a new assessment of revenue upon the lands owing to lapse of time.

The declaration contained in the last part of the decree must be cancelled, since, as already stated, limitation cannot be pleaded against the right of the State to assess with revenue lands hitherto held revenue free.

The decree of the Subordinate Judge will then be limited to a declaration that the lands in suit formed part of the area that was permanently settled with the plaintiffs' ancestors at the decennial settlement, and such a decree does not appear open to any objection on the ground that the Civil Court has no jurisdiction to make it.

The question raised and dealt with is whether the plaintiffs have a right to the lands as forming part of a mahal held by their ancestors under decennial leases in 1790, and subsequently settled with them under a permanent settlement, which in consequence are not legally liable to further assessment for revenue; or, on the other hand, the lands formed no part of such area, and have subsequently accreted, and are liable to be assessed. The decree does no more than declare rights which the plaintiffs have had conferred upon them in

pursuance of enactments of the Legislature, and the adjudication upon such rights is within the province of the Civil Courts, whether or not there may be involved questions of the liability of land to assessment for revenue.

We have here no question properly of the Civil Court's jurisdiction being excluded in respect of acts done in the exercise of [145] sovereign powers, for the suit is for alleged wrongful acts of the Revenue officers in violation of rights conferred on the plaintiffs by the Legislature and the Civil Court's jurisdiction does not appear to be excluded by express legislation in s. 241 of the Land Revenue Act, which has specified the matters over which Civil Courts exercise no jurisdiction.

The matter does not come under (b), s. 241. There is here no question of the claim of any person to be settled with, or the validity of any engagement with Government for the payment of revenue, or the amount of revenue to be assessed on any mahal or share of a mahal.

(D) s. 241, allows the Civil Courts no jurisdiction over the "matter of the notification of settlement," but we are not in this suit concerned with that. The notification referred to is probably that made under s. 36, which directs that "whenever the Local Government thinks that any district or other local area liable to be brought under settlement should be so brought, it shall publish a notification specifying such area."

The expression "matter of the notification of settlement" is very vague, but possibly it was only intended not to allow suits to set aside settlements on the ground that the notification was not duly issued; and however this may be, the claim decreed does not touch upon the legality of the notification. A Civil Court may declare certain lands to be part of an area already permanently assessed for revenue, and in consequence not liable to further assessment, without interfering with the notification.

The only part of s. 241, which has been referred to in order to oust the jurisdiction of the Civil Court, is cl. (h), namely, matters provided for in ss. 79 to 89, which refer to the resumption of rent-free grants and liability of rent-free lands for Government revenue; but obviously the matter in this suit is not one of those. The case referred to by the Subordinate Judge—*The Government v. Rajah Raj Kishen Singh*, 9 W. R. 427,—appears to support the view here taken. The plaintiff in that case sued to have his right declared to certain lands as part of a mahal permanently settled, and to set aside a survey and proceedings incidental to it, by which the lands [146] were claimed by the defendant as excluded from plaintiff's permanently settled mahal. It was held that the Civil Courts had jurisdiction in the matter. The difference between that case and the one before us is, that in that case the Government had not, as here, recognized the proprietary right of the plaintiff to the lands, or made an assessment of the lands, and offered to settle them with him.

The case of *Collector of Futtehpore v. Munglee Pershad*, N.-W. P. S. D. A. Rep., 1854, p. 167, is very much in point. The object of the suit was to resist the demand of Government for the revenue of certain lands, on the ground that they had already been assessed with revenue, and the plaintiffs were not liable to be called on to pay the same amount twice over; and the claim was entertained and allowed. The Court observed:—"The majority of the Court disclaim all intention in this judgment of interfering with the Government's acknowledged power of determining the assessments of the revenue: with this power the Civil Courts have no authority to interfere, nor do the majority of the Court interfere with it in the present instance. They merely

declare judicially that the Government has, through its revenue officers, assessed the land in dispute as part and parcel of the villages of the respondents, who are not legally subject to any further demand on that account."

In *Rajah Rughonath Suharee v. Bishen Singh*, N.-W. P. S. D. A. Rep., 1855, p. 302, which was a suit brought to set aside an order passed by the revenue authorities, by which defendants were admitted to the settlement of mauza Sirsya to the exclusion of plaintiff, in contravention of a settlement which had previously been made with plaintiff, the Sudder Court held that the existing Regulations confer no power on the revenue authorities of remodelling at their will and pleasure settlement arrangements regularly entered into, so long as the party admitted to settlement fulfils the terms of his engagement, and the Court allowed the claim, finding on the facts in the case that the party admitted to the direct management of the estate had no rights in it beyond those of a mere ryot or cultivator.

The case of *Zoolfikar Ali v. Ghunsam Baree*, N.-W. P. S. D. A. Rep., 1865, p. 92, may also be referred to, to show that the Civil Courts have exercised jurisdiction [147] to enforce rights of parties under a settlement, and to set aside orders of the revenue authorities in contravention thereof. A case decided by the Madras High Court—*Sri Uppu Lakshmi Bhayamma Garu v. Purvis*, 2 Mad. H. C. Rep., 167,—may also be referred to. The question was the jurisdiction of the Civil Courts to entertain a suit brought to try a question of liability to the public revenue assessed upon land. The plaintiff sought to establish, as the judgment states, that the lands were legally exempt from an additional assessment to the water-rate, on the ground, first, of a right by long enjoyment of the free supply of the same quantity of water from an old canal, (of which it was alleged the Government officer had cut off the supply), as was obtained from a new canal which they had made, and with reference to the supply from which the plaintiff had been assessed with water-rate; and secondly, on the ground that the lands were of the description excepted from the assessment by the rules promulgated by the Board of Revenue for the levying of the water-rate. The Court (SCOTLAND, C. J., and PHILLIPS, J.) observed:—"The suit, then, is clearly a suit of a civil nature, brought for alleged wrongful acts by an executive officer of Government, and, in the absence of any express legal enactment or provision, we think the circumstance that the acts complained of were done in enforcing payment of a revenue assessment sanctioned by Government, did not, *per se*, preclude the jurisdiction of the Court to entertain the suit. There no doubt may be acts done by the Government through its executive officers, which, though not contrary to any existing law, may be regarded as grievances; and undoubtedly acts that could not be considered as contrary to any existing right acquired under the laws administered by the Municipal Courts, would afford no cause of suit, and a plaint in which such an act appeared to be the only subject-matter of complaint would properly be rejected *in limine*. . . But in the present case the plaintiff sets up that she possesses a legal proprietary right in the land entitling her to the supply of water free of the assessment—a claim of legal exemption—and seeks to recover in respect of an act done in violation of such legal rights, as also of the Revenue rules in force, and, until altered, binding upon the defendant; and we think the question in this, as in other suits of a civil [148] nature, is whether the cognizance of the suit was barred by any Act or Regulation in force when the suit was brought."

I would affirm the Subordinate Judge's decree, declaring that the land in dispute was included in the area of the plaintiffs' villages, for which a permanent

settlement was made, and is not liable to further assessment for revenue; and I would dismiss the appeal with costs.

Mahmood, J., concurred.

Appeal dismissed.

NOTES.

[This was allowed in (1903) 27 Mad., 386.]

[7 All. 148]

The 13th November, 1884.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Ganga Ram.....Plaintiff

versus

Beni Ram and others.....Defendants.*

Jurisdiction of Civil Court—Landholder and tenant—Suit for recovery of land of which tenant has been dispossessed—Relation of landlord and tenant admitted—Act XII of 1881 (N.-W. P. Rent Act), s. 95 (n).

A landholder served a notice of ejectment on G, under the provisions of s. 36 of the Rent Act (N. W. P.), as a tenant-at-will. Under the provisions of s. 39 of the Act G contested his liability to be ejected, on the ground that he was not a tenant-at-will, but one holding by virtue of an agreement executed in his favour by the landholder. The question of G's liability to be ejected was decided adversely to him, and he was ejected under s. 40 of the Act. He subsequently sued the landholder in the Civil Court for possession of the land, by virtue of the agreement, alleging that his ejectment was a breach of such agreement. The landholder's defence to this suit was that G had been rightfully ejected. *Held* that, inasmuch as the relation of landlord and tenant between the parties at the time of the proceedings under the Rent Act was admitted, and the dispute in the suit could appropriately form the subject of an application under cl. (n) of s. 95 of that Act, the suit was not cognizable in the Civil Courts.

Muhammad Abu Jafar v. Wali Muhammad, I. L. R., 3 All., 81; *Sukhdai Misr v. Karim Chaudhri*, I. L. R., 3 All., 521; *Kanchia v. Ram Kishen*, I. L. R., 2 All., 429; distinguished. *Shimbhu Narain Singh v. Bachcha*, I. L. R., 2 All., 200, referred to.

THE suit in which this second appeal arose was instituted in the Court of the Munsif of Agra. It appeared that in February 1882, the defendants, who were the zamindars of the village in which the plaintiff cultivated certain land, caused a notice of ejectment to be served on the latter under the provisions of s. 36 of Act [149] XII of 1881 (N.-W. P. Rent Act). They alleged that the plaintiff was the tenant-at-will of the land. The plaintiff, under the provisions of s. 39 of that Act, contested his liability to ejectment, on the ground that by an agreement in writing between him and the defendants, called a "*pā'ta*" (lease), dated the 13th November 1881, and attested before the kanungo, his rent had been enhanced, and it had been agreed that, so long as he paid the enhanced rent, he should not be ejected. The Assistant Collector who heard the case decided that the plaintiff was liable to ejectment, and on the 5th June 1882,

* Second Appeal No. 1744 of 1883, from a decree of Babu Promoda Charan Banerji, Subordinate Judge of Agra, dated the 11th September 1883, affirming a decree of Maulvi Muhammad Fida Husain, Munsif of Agra, dated the 28th February 1883.

the plaintiff was ejected under the provisions of the Rent Act. In the present suit the plaintiff claimed to recover possession of the land, by virtue of the agreement, dated the 13th November 1881. The defendants defended the suit upon the grounds, among others, that it was not cognizable in the Civil Courts, and that the instrument of the 13th November 1881, was not admissible in evidence, not having been registered under the Registration Act, 1877. The Court of First Instance framed issues on these points, and disposed of the suit with reference to its decision on the second point. It held on this point that the instrument of the 13th November 1881, was a lease, and therefore an instrument which was compulsorily registrable, and not being registered was not admissible in evidence. It therefore dismissed the suit. On appeal the plaintiff contended that the instrument of the 13th November 1881, was not a lease, but merely an agreement of the kind mentioned in ss. 12 and 21 of the Rent Act, and therefore not compulsorily registrable. The Lower Appellate Court (Subordinate Judge) held, on the question of jurisdiction, that the suit was cognizable in the Civil Courts. It observed as follows:—"I am of opinion that the suit is cognizable in the Civil Courts. The Revenue Court has jurisdiction when the relationship of landlord and tenant is admitted to exist between the parties. In this case the defendants deny that the plaintiff is a tenant. He has been ejected by the Revenue Court, and it has been declared that he has no right to retain possession of the land in suit. He is therefore competent to sue in the Civil Courts for a declaration that he is still the tenant of the defendants, and that he has the right to occupy his holding in perpetuity so long as he pays his rent. The Civil Court alone can make such a declaration. Of course, if it [150] be found that the plaintiff is the tenant of the defendants and is entitled to remain in possession of his holding, it will abstain from giving a decree for possession, with reference to the provisions of s. 95 of the Rent Act, leaving the plaintiff to seek his remedy under clause (n) of that section. This view is supported by *Muhammad Abu Jafar v. Wali Muhammad*, I. L. R., 3 All., 81, and *Sukhdark Misr v. Karim Chaudhri*, I. L. R., 3 All., 521, and *Ram Prasad v. Ram Shankar*, Weekly Notes, 1882, p. 58. The decision of the Revenue Court between these parties cannot moreover operate as *res judicata*. On the question whether the instrument of the 13th November 1881, was compulsorily registrable, the Lower Appellate Court agreed with the Court of First Instance in holding that the instrument was a lease; and that as such compulsorily registrable under the Registration Act, 1877, and that it was not receivable in evidence, not being registered.

In second appeal the plaintiff contended, *inter alia*, that the instrument on which his suit was based was not a lease, and consequently was not compulsorily registrable under the Registration Act.

Mr. J. D. Gordon, for the Appellant.

The Junior Government Pleader (Babu Dwarka Nath Banerji) and Pandit Bishambhar Nath, for the Respondents.

The Court (MAHMOOD and OLDFIELD, JJ.) delivered the following judgment:—

Mahmood, J.—We consider it unnecessary to enter into the various points raised by the argument of the learned counsel for the appellant, because we are of opinion that the suit was not cognizable by the Civil Court. That the relation between the parties was that of landlord and tenant is admitted on all hands, and the plaintiff's case, even if fully admitted, amounts to a contention that by reason of the *patta* of 13th November 1881, his tenancy-at-will was converted into a perpetual tenancy at the fixed annual rent of Rs. 79, and that, in breach of the conditions of the *patta*, the defendants ejected him on the 5th June

1882. On the other hand, the defendants, whilst denying the execution of the *patta*, did not deny that at the time of his ejectment the plaintiff was their tenant, and [151] the substantial part of the defence, amounted to the contention that his ejectment was not wrongful. Neither party asserted any rights which are inconsistent with or go beyond the relation of landlord and tenant, and the dispute thus raised could therefore appropriately form the subject-matter of an "application for the recovery of the occupancy of any land of which a tenant has been wrongfully dispossessed," within the meaning of cl (n), s. 95 of the Rent Act (XII of 1881), which must therefore be understood to oust the jurisdiction of the Civil Court in this case. The rulings on which the learned Subordinate Judge has relied for the contrary opinion are not applicable to the present case. In *Muhammad Abu Jafar v. Wali Muhammad*, I. L. R., 3 All., 81, the defendants distinctly asserted a right in themselves which would be wholly inconsistent with the relation of landlord and tenant, whilst in *Sukhdaik Misr v. Karim Chaudhri*, I. L. R., 3 All., 521, the plaintiff distinctly stated that the defendants were simple trespassers wrongfully retaining possession after the expiration of the lease, and similar was the case in *Kanahia v. Ram Kishen*, I. L. R., 2 All., 429. The learned Subordinate Judge has held that the relation of landlord and tenant does not exist between the parties in the present case, because, by reason of the ejectment of the 5th June 1882, the plaintiff ceased to be a tenant of the defendants, but that ejectment is stated to be the cause of action for this suit, and the relation of landlord and tenant being admitted to have existed between the parties at that time, the plaintiff's complaint amounts to a claim such as would form the matter of an application under cl. (n), s. 95 of the Rent Act. This view of the law is not inconsistent with the *ratio decidendi* of either of the two contrary opinions expressed by the learned Judges in the Full Bench case of *Shimbhu Narain Singh v. Bachcha*, I. L. R., 2 All., 200. In the present case, however, it appears that the relation of landlord and tenant being admitted to have existed at the time, the defendants, as landholders, applied according to law to eject the plaintiff by service of notice, and the plaintiff's objections to ejectment being overruled by the Revenue Court, he was ejected from the holding. The matter was one exclusively within the jurisdiction of the Revenue Court, and since in the present case the pleadings of the parties do not raise any question of title [152] such as would be inconsistent with, or in excess of, the relation of landlord and tenant, the suit was not cognizable by the Civil Court.

For these reasons we uphold the decrees of the lower Courts dismissing the suit, and dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[See also (1893) 15 All., 387 at 389.]

The 7th August, 1883.

PRESENT :

MR. JUSTICE STRAIGHT, MR. JUSTICE OLDFIELD, MR. JUSTICE BRODHURST,
AND MR. JUSTICE TYRRELL.

Godha and another.....Plaintiffs

versus

Naik Ram and another.....Defendants.*

*Suit for personal property—Suit to establish right—Small Cause Court suit—
Civil Procedure Code, s. 253—Act XI of 1865, s. 6.*

A person, who had claimed moveable property attached in execution of a decree as his own, and whose claim had been investigated and disallowed under ss. 278 to 281 of the Civil Procedure Code, sued, the property being under attachment, the decree-holder and the judgment-debtor in a Court of Small Causes for the property or its value. *Held* that the suit could not properly be regarded as a suit "for personal property or for the value of such property," within the meaning of s. 6 of Act XI of 1865, but must be regarded as a suit to establish the plaintiff's right, in the sense of s. 283† of the Civil Procedure Code, inasmuch as the plaintiff could not recover the property without clearing out of his way the order of attachment, which he could only do by establishing his right in the sense of s. 283, and therefore the suit was not one cognizable in a Court of Small Causes.

Janakiammal v. Vithenadien, 5 Mad. H. C. Rep., 191; *Kundeme Naine Booshe Naidoo v. Ravoo Lutchmeepity Naidoo*, 8 Mad. H. C. Rep., 36; *Gordhan Pema v. Kasandras Balmukunddas*, I. L. R., 3 Bom., 179; *Chhaganlal Nagardas v. Jeshan Rav Dalsukhram*, I. L. R. 4 Bom., 503; *Balkrishna v. Kisansing*, I. L. R., 4 Bom., 505; and *Radha Kishen v. Choley Lal*, N. W. P. H. C. Rep., 1871, p. 155, dissented from.

THIS was a reference by Babu Promoda Charan Banarji, Judge of the Court of Small Causes at Agra, under s. 617 of the Civil Procedure Code. The question of law referred was "whether a suit under s. 283 of the Civil Procedure Code, for establishment of right to, and recovery of, moveable property, by an unsuccessful claimant, is cognizable by a Court of Small Causes, where the value of the property is within the pecuniary limit of the jurisdiction of such Court." The facts which gave rise to the reference were [153] these:—Naik Ram, who held a decree for money against Murli Singh, caused certain crops to be attached in execution of that decree. Godha and Bidha objected to the attachment, claiming the crops as their own. The Court executing the decree, under ss. 278—281 of the Civil Procedure Code, disallowed the objection. Thereupon Godha and Bidha brought the suit in which this reference was made, in the Court of Small Causes at Agra, against Naik Ram, the decree-holder, and Murli Singh, his judgment-debtor. They prayed that the crops might be declared to belong to them, and might be delivered to them, or they might be awarded Rs. 200 as their value, in case the crops could not be

* Reference under s. 617 of the Code of Civil Procedure, by Babu Promoda Charan Banarji, Judge of the Court of Small Causes at Agra, dated the 15th May 1883.

† Saving of suits to establish right to attached property.

† [Sec. 283:—The party against whom an order under sections 280, 281 or 282 is passed may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.]

delivered to them. The Judge of the Small Cause Court, being doubtful whether the suit was cognizable in a Court of Small Causes, made the present reference to the High Court. The reference came before a Full Bench for

The plaintiffs did not appear.

The Junior Government Pleader (Babu Dwarka Nath Banarji), for the Defendant Naik Ram.

The following judgment was delivered by the Full Bench:—

Straight, Oldfield, Brodhurst, and Tyrrell, JJ.—The question submitted to us by the Division Bench arises as follows:—The plaintiffs allege that certain crops cultivated by them, worth Rs. 200, were caused to be attached by Naik Ram, defendant, as the property of his judgment-debtor, Murli Singh, defendant, under an order of the Subordinate Judge of Agra, and that they objected to such attachment under s. 278 of the Civil Procedure Code, but such objection was rejected on the 13th June 1882. They therefore pray “that the produce or crop specified hereafter be declared to be the plaintiffs’ property, and be delivered to them; and in case of this prayer being impracticable, Rs. 200, value thereof, may be awarded to the plaintiffs against the defendants.”

The point for our determination is, whether such a suit is to be regarded as one “for personal property or for the value of such property,” within the meaning of s 6 of Act XI of 1865, and, as such, exclusively cognizable by a Small Cause Court. We may premise by observing that it must now be taken as settled law that a suit by a decree-holder to have the right of his judgment-debtor [154] declared to property, attachment of which has been raised, cannot be determined by a Small Cause Court—*Ram Dhun Biswas v. Kefal Biswas*, 10 W.R., 141, a decision of Sir BARNES PEACOCK, is the leading authority upon this point—and the same view was expressed in *Ram Gopal v. Ram Gopal*, 9 W.R., 136. On the other hand, a suit by the owner of property which has been attached, after disallowance of his objection to the attachment, either against the decree-holder or an auction-purchaser, to recover such property, seems to have been generally held to be exclusively cognizable by a Small Cause Court, as the following authorities show. In the case of *Woomesh Chunder Bose v. Muddun Mohun Sircar*, 2 W. R., 44, the plaintiff sued to recover bricks under these circumstances. So in *Shiboo Narain Singh Muddun Ally*, I.L.R., 7 Cal., 608, GARTH, C.J., and McDONELL, J., held that where goods had been illegally seized and sold in execution, a suit by the owner thereof against the purchaser for the goods or their value, will lie in a Small Cause Court, if the value of the goods is within the amount for which that Court has jurisdiction. In the course of the judgment, GARTH, C.J., remarked:—“A person whose goods are illegally sold under an execution does not lose his right to them, although he may have claimed them unsuccessfully in the execution-proceedings. He may follow them into the hands of the purchaser or any other person, and sue for them or their value without reference to anything which has taken place in the execution-proceedings, except that, under art. 11 of the Limitation Act, he must bring his suit within a year from the time when the adverse order in the execution-proceedings was made.” The learned Chief Justice further ruled that “if the plaintiff makes the decree-holder and judgment-debtor parties to the suit, and requires a declaration of his right to the property, such a suit will not lie in the Small Cause Court.”

This decision appears to have been followed in *Akbar Ali v. Jezuddin*, I.L.R., 8 Cal., 399, by GARTH, C.J., and PONTIFEX, J., the former remarking: “A man whose goods have been taken and sold in execution has a right to

bring a suit in the Small Cause Court for the recovery of those goods against any one into whose hands they have come . . . Sections 280 and 281 of the Civil Procedure Code relate only to [155] execution-proceedings, and have no application to a substantive suit, which is brought to establish a mere right. But in this case, although the plaintiff asks in form for a declaration of his right, he is really suing, not for a declaratory decree, but to recover possession, &c." There are two Madras cases, one *Janakiammal v. Vithenadien*, 5 Mad. H. C. Rep., 191, in which SCOTLAND, C.J., and INNES, J., held that, where the property of N having been attached, and the plaintiff (his wife) having objected to such attachment, and her objection being disallowed, her suit, before sale could take place, for removal of the attachment and recovery of the property, was cognizable by the Small Cause Court; and the other, *Kundeme Naine Booche Naidoo v. Ravoo Lutchmespaty Naidoo*, 8 Mad. H. C. Rep., 36, in which MORGAN, C.J., and KINDERSLEY, J., took a similar view. The Bombay cases are also important. In *Nathu Ganesh v. Kalidas Umed*, I. L. R., 2 Bom., 355, the plaintiff was the owner of property attached in execution of decree, whose objection had been rejected under s. 246 of Act VIII of 1859, and he sued the decree-holder for possession thereof. WESTROPP, C.J., after examining the authorities, observes:—"We do not think that the concluding passage in s. 246 of Act VIII of 1859, which leaves it open to a party against whom an order upon an application under that section has been made, to bring a suit to establish his right at any time within one year from the date of the order, prevents a tribunal, before which such a party might have brought his suit, if there had not been any application made under that section, from entertaining it. Whenever a person sues to recover property alleged to have been wrongfully taken from him, he sues to establish his right to it, and if he did not so establish his right, he could not recover it *in specie* or compensation by way of damages for it. Whether the new Civil Procedure Code (Act X of 1877) allows such a suit as the present, by an alleged owner, to be brought in a Court of Small Causes, it will be time enough to say when the question arises." In *Gordhan Pema v. Kgsandas Balmukundas*, I. L. R., 3 Bom., 179, MELVILL and KEMBALL, JJ., held, in advertence to ss. 283 and 57 (a) of Act X of 1877, that a suit by a defeated claimant to establish his right to, and for possession of, attached moveable property, against the decree-holder, must be instituted in a Small Cause Court, and the accuracy of this [156] ruling was recognised in *Chhaganlal Nagardas v. Jeshan Rav Dalsukhram*, I. L. R., 4 Bom., 503, by MELVILL and PINHEY, JJ. "The reason for that decision was," they remark, "that a suit, by the owner, for the recovery of attached property may properly be regarded as a suit 'for personal property' But a suit by a decree-holder to establish his right to attach and sell certain property, as belonging to his judgment-debtor, cannot be called a suit for personal property." This decision was followed in *Balkrishna v. Kisansing*, I. L. R., 4 Bom., 505 (MELVILL and KEMBALL, JJ.). In this Court, in the case of *Balmokund v. Lekhray*, N. W. P. H. C. Rep., 1871, p. 156, the plaintiff sued to set aside an order in execution under s. 246 of Act VIII of 1859, releasing a boat from attachment, and to obtain its sale in execution as the property of one Buljeeta, judgment-debtor of the plaintiff. The defendant Lekhray was an auction-purchaser at a sale in execution of another decree against Baljeeta. The Full Bench held that such a suit was not cognizable by a Court of Small Causes; but incidentally, in reference to the case of *Ram Dhun Biswas v. Kefal Biswas*, 10 W. R., 141, it was remarked:—"The effect of that decision is, that a decree-holder cannot, in order to obtain satisfaction of his decree, sue in the Small Cause Court to establish his judgment-debtor's title to property seized in execution and afterwards released. Had the plaintiff there himself possessed any right of property in the goods, and had the suit been brought to vindicate

that right, the decision might have been different. Such a suit to establish right and to obtain relief either by recovery of the property or of damages, appears to be cognizable by a Small Cause Court." This latter expression of opinion, which would seem to be a mere "*obiter dictum*," was treated by TURNER and TURNBULL, JJ., in *Radha Kishen v. Chotey Lall*, N.-W. P. H. C. Rep., 1871, p. 155, as an authoritative ruling that "a suit brought by an owner to recover moveable property, of which he has been dispossessed by an attachment order, may, when the value is less than Rs. 500, be maintained in a Court of Small Causes, it being a suit for personal property."

In *Makund Lall v. Nasiruddin*, Weekly Notes, 1882, p. 93, the plaintiff, alleging himself to be the owner of a cart, his objection to the attachment of which had been disallowed, sued the decree-holder, who had [157] attached it as the property of one Nabi Bakhsh, his judgment-debtor, for recovery thereof and damages, and to set aside the order disallowing his objections to the attachment. STRAIGHT and BRODHURST, JJ., held that "as the suit was not for personal property, pure and simple, as mentioned in s. 6 of Act XI of 1865, but the further relief was prayed that the order in execution disallowing the plaintiff's objections in respect of the property might be set aside, the suit was not cognizable in a Court of Small Causes."

The latest case is that of *Elliaz v. Sita*, Weekly Notes, 1883, p. 115, of which the Subordinate Judge speaks in his referring order. There the plaintiffs claimed, as owners, certain attached property, after their objection to its attachment had been disallowed. OLDFIELD and BRODHURST, JJ., observed that the suit was one "brought, with reference to the provisions of s. 283 of the Civil Procedure Code, to have a right declared in property under attachment by a Civil Court, and for its recovery by removal of attachment. It is not, in our opinion, a suit cognizable by a Court of Small Causes." This completes the authorities bearing upon the question before us, and, summarising the effect of them, it would seem that the Calcutta and Bombay Courts hold that, not only under s. 246 of Act VIII of 1859, but under s. 283 of Act XIV of 1882, a suit by the owner of moveable property, wrongly attached in execution of decree, to recover the same from a purchaser, after disallowance of his objection to the attachment, lies in the Small Cause Court. The Bombay and Madras rulings appear to go further, and to hold that such a suit may be maintained in the Small Cause Court against the decree-holder, while the goods are under attachment, though the decisions of the latter Court are confined to Act VIII of 1859; and this seems to be the view of TURNER and TURNBULL, JJ., in the case already mentioned. Both GARTH, C. J., and WESTROPP, J., lay down that the owner of goods does not lose his title to them because they have been illegally attached or sold, and his objection to their attachment has been disallowed. It must be remembered that the latter's remarks, however, were specifically limited to s. 246 of Act VIII of 1859, and he in terms declined to express any opinion in reference to the language of s. 283 of the present Civil Code.

[158] It is after all no more than a truism to say that every person who goes into a Small Cause Court to sue for personal property or its value, must, in order to succeed, establish his right to, that is to say his ownership of, such property. The difficulty in dealing with the question referred to us is to understand how, having regard to the language of ss. 280, 281, 282 and 283 of the Procedure Code, and art. 11 of the Limitation Law, a suit against a decree-holder, while attachment is subsisting, if it is to have any practical effect, can be regarded as other than one to establish the right mentioned in s. 283. In *Shiboo Narain Singh v. Muddun Ally*, 1. L. R., 7 Cal., 608, GARTH, C.J.,

intimates that, "if a suit by an owner is brought against a purchaser in the Small Cause Court, it must be instituted within a year from the time when the adverse order in the execution-proceedings was made."

We confess our inability to reconcile this passage in his judgment with what immediately precedes it, namely, that the suit may be brought "without reference to anything which has taken place in the execution-proceedings." It seems to us that, if art. 11 of Act XV of 1877 supplies the limitation, such a suit must be considered as for "the establishment of right to, or the present possession of," property in respect of which an order has been passed under ss. 280, 281 or 282. But if it is to be treated as a suit for personal property, pure and simple, against the purchaser, irrespective of anything that may have happened in execution, then surely the limitation to be applied to it should be that provided in art. 48. It must be conceded that the order passed under s. 283 is only conclusive as between the parties to the proceeding under ss. 280, 281, 282, and for the purpose of answering this reference it is not necessary to discuss how far, when unreversed by a suit, it confers, through a subsequent auction-sale, a good title on a purchaser. However this may be, in the case before us, the property is still under attachment, and the decree-holder and the judgment-debtor, between whom and the plaintiffs an order conclusive of the right to the property, subject to a suit, has been passed in execution, are the defendants. It is impossible for the plaintiffs to reach the property, without clearing out of their way the order of attachment, which is still subsisting, and [159] this they can only do by establishing their right in the sense of s. 283. We do not think such a suit is cognizable by a Small Cause Court, or that it can be properly regarded as simply one for "personal property" or its value. Were we so to hold, the result must follow that a decree of a Small Cause Court could override orders in execution of the ordinary Civil Courts passed under ss. 280, 281 and 282—a form of procedure that could not but be most inconvenient. In expressing the above view, we regret to have formed a different opinion to that of the Courts of Madras and Bombay, though it does not appear to be in conflict with the Calcutta rulings to which we have referred. The reference may be answered as indicated above.

NOTES.

[This was followed in (1893) 21 Cal., 430; (1885) 7 All., 855. See also (1887) 11 Mad., 264.]

[7 All. 159]

APPELLATE CIVIL.

The 1st November, 1884,

PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Chunni Lal.....Plaintiff

versus

Chamman Lal.....Defendant.*

Civil Procedure Code, ss. 108, 136—Decree against defendant under s. 136—"Ex-parte" decree.

A defendant failing to comply with an order to answer interrogatories, the Court, under s. 136 † of the Civil Procedure Code, struck out his defence, and, proceeding *ex-parte*, passed a decree against him. Held, that the decree could not be treated, in respect of the remedy by appeal, as an *ex-parte* decree, and therefore, under the ruling in *Lal Singh v. Kunjan*, I. L. R., 4 All., 387, not appealable, but that an appeal would lie from the decree.

THE facts of this case are sufficiently stated in the judgment of the Court.

Babu Sital Prasad and Munshi Hanuman Prasad, for the Appellant.

Babu Jogindro Nath Chaudhri, for the Respondent.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

Oldfield, J.—The plaintiff instituted this suit in the Court of the Munsif of Etawah, and the defendant was called upon by the Munsif to answer certain interrogatories, and, having failed to comply with the order, the Munsif proceeded, under s. 136, Civil Procedure Code, to strike out his defence and disposed of the suit as if he had not appeared and answered.

The defendant appealed in the Subordinate Judge's Court, and the Subordinate Judge has set aside the decree, and remanded the suit for fresh trial.

The plea in appeal before us is that there is no appeal, inasmuch as the decree of the Munsif must be treated as an *ex-parte* decree. It is true that the majority of this Court (OLDFIELD and BRODHURST, JJ., dissenting) have held that no appeal will lie from an *ex-parte* decree—*Lal Singh v. Kunjan*, I. L. R., 4 All., 387. We are of opinion, however, that a decree made in a suit, where the provisions of s. 136 of the Civil Procedure Code have been put in force, cannot be treated as an *ex-parte* decree in respect of the remedy by appeal. In the first place, as a matter of fact, the defendant did appear to answer to the suit, and, therefore, there was no *ex-parte* decree in the strict sense of the word ;

* First Appeal No. 51 of 1884, from an order of Maulvi Muhammad Basit Khan, Subordinate Judge of Mainpuri, dated the 5th May 1884.

† [Sec. 136:—If any party fails to comply with any order under this chapter, to answer interrogatories or for discovery, production or inspection, which has been duly served, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not appeared and answered ;

and the party interrogating or seeking discovery, production or inspection may apply to the Court for an order to that effect, and the Court may make such order accordingly.

Any party failing to comply with any order under this chapter, to answer interrogatories or for discovery, production or inspection, which has been served personally upon him, shall also be deemed guilty of an offence under Section 188 of the Indian Penal Code.]

and next, unless allowed an appeal, he would have no remedy, for the remedy by application to the Court that makes an *ex-parte* decree under s. 108 is inapplicable to a case dealt with under s. 136, as the terms of s. 108 show. Under that section, a defendant, in order to succeed, has to satisfy the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. It contemplates cases of *ex-parte* proceedings strictly and properly so, and not such as are made under s. 136. We dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[See also (1898) 2 C.W.N., 676.]

[7 All. 160]

APPELLATE CRIMINAL.

The 14th November, 1884.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND
MR. JUSTICE DUTHOIT.

Queen-Empress

versus

Kallu and another.

Criminal Procedure Code, s. 338—Tender of pardon to accomplice who has pleaded guilty—Accomplice—Evidence—Corroboration—Practice—Accused not defended—Court to test statements of witnesses for prosecution.

A Court of Session, under s. 338 * of the Criminal Procedure Code, tendered a pardon to an accused person, charged jointly with two others for the same offence, who had pleaded guilty. The tender was accepted, and such person was examined as a witness against the other accused. *Held*, that the tender of pardon was not improperly made, and the evidence of the approver was admissible.

[461] *Per DUTHOIT, J.*—The word “supposed” in s. 338 must be taken merely as intended to exclude the case of a man who has actually been convicted of the crime, and not the case of a man, who, although admitted to be a party to the crime, is unconvicted.

Per PETHERAM, C.J.—Where an accused person is not defended, the Court should, in the interests of justice, test the statements of the witnesses for the prosecution, by questions in the nature of cross-examination.

THIS was an appeal from convictions by Mr. R. S. AIKMAN, Offg. Sessions Judge of Aligarh, dated the 2nd August 1884. The appeal came for hearing before DUTHOIT, J., who directed that the case should be laid before a Divisional Bench. The case accordingly came for hearing before PETHERAM, C.J., and DUTHOIT, J. It appeared that the appellants, Kallu and Dungar, together with

* [Sec. 338:—At any time after commitment, but before judgment is passed, the Court to which the commitment is made may, with the view of ob-

Power to direct tender taining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender, or order the committing Magistrate or the District Magistrate to tender a pardon on the same condition to such person.]

one Loka, were charged before the Sessions Judge, under s. 397 of the Penal Code, with dacoity with attempt to cause death or grievous hurt. The accused Loka was further charged, under s. 412, with dishonestly receiving property stolen in the commission of a dacoity. When the charges had been read, Loka pleaded guilty to the charge under s. 397, but claimed to be tried on the charge under s. 412. The other accused pleaded not guilty. At the beginning of the trial the Sessions Judge, on the application of the Government Pleader on behalf of the Crown, exercised the powers given to the Court by s. 338 of the Criminal Procedure Code, tendered a pardon to Loka, and admitted his evidence as that of an approver against the other accused. In the result the Sessions Judge was of opinion that the evidence given by Loka was sufficiently corroborated, and he accordingly convicted both Kallu and Dungar, and sentenced them to be rigorously imprisoned for seven and four years respectively.

In this appeal by Kallu and Dungar the first contention raised on their behalf had reference to the terms of s. 338 of the Criminal Procedure Code, and it was to the effect that no pardon should have been tendered to Loka, nor should he have been accepted as an approver, since he was not merely "supposed" to have been concerned in the offence, but known, on his own admission, to have been concerned in it. The second ground of appeal was, that the testimony of Loka was not sufficiently corroborated by independent evidence to justify the convictions.

Mr. A. Carapet, for the Appellants.

[162] The Junior Government Pleader (Babu Dwarka Nath Banarji), for the Crown.

The Court delivered the following judgments:—

Petheram, C. J.—In this case I think that the convictions and the sentences must be affirmed. The question depends really upon the value of the evidence. The evidence which is material for the whole story was the evidence of the approver. Now the practice, no doubt, of the Courts is, where the evidence of an approver stands alone, to treat it as not of sufficient value to make it safe for the Courts to act upon it, because the man who gives the evidence comes before the Court, practically with the statement:—"I have so little sense of justice that I do not object to commit a crime;" and consequently his testimony cannot be taken as of sufficient value to subject a man to punishment. That, however, does not affect the fact that his evidence is admissible. The story told must be looked to, to see whether it hangs together or not. The story told here is a categorical story, which bears the semblance of truth on the face of it. I think that Magistrates who conduct these inquiries would be wise if they would test the accuracy of such statements by cross-examination themselves. Where the prisoner is not defended, the Magistrate and the Judge himself ought, in the interests of justice, to test the accuracy of the statements made by witnesses, by questions in the nature of cross-examination, and, if that were done with care, I think myself that the result of these inquiries would be more satisfactory. At all events, the evidence of the approver does not appear to have been shaken by cross-examination, and the question is whether independent evidence has been given in this case which corroborates his evidence.

[His Lordship then examined the other evidence in the case, and was of opinion that it sufficiently corroborated the evidence of the approver, and that the appeal should be dismissed.]

Duthoit, J.—The first point raised in this appeal is whether the Judge was right in tendering a pardon to Loka. The second point is whether the

conviction of the appellants upon the evidence given by Loka is good and can be sustained or not. As regards the first point, I think that there was no irregularity in the tender of a pardon to Loka. It is urged with reference to s. 338 of the Crim. [163] inal Procedure Code, that Loka should not have been made an approver, because he was not only "supposed" to have been concerned in the crime, but was, on his own showing, actually concerned in it, and liable to conviction upon his plea of guilty. But I think that the words in question must be taken merely as intended to exclude the case of a man who has actually been convicted of the crime, and not the case of a man like Loka, who, although admitted to be a party to the crime, is unconvicted. I hold, therefore, that the evidence of the approver was rightly taken. Under s. 133 of the Evidence Act a conviction is not illegal simply because it proceeds upon the uncorroborated testimony of an accomplice. Of course, such evidence must be received with great caution, and it has been our practice to require corroboration of such evidence.

[The learned Judge then considered the corroboration in this case, and concurred with the Chief Justice in accepting it as sufficient.]

Convictions affirmed.

NOTES.

[See also (1900) 10 M. L. J., 147.]

[7 All. 163]

APPELLATE CIVIL.

The 18th November, 1884.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE BRODHURST.

Kalian Singh and another.....Defendants

versus

Sanwal Singh.... .Plaintiff.*

Declaratory decree—Cause of action—Hindu widow—Testamentary declaration.

A sonless Hindu widow, in possession of her deceased husband's estate as such, made a statement before a revenue official, which was recorded by him, to the effect that she wished the property to go after her death to her nephew, and that S, the person entitled to succeed her, had no right to the property. *Held*, that such statement, as it was intended to operate, and would have operated, as a will in respect of the property, gave S a right to sue for a declaration that it should not have any effect as against him.

ONE Toudi Singh, a Hindu, governed by the law of the Mitakshara, died without leaving any issue, but leaving a widow named Jamna Kuar. The latter succeeded to certain zemindari shares comprising the separate property of her deceased husband. On the 6th January 1883, at or about the time this succession was recorded in the revenue register, Jamna Kuar made the following deposition :—

[164] "I am the married wife of Toudi Singh. All the zamindari belonging to my husband is recorded in my name. I wish that, after my death,

* First Appeal No. 17 of 1884, from a decree of A. F. Millett, Esq., District Judge of Shahjahanpur, dated the 17th September 1883.

the property left by my deceased husband be given to my nephew, Kalian Singh. Bhikam Singh and Sanwal Singh have no right in the property, and they should not get anything in it. This property was acquired by Ganjan Singh, my grandfather-in-law, who was grandfather of Tondi Singh. It was not acquired by Taj Singh, the common ancestor. [In reply to Bhikam Singh's question, witness stated] My grandfather-in-law and Bhikam Singh's grandfather were brothers; but the property was not acquired by Taj Singh. My father-in-law sold 8 biswas of the claimant's property which is with Bhikam Singh. My husband brought up Kalian Singh from the age of three years, and made him *malik* (proprietor)."

The plaintiff in this suit, Sanwal Singh, who was the person entitled under the Mitakshara law to succeed to the property of Tondi Singh on the death of his widow, brought the present suit against Jamna Kuar and Kalian Singh, to have the statements contained in her deposition declared as of no effect against him. The relief sought by him was thus stated in his plaint:—

"That the statement made by defendant No. 1 (Jamna Kuar) on the 6th January 1883, as her last testament, to the effect that the plaintiff has no right, but that defendant No. 2 (Kalian Singh) will become the owner in future, may be declared null and void, as against the plaintiff, after the Musammat's death."

The defence set up by the defendant Jamna Kuar raised two questions, namely: (i) whether the plaintiff had a cause of action, and (ii) if he had, whether the suit was one in which a declaratory decree should be given. Upon these questions the Court of First Instance (District Judge of Shahjahanpur) observed as follows:—

"Assuming the statement which has led to this suit not to partake of a testamentary character, it is still, in my opinion, sufficient basis for the suit. It has been seen that a denial of title is sufficient, and there can be no question that the statement in question was a very clear and positive denial of the plaintiff's right. The circumstances under which it was made gave it formality. It not only, moreover, denied the plaintiff's right, but in plain terms [165] asserted the right of another person. Under these circumstances I am disposed to think that, even if the statement of defendant No. 1 do not amount to a will, there is sufficient in it, so far as its contents have to be studied, to see whether the suit is maintainable.

"It may be open to question, however, whether the plaint should not be regarded as resting upon the alleged testamentary character of the statement, and it will be better therefore to notice the fourth and fifth of the points above enumerated. It will not be necessary to do so at any length. The validity of a will or the observance of the requisite formalities in its execution do not necessarily affect the question whether a suit challenging its force as against any person is maintainable; the former may be of importance in the defence, if the defence be that the will is valid; the latter may not be immaterial, if the defence be, as it is here, an attempt to divest the document of its testamentary character (as tending to show the document was not intended and could not be considered to possess that character), but it does not appear to me necessary to determine those points for the purpose of deciding whether the suit is maintainable. If the statement is of such a nature that there are reasonable grounds for the apprehension that it was intended as a will, or that it might be regarded as one, I think the plaintiff has sufficient justification for seeking a declaration that the statement has not, as a will, any testamentary force as against him, and if he shows that the statement furnishes such reasonable

grounds, he sufficiently establishes the allegation in the plaint, the only point now under consideration.

"That there are such grounds plaintiff shows by the authorities he quotes. The first of these is Mayne's Hindu Law, 3rd ed., s. 357, and it is there pointed out that petitions to officials or answers to official inquiries have been held to amount to a will. This, moreover, does not rest only on Mr. Mayne's own view of the law, but on important rulings of the Privy Council.* All that defendants can urge is the invalidity of the will, and the absence of various features said to be necessary to a will, and I do not think these suffice to prevent apprehension of the purpose for which the statement was intended or might be used.

"[166] "I think, then, that even if it was necessary for plaintiff to make good the allegation in this plaint in order to render the suit maintainable, he does sufficiently establish the allegation, and the suit is maintainable.

"For the above reasons I find that the suit is maintainable, and the first issue is thus decided in favour of plaintiff.

"The second issue is, whether the suit is one in which a declaratory decree may properly be granted to the plaintiff.

"The only objection raised in the pleadings is that the plaintiff is older than defendant, and thus the reasonable presumption is that the plaintiff will die before defendant No. 1. It is with regard to this argued that declaratory suits should only be allowed when difficulty would arise on the widow's death, and *Chittoo Misser v. Jemah Misser*, I. L. R., 6 Cal., 198, and *Hansbutti Kerain, v. Ishri Dutt Koer*, I. L. R., 5 Cal., 512, are cited in support of the view. The first of these is to the effect that unless such suits were permitted, it might be impossible to bring evidence at the time of the widow's death to prove there was no necessity for alienations, and it would be impossible to prevent the widow from committing irremediable mischief to the estate. The second holds that the Court will not decide, in a declaratory suit, intricate questions of law, where, possibly no effect may be given to its decision, and certainly no immediate effect can be, and when the postponement of the decision to a more appropriate time will not prejudice the plaintiff. To this may be added what I have above quoted from the statement of objects and reasons for Act I of 1877.

"Now in this case defendant No. 1 made a statement to the effect that she wished defendant No. 2 to be owner after her death, and this was the so-called testamentary part of the statement. Had this been all she said, I should have been disposed to hold that the validity of the so-called will might have equally well been inquired into at the death of defendant, if it took place half a century hence. But this was not the whole of her statement; she said that her wish was in accordance with the wish (*marzi*) of her husband, and she thus raised a question on which not improbably evidence might seem necessary, and that evidence would not be equally obtainable half a century hence. Defendant No. 1 further [167] denied plaintiff's right without stating on what grounds she did so, and herself again raised a question on which evidence might seem necessary. By these two latter parts of her statement she thus gave plaintiff reason and occasion to bring a suit at once, and I think the case is one in which a declaration might be properly asked for. The fact that defendant now does not attempt to defend her statement is not a ground for not granting the declaration sought, nor, indeed, is it pleaded by defendant that it is."

* *Mahomed Shumsool Hooda v. Shewukram*, L. R., 2 Ind. Ap., 7; *Hurpurshad v. Sheo Dyal*, I. R., 3 Ind. Ap., 259.

On appeal by the defendants to the High Court, it was again contended that the statements contained in the deposition of Jamna Kuar gave the plaintiff no cause of action.

Mr. A. Carapiet and Babu Baroda Prasad, for the Appellants.

Babu Ram Das Chakarbaty, for the Respondent.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following Judgment:—

Oldfield, J.—The statement made before and recorded by the Revenue Court was intended to operate, and would have operated, as a will in respect of the property, and it gave a valid cause of action to the plaintiff for bringing this suit.

We affirm the decree and dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[The form of a will is immaterial.—(1908) 13 C.W.N., 291.]

[7 All. 167]

The 19th November, 1884.

PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Durga.....Defendant

versus

Haidar Ali.....Plaintiff.

Pre-emption—Rival pre-emptor impleaded as defendant—Act XV of 1877 (Limitation Act), sch. ii, Nos. 10, 120—Remand—Civil Procedure Code, ss. 562, 564.

Two suits to enforce the right of pre-emption in respect of a particular sale having been instituted, the plaintiff in the one first instituted was added as a defendant to the other. *Held*, that, as regards him, the second suit constituted a claim by one pre-emptor against another for determination of the question whether the plaintiff or the defendant had the better right to pre-empt the property, which was a claim essentially declaratory in its nature; and there being no specific provision for such a claim in the Limitation Act, it was governed by art. 120† of that Act, and the right to sue accrued when the first suit was instituted.

* First Appeal No. 47 of 1884, from an order of W. Barry, Esq., District Judge of Banda, dated the 14th April 1884.

† Art. 120:—

Description of suit.	Period of limitation.	Time from which period begins to run.
Suit for which no period of limitation is provided elsewhere in this schedule.	Six years.	When the right to sue accrues.]

THE plaintiff in this suit claimed to enforce the right of pre-emption in respect of the sale of a share in a village. The suit [168] was based on the *wajib-ul-arz* of the village. It appeared that on the 14th December 1882, Nabi Bakhsh, defendant, executed and registered a deed of sale, whereby he conveyed his share in a village to Gayadin and Bhura, defendants. Durga, a co-sharer in the village, instituted a suit, on the 4th December 1883, to enforce the right of pre-emption in respect of that sale. During the pendency of that suit, Haidar Ali instituted the present suit on the 7th December 1883, to enforce the right of pre-emption in respect of the same sale, and on the 21st December 1883, he applied to add Durga as a defendant to his suit, on the ground of his having previously instituted a rival suit for pre-emption. Durga was accordingly impleaded, and a summons was served on him on the 30th of December 1883.

Various pleas were set up in defence of Haidar Ali's suit, but it is not necessary for the purposes of this report to notice any of them, except the plea of limitation set up by the defendant Durga.

The Court of First Instance tried the two suits together. It decreed the claim of Durga, but applying the provisions of the penultimate paragraph of s. 32 of the Civil Procedure Code and those of s. 22 of the Limitation Act and sch. ii, No. 10 of the same enactment, dismissed Haidar Ali's suit, both against Durga and the other defendants, as barred by limitation.

On appeal by Haidar Ali, the Lower Appellate Court held that his suit, so far as it claimed pre-emption against the vendor and the vendees, had an aspect different to his claim against Durga, the rival pre-emptor; that in its former aspect it was governed by one year's limitation under sch. ii, No. 10 of the Limitation Act; that in its other aspect it fell under No. 120 of the same enactment, being a claim for which no special period of limitation is provided in the Act; and that the entire suit was therefore within time.

On these findings the Lower Appellate Court set aside the decree of the Court of First Instance in the suit of Haidar Ali, and remanded the case for disposal on the merits.

From that order the present appeal was preferred by Durga, and in his memorandum of appeal he contends that the suit, as against him, was barred by limitation; that even if it were not so barred, the Lower Appellate Court should, instead of remanding the case, [169] have disposed of it finally, there being on the record the entire evidence produced by the parties; and that the order as to costs was erroneous.

Munshi Sukh Ram, for the Appellant.

Munshi Hanuman Prasad, for the Respondent.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

Mahmood, J.—We are of opinion that the appeal, so far as it relates to the question of limitation, has no force. Haidar Ali's suit, so far as it claimed pre-emption in respect of the sale of 14th December 1882, was properly instituted within a year after the sale, and the vendor and the vendees, necessary parties to such a suit, were duly impleaded.

The suit was governed by art. 10 of the Limitation Act, and was obviously within time. So far as the position of Durga, appellant, is concerned, it is true that he was impleaded as defendant to the suit after the lapse of one year from the date of the sale. But the claim against him is not of the nature contemplated by art. 10 of the Limitation Act. He was impleaded, not because he was a party to the sale in respect of which pre-emption was sought

to be enforced, but because he had, by instituting a rival suit for pre-emption, rendered it necessary for the plaintiff Haidar Ali to pray in his suit for the declaration that he had a right of pre-emption preferential to that of the defendant Durga. Such a claim cannot be regarded as a claim for pre-emption, but a claim to establish a right to pre-empt the property in preference to a rival pre-emptor. In other words, the suit, so far as it relates to Durga, constituted a claim by one pre-emptor against another for determination of the question whether the plaintiff or the defendant had the better right to pre-empt the property. The claim was essentially declaratory in its nature, and there being no specific provision for such a claim in the Limitation Act, it was rightly held by the Lower Appellate Court to be governed by art. 120 of the Limitation Act,—the right to sue against Durga having accrued when the latter instituted his pre-emptive suit on the 4th of December 1883.

But we are of opinion that the third ground of appeal has force. The learned pleaders for the parties admit that the record of the [170] case is complete, and that, although Haidar Ali respondent's suit was disposed of by the Court of First Instance on a preliminary point, yet that Court did not exclude any evidence offered by the parties. Such being the case, we are of opinion that s. 562 of the Civil Procedure Code was not applicable, and the order of the Lower Appellate Court remanding the case for a second decision was opposed to the express provisions of s. 564 of the Code. We must therefore, whilst upholding the view of the Lower Appellate Court on the question of limitation, set aside the order of that Court, and direct it to dispose of the case itself on the merits, with reference to the issues raised by the pleadings of the parties. This view renders it unnecessary for us to dispose of the last ground of appeal, which relates to costs.

We decree this appeal, and, setting aside the order of the Lower Appellate Court so far as it relates to the suit of Haidar Ali, plaintiff-respondent, remand the case to that Court for disposal according to law. Costs to follow the result.

Appeal allowed.

NOTES.

[As regards the necessity of joining the vendor etc., as parties and the point of limitation, see also (1889) P.R., 134; (1890) 13 All., 126; (1897) 20 All., 35; (1905) P.L.R., 86; (1905) 2 A.L.J., 151; (1912) 14 I. C., 328.]

[7 All. 170]
FULL BENCH.

The 19th November, 1884.

PRESENT :

'SIR W. COMER PETHERAM, Kt., CHIEF JUSTICE, MR. JUSTICE OLDFIELD,
MR. JUSTICE BRODHURST, MR. JUSTICE MAHMOOD, AND
MR. JUSTICE DUTHOIT.

Ram Ghulam.....Plaintiff

versus

Dwarka Rai and others.....Defendants.*

*Civil Procedure Code, s. 244—Mesne profits—Decree for possession of
immoveable property—Reversal of decree on Appeal—Appellate
decree silent as to mesne profits—Suit for recovery of
mesne profits.*

The plaintiff in a suit for possession of immoveable property obtained a decree for possession thereof, and in execution of the decree obtained possession of the property. This decree was subsequently reversed on appeal by the defendant. The decree of the Appellate Court was silent in respect of the mesne profits which the plaintiff had received while in possession. The defendant instituted a suit to recover those profits.

Held, per PETHERAM, C.J., and OLDFIELD, BRODHURST, and DUTHOIT, JJ., that the suit was not barred by s. 244 of the Civil Procedure Code, the question raised by such suit, although it might have arisen out of the decree of the Appellate Court, not "relating to the execution, discharge or satisfaction of the decree," within the meaning of that section, (because, at that time, no such question had [171] arisen or was in existence), and therefore not, one in respect of which a separate suit is barred by that section.

Partab Singh v. Beni Ram, I. L. R., 2 All., 61, distinguished by OLDFIELD, J.

Per MAHMOOD, J.—That the suit was not barred by s. 244, the mesne profits sought to be recovered not having been realized in execution of the decree reversed on appeal.

Per DUTHOIT, J.—The words in cl. (c) of s. 244, "any other questions arising, &c.," should be read as "any other questions directly arising"; otherwise the most remote inquiries would be possible in the execution department.

THIS was a reference to the Full Bench by MAHMOOD and DUTHOIT, JJ. The portion of the referring order in which the facts of the case were stated was as follows:—

"This is an appeal from a decree of Babu Mrittonjoy Mukerji, Subordinate Judge of Ghazipur, reversing a decree of the Munsif of Ghazipur, and dismissing a suit instituted by the plaintiff (appellant) on the 27th July 1882, against the defendants (respondents) for the recovery of Rs. 796-8-0, under the following circumstances:—

"On the 21st October 1878, Sheocharan mortgaged usufructually to Ram Ghulam certain property, and put the mortgages into possession. On the 24th November 1879, Sheocharan borrowed from Ram Ghulam some more money, and secured the loan upon the former mortgage. On the 21st June 1880, Sheocharan sued for redemption of the mortgage of the 21st October 1878.

*Second Appeal No. 1223 of 1883, from a decree of Babu Mrittonjoy Mukerji, Subordinate Judge of Ghazipur, dated the 25th May 1883, affirming a decree of Babu Nilmadhub Roy, Munsif of Ghazipur, dated the 12th December 1882.

He was met by the plea that without satisfaction of the tacked mortgage of 1879, he was not entitled to redemption. The Munsif of Ghazipur, in whose Court the suit was heard, found the document of the 24th November 1879 to be a forgery, and decreed redemption as prayed. Execution of this decree was taken out, and Ram Ghulam was formally dispossessed under it on the 3rd December 1880. Meanwhile Ram Ghulam had appealed to the District Judge, who, on the 1st February 1881, reversed the Munsif's decree, and declared the mortgagor not entitled to redemption till he should satisfy the tacked mortgage of 1879. Sheocharan appealed to this Court, which, on the 19th December 1881, dismissed his appeal with costs.

"Neither the decree of this Court nor the decree of the District Judge provided for the contingency of possession of the property having been obtained by the mortgagor under the decree of the [172] Munsif. On the 17th July 1882, Ram Ghulam recovered possession of the property in execution of the final decree of this Court. He has in this suit alleged that he was, as a fact, dispossessed by Sheocharan and the other defendants, on the 6th August 1880, not in due course of law, but before the date of the Munsif's decree, and he has sued for the recovery of the sum claimed as compensation for the loss of the profits of the property between that date and the 17th July 1882. Among other pleas taken by Sheocharan in his defence, was one to the effect that the suit is barred by the provisions of s. 244 of the Civil Procedure Code. The Court of First Instance overruled this plea, found that the plaintiff's allegations as to the joint action of the defendants in dispossessing him and as to the date and manner of dispossession were correct, and decreed the plaintiff's claim to the extent of Rs. 250 against all the defendants. The defendants appealed. The Lower Appellate Court has found that the plaintiff was not dispossessed on the 6th August 1880, by all the defendants, but was dispossessed in due course of law by Sheocharan, defendant, alone on the 3rd December 1880, and it has dismissed the plaintiff's suit on the ground that it is barred by the provisions of s. 244 of the Code of Civil Procedure.

"It is contended in second appeal that it is not so barred."

The learned Judges referred the following question to the Full Bench:—

"When a person is deprived of the possession of immoveable property in execution of a decree, which is afterwards set aside in appeal by a decree which is silent as to the disposal of the proceeds of the property during the interval between the date of effect being given to it and the date on which effect was given to the decree reversed by it, is a suit brought by such person to recover compensation for the loss of such property, or is it not, barred by the provisions of s. 244 of the Code of Civil Procedure?"

Munshis *Kashi Prasad* and *Hannuman Prasad*, for the Appellant.

The *Senior Government Pleader* (*Lala Juala Prasad*), for the Respondent.

Counsel for the Appellant were not called on.

For the respondents it was urged that the question in the present suit was one arising between the parties to the suit in [173] which the decree was passed, and relating to the execution, discharge, or satisfaction of the decree within the meaning of s. 244 of the Civil Procedure Code; and, in support of this contention, it was argued that the decree of the Appellate Court reversing the original decree also set aside all that had been done in pursuance thereof, and therefore entitled the defendant to restoration of mesne profits without instituting a fresh suit.

The following judgments were delivered by the FULL BENCH :—

Petheram, C. J.—I am of opinion that this suit is not barred by s. 244 of the Code of Civil Procedure. The original suit was instituted by the respondent Sheocharan in 1880 for redemption of a mortgage; he obtained a decree, and, in the execution of that decree, the present appellant was dispossessed of the mortgaged property, and the decree-holder obtained possession. He remained in possession for more than a year and the decree was then reversed on appeal; but the Appellate Court made no order in regard to the profits which he had received while in possession. The present suit was instituted by the appellant to recover compensation for the loss of these profits. Now, we have two questions to consider. First, could the appellant have recovered the profits under the decree of the Appellate Court? Secondly, was he bound to recover them in that manner, or could he maintain a fresh suit for them?

For my own part I doubt whether the appellant could have recovered the profits in execution of his decree. The value of the profits is a question which was not then tried, and I do not see what means the Court had of deciding it, or of giving effect to any order for restitution of profits. The real question before us is, whether this is a matter "arising between the parties to the suit in which the decree was passed, and relating to the execution, discharge, or satisfaction of the decree." It may be that the present question arose out of the decree; but it did not "relate to the execution, discharge, or satisfaction of the decree," because at that time no such question had arisen or was in existence. I am therefore of opinion that, whatever powers the Court might possess as to ordering restitution of the amount received by the respondent during his wrongful possession, such a question is not one of the kind referred to in s. 244 of the Civil Procedure Code in respect of which a [174] separate suit is barred. The real meaning of s. 244 would seem to be that the decree must be enforced by execution, and that the decree-holder may not bring an action upon the decree itself.

Oldfield, J.—I am of the same opinion; but I wish to distinguish the present case from *Partab Singh v. Beni Ram*, I. L. R., 2 All., 61, which has been referred to. In that case the decree was for mesne profits, which were therefore properly recoverable in the execution-department, but here the decree was silent as to mesne profits.

Brodhurst, J.—I also am of opinion that the suit is maintainable.

Mahmood, J.—I concur in the conclusion arrived at by the learned Chief Justice, on the ground that the mesne profits collected by the respondent were not realized by him in execution of the decree which was reversed on appeal.

Duthoit, J.—I also concur with the Chief Justice; but I wish to add that the words in cl. (c) of s. 244, "any other questions arising," &c., should be read as "any other questions directly arising;" otherwise the most remote inquiries would be possible in the execution department.

NOTES.

• [In the C. P. C., 1908, sec. 144 is drafted in very wide terms and makes statutory provision for restitution.

The decision in 7 All., 170 was followed in (1887) 14 Cal., 605; 484; see also (1894) 21 Cal., 989; (1886) 9 Mad., 506; (1887) 11 Mad., 261; (1895) 22 Cal., 501; (1902) P.R., 29; (1884) 7 All., 197; (1885) 7 All., 432.]

[7 All. 174]

The 22nd November, 1884.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE OLDFIELD,
MR. JUSTICE BRODHURST, MR. JUSTICE MAHMOOD,
AND MR. JUSTICE DUTHOIT.

Queen-Empress

versus

Juala Prasad.

Criminal Procedure Code, ss. 233, 234—Joinder of charges—Offences of the same kind committed in respect of different persons.

Where a post-master was accused of having, on three different occasions, within a year, dishonestly misappropriated moneys paid to him by different persons for money orders, held that, the offences of which such person was accused being the dishonest misappropriations by a public servant of public moneys, (for as soon as they were paid they ceased to be the property of the remitters), such offences were "of the same kind," within the meaning of s. 234* of the Criminal Procedure Code, and such person might, therefore, under that section, be charged with and tried at one trial for all three offences.

Empress v. Murari, I.L.R., 4 All., 147, observed on.

THIS was an application to the High Court to exercise its powers of revision under s. 439 of the Criminal Procedure Code. The applicant was the post-master of the city or branch post-office at Budaun. He was tried by Mr. C. F. Hall, Magistrate of [175] the Budaun District, under s. 409 of the Penal Code, for criminal breach of trust in regard to three sums of money paid to him by different persons for money-orders. All three offences were committed in the year 1883. The Magistrate, by an order dated the 3rd May 1884, convicted the applicant of each offence, and sentenced him to one year's rigorous imprisonment under each conviction,—in all, to three years' rigorous imprisonment. On appeal to the Sessions Judge of the Bijnor-Budaun Division, Mr. J. C. Leupolt, it was contended on behalf of the applicant that, with reference to the case of *Empress v. Murari*, I. L. R., 4 All., 147, the joinder of charges was improper. The Sessions Judge, in an order dated the 5th July 1884, disposed of the contention thus:—"With reference to the High Court ruling, I believe the Calcutta Court (*Manu Miya v. The Empress*, I.L.R., 9 Cal., 371) have more recently decided that the law does not require the three offences to be against the same person."

The same contention was raised on behalf of the applicant on the present application, which came before DUTHOIT, J., who referred it to a Divisional Bench, observing as follows:—

"The Session Judge ought not to have followed the authority of another High Court so long as the authority of this Court, to which he is subordinate, was against the views he wished to take of the point raised before him. But

*[Sec. 234:—When a person is accused of more offences than one of the same kind, committed within the space of twelve months from the first to the last of such offences, he may be charged with, and tried at one trial for, any number of them not exceeding three.

Three offences of same kind within year may be charged together. Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code, or of any special or local law.]

there can, I think, be no doubt that the view of the law stated in *Murari's Case* is erroneous; and the Junior Government Pleader informs me that Mr. Justice STRAIGHT, who was a party to that decision, recently expressed from the Bench an opinion to this effect. The difference between the terms of s. 453 of Act X of 1872 and those of s. 234 of the present Code of Criminal Procedure, is not sufficient to enable me to get over the difficulty by ruling that the limitation presented in *Murari's Case*, whatever it may have been under the old law, is inapplicable under s. 234 of the present Code. Could I hold myself competent to do so, I should refer to a Full Bench the following question:—With reference to the terms of s. 234 of the Code of Criminal Procedure, is it, or is it not, necessary that the three offences contemplated by that section should have been committed against the same person? But with reference to the [176] terms of Rule of Practice No. 2 of 1870, I do not find myself competent to do more than order the case to be heard by a Division Court of two Judges."

The case was accordingly laid before PETHERAM, C.J., and DUTHOIT, J., who referred the following question to the Full Bench, namely:—

"With reference to the terms of s. 234 of the Code of Criminal Procedure, is it, or is it not, necessary that the three offences contemplated by that section should have been committed against the same person?"

Mr. C. Dillon and Pandit Nand Lal, for the Applicant.

The Junior Government Pleader (Babu Dwarka Nath Banarji), for the Crown.

Pandit Nand Lal, for the Applicant.—The prisoner in this case objected to the single trial, and the objection was disallowed by the Sessions Judge. We rely on the case of *Empress v. Murari*, I. L. R., 4 All., 147, in which it was laid down by STRAIGHT and TYRRELL, JJ., that "the combination of three offences of the same kind for the purpose of one trial, can only be where they have been committed in respect of one and the same person, and not against different prosecutors, within the period of twelve months, as provided by the Criminal Procedure Code." This case was no doubt dissented from by the Calcutta High Court (FIELD and NORRIS, JJ.) in *Manu Miya v. The Empress*, I. L. R., 9 Cal., 371. In that case, however, NORRIS, J., showed that the practice in England, in cases of felony, is to allow an objection by the prisoner to the joint trial. [PETHERAM, C.J.—The practice in England has nothing to do with the question referred to us. That can only be decided with reference to the construction to be placed on ss. 233 and 234 of the Criminal Procedure Code.] In India, where the distinction between felonies and misdemeanours does not exist, the practice of allowing the prisoner's objection to joint trial should, as a matter of expediency, be applied to all offences. The Calcutta High Court admit that it may be the better course for charges not to be joined, and that "the Court should at all times be anxious to lend a willing ear to any application," for separation of charges, and for separate trials.

[177] [DUTHOIT, J.—We have not to consider the expediency, but only the legality of the course pursued by the Magistrate and Judge. PETHERAM, C.J.—the reason of the practice in England is that the jury, who in England are judges of the facts, may not be prejudiced against the prisoner when he is being tried upon one charge, and evidence has just been given against him upon the other charges. In this country, the whole case is generally tried by a Judge, who is supposed to be less accessible to prejudice, and who, under s. 234, "may" separate the charges, if the joint trial would be unfair to the accused.]

The Junior Government Pleader (Babu Dwarka Nath Banarji), for the Crown.

"The following judgment was delivered by the FULL BENCH:—

Petheram, C.J. (OLDFIELD, BRODHURST, MAHMOOD, and DUTHOIT, JJ., concurring). I have no doubt that this case was properly decided, and that three charges of this kind may be joined under s. 234 of the Criminal Procedure Code. The question is of the simplest possible kind, being one merely of the proper construction to be placed upon the two ss. 233 and 234 of the Code. Section 233 provides that "for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in ss. 234, 235, 236 and 239." This section contains the general law, and the reason of it is, that the mind of the Court might be prejudiced against the prisoner if he were tried in one trial upon different charges resting on different evidence. It might be difficult for the Court trying him on one of the charges not to be unfairly influenced by the evidence against him on the other charges.

The Legislature has, however, made certain exceptions. One of these is contained in s. 234 of the Code, which provides that when a person is accused of more offences than one of the same kind, committed within the space of twelve months from the first to the last of such offences, he *may* be charged with and tried at one trial for, at all events, as many as three of them. In this case we have a public servant accused of having, on three occasions, embezzled moneys which were public property, for, as soon as they were paid to him, they ceased to be the property of the persons [178] who paid them. All three acts of embezzlement were committed within one year, and each was committed in the same circumstances as the others. How can it be said that these offences were not "of the same kind?" They did not merely resemble each other, but were the same offence. I see no reason why they should not be joined in the same trial; and I am of opinion that the Magistrate was right in joining them. As regards the case of *Empress v. Murari*, I. L. R., 4 All. 147, to which reference has been made, that was decided by Mr. Justice STRAIGHT under a different statute, and his decision in that case will be unaffected by ours in this.

NOTES.

[This was followed in (1908) 9 C. L. J., 149.]

[7 All. 178]

The 29th November, 1884.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE OLDFIELD,
MR. JUSTICE BRODHURST, MR. JUSTICE MAHMOOD, AND
MR. JUSTICE DUTHOIT.

Jawahra and others.....Defendants

versus

Akbar Husain.....Plaintiff.*

Religious endowment—Mosque—Form of suit—Right to sue—

Civil Procedure Code, ss. 30, 539.

Every Muhammadan who has a right to use a mosque for purposes of devotion is entitled to exercise such right without hindrance, and is competent to maintain a suit against any

* Second Appeal No. 1499 of 1883, from a decree of C. W. P. Watts, Esq., District Judge of Saharanpur, dated the 13th August 1883, affirming a decree of Maulvi Muhammad Sayid Khan, Munsif of Muzaffarnagar, dated the 16th February 1883.

one who interferes with its exercise, irrespective of the provisions of ss. 30* and 539† of the Civil Procedure Code.

Section 30 of the Civil Procedure Code applies only to cases in which many persons are jointly interested in obtaining relief, and not to cases in which an individual right has been violated.

Zafarayab Ali v. Bakhtawar Singh, I. L. R., 5 All., 497, referred to. *Jan Ali v. Ram Nath Mundul*, I. L. R., 8 Cal., 52, dissented from.

THE plaintiff in this case stated that in a village belonging to the plaintiff there was an "old dilapidated mosque intended for Muhammadan worship," which "was protected and looked after" by him and other Muhammadans of the village; that in consequence of the mosque and its appurtenances being "*wakf*," it had been excluded from the partition of the village, and the plaintiff intended to repair the mosque; that the defendants had enclosed a part of the land, and had also erected a mill on a part of it; that they had, by means of certain erections of thatch and mud, converted the mosque into a place for storing straw—all of which acts they had wrongfully done; that the plaintiff had remonstrated with the defendants and asked them to remove the things, but they paid no attention to this request, and prevented the plaintiff from making repairs; and that these "unlawful acts of the defendants were calculated to affect the character of the said endowed property, and were an insult to the religion." Upon these allegations, the plaintiff claimed "a declaration of his right to repair the old dilapidated mosque.....by removal of the defendants' interference," and the demolition of the compound, and removal of the mill, the thatches, and the straw stored in the mosque. The plaintiff concluded with these words:—"Suit brought according to the doctrines of the Muhammadan religion and on written and oral evidence." The defendants did not deny the acts imputed to them by the plaintiff. They defended the suit upon the grounds, amongst others, that the building which was the subject-matter of the suit was not a mosque but an "*atta* or fortress made for the purpose of shelter from robbers in former days"; and that the

* [Sec. 30:—Where there are numerous parties having the same interest in one suit, one or more of such parties may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of all parties so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such parties either by personal service or (if from the number of parties or any other cause such service is not reasonably practicable) by public advertisement, as the Court in each case may direct.]

† [Sec. 539.—In case of any alleged breach of any express or constructive trust created for public, charitable or religious purposes, or whenever the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General acting *ex-officio*, or two or more persons having a direct interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit in the High Court or the District Court within the local limits of whose civil jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

- (a) appointing new trustees under the trust;
- (b) vesting any property in the trustees under the trust;
- (c) declaring the proportions in which its objects are entitled;
- (d) authorizing the whole or any part of its property to be let, sold, mortgaged or exchanged;
- (e) settling a scheme for its management;

or granting such further or other relief as the nature of the case may require.

The powers conferred by this section on the Advocate-General may, outside the Presidency towns, be, with the previous sanction of the Local Government, exercised also by the Collector or by such officer as the Local Government may appoint in this behalf.

Act No. X of 1840, Section 2, is hereby repealed.]

plaintiff had no right to repair it. The Court of First Instance found that the building was a mosque and not an "atta," and held that "the plaintiff, as a Muhammadan and guardian of religious buildings, was entitled to repair the mosque." It therefore gave the plaintiff a decree as claimed. On appeal, the defendants contended that "a claim for endowed property cannot be instituted and heard without the permission of the Advocate-General under Act XX of 1863." Upon this point the Court observed as follows:—"The first ground of appeal must be overruled. In a similar case—*Zafaryab Ali v. Bakhtawar Singh*, I. L. R., 5 All., 497,—our own High Court have just ruled that s. 539 of the Civil Procedure Code would not apply, and that the plaintiffs, as persons entitled to frequent the mosque can maintain the suit. This, however, is quite opposed to a ruling of the Calcutta High Court—*Jan Ali v. Ram Nath Mundul*, I. L. R., 8 Cal., 32." The Court also observed as follows:—"Respondent said at first that he was the only Musalman in the village, the population of which is variously stated by appellants as 500 or 600, by respondent as only 70. If this be so, of course s. 30 of the Civil Procedure Code would not [180] apply. But it comes out that there is at least one other, Shaikh Jani, the custodian of a shrine or *dargah*, with his son or sons." The decree of the Court of First Instance was affirmed.

On second appeal, the defendants contended (i) that the suit was not maintainable in its present form, as no special right to sue in the plaintiff was disclosed; and (ii) that as there were probably other Muhammadan residents in the village, the suit was not maintainable without compliance with the provisions of s. 30 of the Civil Procedure Code.

The Divisional Bench (MAHMOOD and DUTHOIT, JJ.) hearing the appeal made the following ORDER OF REFERENCE to the Full Bench:—

"The grounds taken in this appeal and the arguments in their support by the learned pleader for the appellants, raise a question of much difficulty and considerable importance. The question relates to the *locus standi* possessed by Muhammadans to institute suits which relate to their religious and charitable endowments and buildings, where the cause of action alleged is stated to be either injury to such buildings, or malversation of the funds, or wrongful alienations of such property, or other similar circumstances which are destructive to, or inconsistent with the objects of such endowments or *wakf* property. The question has become more complicated by reason of the provisions of the law as contained in ss. 30 and 539 of the Civil Procedure Code.

In the case of *Zafaryab Ali v. Bakhtawar Singh*, I. L. R., 5 All., 497, a Division Bench of this Court held that a suit to set aside a mortgage of endowed property belonging to a mosque, the decree enforcing the mortgage, and the sale of the mortgaged property in execution of that decree, and for the demolition of buildings erected by the purchaser, and the ejectment of the purchaser, was maintainable by Muhammadans entitled to frequent the mosque and to use the other religious buildings connected with the endowment. It was also held that s. 539 of the Civil Procedure Code had no application to the case, the endowment being a religious institution within the meaning of s. 24 of the Civil Courts Act (VI of 1871), and therefore governed by Muhammadan Law. On the other [181] hand, in the case of *Jan Ali v. Ram Nath Mundul*, I. L. R., 8 Cal., 32, the Calcutta High Court applied s. 539 of the Civil Procedure Code to similar suits, by holding that so much of the prayer in the plaint as fell within the provisions of s. 539 of the Code, the plaintiffs were not entitled to sue for, as they were not "persons having a direct interest in the trust" within the meaning of the section. It was also held in that case that, though the plaintiffs might possibly have obtained leave to sue

under s. 30 of the Code on behalf of themselves and the other persons attending the mosque, they, not having obtained such leave, were not entitled to institute a suit for the purpose of obtaining the relief asked for. This ruling was referred to in the case already cited, but although there is no express allusion to the case in the judgment of this Court, the ruling was apparently disapproved. Again, in the case of *The Muhammadan Association of Meerut v. Bakshi Ram*, I. L. R., 6 All., 284, a Division Bench of this Court appears to have approved of the rule laid down by the Calcutta Court so far as s. 30 of the Code is concerned.

In view of its great importance we refer to the Full Bench the following question :—

Can any Muhammadan or Muhammadans maintain a suit like the present, irrespective of the provisions of ss. 30 and 539 of the Civil Procedure Code ? "

Munshi Kashi Prasad, for the Appellants.—The property to which the suit relates is endowed property. Such property belongs to the Muhammadan community. The right of Muhammadans in such property is like the right in a public road. PETHERAM, C. J. It is more like the right in a private road. The plaintiff, as a Muhammadan, has not such an interest in the property, as entitles him to maintain a suit on his own account. He ought to have sued for the Muhammadan community. PETHERAM, C. J. Your argument would be good if the Muhammadan community were the public. *Jan Ah v. Ram Nath Mundul*, I. L. R., 8 Cal., 32, is in point.

Mr. *Amiruddin*, for the Respondent.

The following judgments were delivered by the FULL BENCH : —

Petheram, C.J.—I have no doubt that the plaintiff was competent to maintain this action. The question has arisen in consequence of the peculiar way in which property of this kind is held. According to Muhammadan custom, the property in a mosque and in the land connected with it is vested in no one. It is not the subject of human ownership, but all the members of the Muhammadan community are entitled to use it for purposes of devotion whenever the mosque is open. Now, the Muhammadans are only a part of the population of this country, so that the right is not vested in the general public, and therefore it resembles a right in a private way. Everyone who has such a right is entitled to exercise it without hindrance, and has a right of action against anyone who interferes with its exercise. It is not a joint right; it is a right which belongs to many people. Section 30 was meant to apply to a case in which many persons are jointly interested in obtaining relief; and where, under the old law, it would have been necessary for all of such persons to be joined, s. 30 prevents the record from being unnecessarily encumbered by many names, and allows one or more, with the permission of the Court, to sue or defend on behalf of all. The rule was introduced in order to prevent rich persons from joining together and putting forward a pauper to conduct the suit, and thus escaping all costs. In the present case it is clear that an individual right has been violated, and that an action will therefore lie.

Mahmood, J.—I wish to add a few observations regarding the Muhammadan Law as to endowments generally, and in particular as to mosques. It must, in the first place, be shown that the Muhammadan people have a right to maintain a suit like the present. But authorities on such a point need not be cited, for the principle is too well known among Muhammadan lawyers. The rule of the Muhammadan Law on the subject is that when anyone has resolved to devote his property to religious purposes, as soon as his mind is made up and his intention declared by some specific act, such as delivery, etc.,

an endowment is immediately constituted; his act deprives him of all ownership in the property, and, to use the technical language of Muhammadan lawyers, vests it in God "in such a manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God by the advantage of it resulting to His creatures."

[183] A mosque is an endowment of this kind, and the Muhammadan community, or any member of it, has a right to enter the mosque and to pray there. The learned Chief Justice has shown that, under the circumstances in India, a mosque cannot be regarded as vested in the public at large, but in the Muhammadan part of the public, and it cannot be said that any Muhammadan is bound to maintain a suit on behalf of the public generally. The right of a Muhammadan to use a mosque is, as the learned Chief Justice has said, like the right to use a private road; any one who has the right may maintain a suit in respect of it. This settles the question as to s. 30 of the Civil Procedure Code. That section applies only to cases where no *individual* right is interfered with; but here we have the case of a mosque in a small village, and one of the worshippers in that mosque is obstructed in his use of it for purposes of devotion. He had a private right, and it was violated.

In regard to s. 539 of the Civil Procedure Code, I was one of the Bench who made this reference, and I wish to add my reasons for holding that the section does not apply to the present case. There is here no question of trust or trustee, or of malversation of trust funds, or other breach of trust. The object of such a suit as this is not such as is contemplated by any of the various clauses of s. 539. In conclusion, I have a few words to say regarding the case which has been cited—*Jan Ali v. Ram Nath Mundul*, I. L. R., 8 Cal., 32,—decided in the Calcutta High Court by PRINSEP and FIELD, JJ. Towards the end of the judgment in that case the following observations occur:—"Now, so far as regards these prayers, we think that the plaintiffs were not authorized to institute this suit merely by reason of having that interest which is set out in para. 10 in the plaint, that is, an interest created by their being followers of the Moslem religion, living in the vicinity of the mosque, and being in the habit of attending the musjid. That interest is common to them with a large number of other persons—common to them with, we will not say all the Muhammadan population of the country, but certainly with all the Muhammadan residents in the vicinity; and we think that this is a case which falls within the provisions of s. 30 of the Civil Procedure [184] Code. That section enacts that 'where there are numerous parties having the same interest in one suit, one or more of such parties may, with the permission of the Court, sue, or be sued, or may defend in such suit, on behalf of all parties so interested.' It may be quite possible that if these plaintiffs had applied to the Court under the provisions of s. 30, they would have obtained permission to institute this suit; but, not having obtained that permission, they certainly were not entitled to institute the suit; and, under the circumstances, we think that the ground of objection taken by the defendants in the second paragraph of their written statement, and which forms the subject of the second issue, was a good objection; and that this suit was properly dismissed by the District Judge." Now, with all due deference to the learned Judges who delivered that judgment, I dissent from the remarks which I have just read. I hold that it is an undoubted principle of Muhammadan Law that the persons who have the most direct interest in a mosque are the worshippers who are entitled and accustomed to use it. It is impossible to imagine whose interest in the mosque can be direct if theirs is not, and I should say, that even if this case fall under the purview of s. 539, they would have *locus standi* to maintain the suit. But, for the

reasons which I have already given, I am of opinion that neither s. 30 nor s. 539 of the Civil Procedure Code applies to the present case, and that the plaintiff was competent to maintain the suit.

My answer to the reference is, therefore, in the affirmative.

Oldfield, Brodhurst, and Duthoit, JJ., concurred.

NOTES.

[For similar rulings see also (1906) 33 Cal., 789 ; (1893) 20 Cal., 810 ; (1896) 18 All., 227 ; (1897) 24 Cal., 385 ; (1899) 24 Bom., 170 ; (1905) 2 C. L. J., 460 ; (1906) 33 Cal., 905 ; (1888) 11 All., 18.]

[7 All. 184]

The 29th November, 1884.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE OLDFIELD
MR. JUSTICE BRODHURST, MR. JUSTICE MAHMOOD, AND MR. JUSTICE
DUTHOIT.

Gandharp Singh and another.....Defendants *

versus

Sahib Singh and another.....Plaintiffs.*

Pre-emption—Wajib-ul-arz—"Co-sharer"—Joint Hindu family.

The members of a joint and undivided Hindu family, other than that member who is recorded in the Collector's book as a sharer in the mahal, are "co-sharers," for the purposes of pre-emption, in the sense of the *wajib-ul-arz*.

[185] THE plaintiffs in this case, recorded in the revenue registers as co-sharers in a village, sued to enforce the right of pre-emption in respect of the sale by another co-sharer of his rights in the village. The suit was based on the *wajib-ul-arz* and village custom. That document gave "co-sharers," as against strangers, a right of pre-emption, in the case of a sale by a co-sharer of his rights in the village. The sale in question had been made to four persons, two of whom were recorded in the revenue registers as co-sharers in the village. The other two were Gandharp Singh and Bisal Singh, sons of Ishri Singh. Ishri Singh was recorded in the revenue records as a co-sharer. The share in respect of which his name was so recorded was joint Hindu family property. The main defence to the suit was that the defendants-vendees were co-sharers in the village and that therefore the plaintiffs' suit was not maintainable.

The Court of First Instance (Munsif of Etawah) held that the defendants-vendees, Gandharp Singh and Bisal Singh, were not "co-sharers" in the village within the meaning of the *wajib-ul-arz*, because, although as members of a joint Hindu family, they might be interested in the share recorded in their father's name, their names were not recorded as co-sharers in the revenue registers. It further held that, although the other defendants-vendees were "co-sharers," yet the sale was invalid, in regard to them also, as they had joined in purchasing with persons who were not "co-sharers." It accordingly gave one of the plaintiffs, Aman Singh, a decree, refusing, for reasons which it is not material for the

* Second Appeal No. 1418 of 1883, from a decree of Maulvi Mahmud Bakhsh, Subordinate Judge of Mainpuri, dated the 4th August 1883, affirming a decree of Pandit Kashi Narain, Munsif of Etawah, dated the 9th April 1883.

purposes of this report to state, to give the other plaintiff a decree. On appeal by the defendants-vendees the Lower Appellate Court (Subordinate Judge of Mainpuri) also held that Gandharp Singh and Bisal Singh were not "co-sharers." It observed as follows:—"As to the above point I am of opinion that under the decisions in *Heera Lal v. Khowanee*, N.-W. P. S. D. A. Rep., 1865, p. 71, and *Bheekum Singh v. Gordhun Singh*, N.-W. P. S. D. A. Rep., 1865, p. 251, the son cannot be considered to be a sharer by virtue of his right of inheritance. When Gandharp Singh and Bisal Singh cannot be considered to be co-sharers in the village, they are strangers. The co-sharers in the *wajib-ul-arz* mean those persons who are entered in the *khevat*."

[186] On second appeal by the defendants-vendees Gandharp Singh and Bisal Singh, it was contended on their behalf that they were co-sharers in the village, within the meaning of the *wajib-ul-arz*, and that the suit was therefore not maintainable as against them.

The Division Bench (STRAIGHT, Offg. C. J., and DUTHOIT, J.), hearing the appeal referred the following question to the Full Bench:—

• "Are the members of a joint and undivided Hindu family, other than that member who is recorded in the Collector's book as a sharer in the mahal, co-sharers for the purposes of pre-emption in the sense of the *wajib-ul-arz*?

Pandits *Ajudhia Nath* and *Nand Lal*, for the Appellants.

Babu *Jogindro Nath Chaudhri*, for the Respondents.

Pandit *Ajudhia Nath*.—The vendees Gandharp Singh and Bisal Singh are "co-sharers" in fact. Their not being recorded is immaterial, so far as the right of pre-emption is concerned. [He was stopped.]

Babu *Jogindro Nath*.—It is not denied that, according to the Mitakshara law, the son of a Hindu father is regarded as a co-sharer with his father. But with reference to the right of pre-emption, which, under the *wajib-ul-arz*, rests on contract, those only who have signed the contract, i.e., whose names are recorded, can be regarded as parties to the contract, and competent to claim rights by virtue of it. [DUTHOIT, J.—You say in fact that apart from the paper, there is no right of pre-emption, and that therefore those only who have signed the paper are enjoying the right? PETHERAM, C. J.—Is not the *wajib-ul-arz* the evidence of the contract, rather than the contract itself?] Sometimes the *wajib-ul-arz* not only states the customs of those living under it, but incorporates contracts made by them. These contracts are sometimes introductory of new rights: thus the right of pre-emption may be created by adding a clause to the *wajib-ul-arz*. The law of pre-emption is not part of the personal law of the Hindus. It acquires force only among those Hindus who have adopted it as a matter of custom or else as a matter of contract. In no third way can it exist among Hindus. [PETHERAM, C. J.—If these defendants were parties to the contract, then they would no doubt be entitled to [187] claim pre-emption under it. You say that there is no evidence of a contract for those who have not signed the paper. But they affirm that they are parties to the contract.] They claim as the sons of a person who have signed, and as having an equal right with their father. [PETHERAM, C. J.—All that they claim is to live under the law of the village. MAHMOOD, J.—The manager of a Hindu joint family has power to bind all the members by his contracts, and therefore the signature of the father would be binding on the sons.] Assuming that to be the case, then if the father should omit to assert the right, his omission also should be binding on the sons, and should prevent any assertion of the right by them. I do not deny that these defendants are co-sharers, but only that they should not be regarded as such for

purposes of pre-emption, because they are not parties to the *wajib-ul-arz*. I rely on the following authorities:—*Mahadeo Singh v. Nanda Singh*, Weekly Notes, 1884, p. 100; *Heera Lal v. Khowanee*, N.-W. P. S. D. A. Rep., 1865, p. 71; *Bheekum Singh v. Gordhun Singh*, N.-W. P. S. D. A. Rep., 1865, p. 251.

Petheram, C.J.—The question before us is whether, assuming that the sons in a joint Hindu family are to be regarded as co-sharers, they are not to be regarded as recorded co-sharers. To me it seems that the question answers itself. It is virtually asking whether many equal co-sharers are to be considered as having equal rights, and I shall hold that they have, until the contrary is shown. To say that the defendants are precluded from exercising their rights appears to me to be idle and contrary to justice; and I have no hesitation in holding that all the co-sharers, whether signatories of the *wajib-ul-arz* or not, have equal rights, both in respect of pre-emption and in other respects.

Oldfield, J.—I am of the same opinion.

Brodhurst, J.—I am of the same opinion.

Mahmood, J.—I also concur, but I only wish to observe that I have seen cases in which it is said in the *wajib-ul-arz* that the recorded share-holders shall be entitled to claim the right of pre-emption. If that had been the case here, I might perhaps have been disposed to hold that co-sharers whose names were not recorded in the revenue papers were debarred from exercising the right; [188] but in the *wajib-ul-arz* now in question no such expression occurs, and therefore the answer which the learned Chief Justice has given fully applies to the case.

Duthoit, J.—I have no hesitation in answering the question in the affirmative.

NOTES.

[This was followed in (1898) 1 O. C. 252. See also (1895) 17 All. 454; (1606) 3 A. L. J., 641; (1904) 7 O. C., 61.]

[7 All. 188]

The 29th November, 1884.

PRESENT.

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE OLDFIELD,
MR. JUSTICE BRODHURST, MR. JUSTICE MAHMOOD
AND MR. JUSTICE DUTHOIT.

Sheodisht Narain Singh and another.....Defendants

versus

Rameshar Dial and another.....Plaintiffs.*

Jurisdiction—Civil and Revenue Courts—Landholder and tenant—Declaratory decree—Act XII of 1881 (N.-W. P. Rent Act), s. 95 (n).

A suit in which the plaintiff claims, as the tenant of land, that he may be declared to be the tenant, and that the defendant, the landholder, may be restrained from interfering with his right to the land as a tenant, and in which the defendant denies the relation

* Second Appeal No. 21 of 1884, from a decree of D. S. Gardner, Esq., District Judge of Benares, dated the 23rd August, 1883, reversing a decree of Shah Ahmad-ullah, Munsif of Benares, dated the 6th June 1883.

between him and the plaintiff of landholder and tenant, is not a suit which is exclusively cognizable in the Revenue Court.

THE plaintiffs in this case alleged that they held 107 bighas 16 biswas of cultivatory land at a rent of Rs. 147-8-0, and 1 bigha of grove-land at a rent of 12 annas, and 1 bigha 5 biswas of rent-free land, as their ancestral property; that they used plot No. 254, consisting of 11 biswas, which was a portion of their rent-paying land, and plot No. 253, consisting of 1 bigha 5 biswas rent-free land, as a threshing floor and for stacking corn; that the defendants, who were the zamindars, denied their right to the two plots mentioned, and interfered with their possession by various acts stated in the plaint; and they asked for a decree declaring their right to the land, and that the grain which the defendants had stored on the land might be removed, and the defendants might be restrained from interfering with their right to the land. The defendants' answer to the suit was that the plots did not belong to the plaintiffs, either as part of their rent-paying holding or rent-free holding, but were waste land belonging to them and in their possession.

The Court of First Instance dismissed the suit. The Lower Appellate Court gave the plaintiffs a decree as claimed.

[189] On second appeal the defendants contended that the suit was not maintainable in the Civil Courts in respect of plot No. 254, claimed by the plaintiffs as part of their rent-paying holding, as the dispute or matter was one on which an application might be made under s. 95 (n) of Act XII of 1881, the N.-W.P. Rent Act, to the Revenue Court.

For the respondents it was contended that s. 95 (n) refers to cases where the relation of landlord and tenant has been recognized by the parties suing, and in which a landlord has dispossessed an acknowledged tenant otherwise than according to the provisions of the Rent Law, and that section did not apply to the present claim in which the dispute was as to the rights of the parties in the land.

The Divisional Bench (OLDFIELD and BRODHURST, JJ.) hearing the appeal referred to the Full Bench the question whether the claim in respect of plot No. 254 was exclusively cognizable by the Revenue Court.

The following cases were noted, in the order of reference, as cases to which reference might be made:—

Sheodan Singh v. Seetul Singh, N.-W. P., S. D. A. Rep., 1865, p. 282; *Shimbhu Narain Singh v. Bachcha*, I. L. R., 2 All., 200; *Kalian Das v. Tika Ram*, I. L. R., 2 All., 137; *Kanahia v. Ram Kishen*, I. L. R., 2 All., 429; *Sawai Ram v. Gir Prasad Singh*, I. L. R., 2 All., 707; *Muhammad Abu Jafar v. Wali Muhammad*, I. L. R., 3 All., 81; *Sukhdaik Mistr v. Karim Chaudhri*, I. L. R., 3 All., 521; *Birbal v. Tika Ram*, I. L. R., 4 All., 11; *Lala Mal v. Salar Baksh*, Weekly Notes, 1881, p. 105; *Ram Prasad v. Ram Shankar*, Weekly Notes, 1882, p. 58; *Muhammad Zaki v. Hasrat Khan*, Weekly Notes, 1882, p. 61; *Lalu v. Sadiya*, Weekly Notes, 1882, p. 62; S. A. No. 456, decided the 2nd August 1883, not reported; S. A. No. 1014, decided the 20th May 1884, not reported; S. A. No. 1503, decided the 20th May 1884, not reported.

Lala Lalta Prasad and *Munshi Hanuman Prasad*, for the Appellants.

The Senior Government Pleader (*Lala Juala Prasad*) for the Respondents.

[190] For the appellants it was contended that the suit was not cognizable in the Civil Courts. The plaintiffs seek to have a right of tenancy declared. This is a relief which the Revenue Courts are competent to give them. The question whether a man is a tenant or not is one for the Revenue Courts to determine. If the plaintiffs were suing for possession, their suit

would be exclusively cognizable in the Revenue Courts. Therefore they should go to those Courts for the relief they now seek.

The following judgments were delivered by the FULL BENCH:—

Petheram, C. J.—In my opinion the suit as brought is cognizable in the Civil Courts, the jurisdiction of those Courts not being barred by s. 95 of the Rent Act. In order to cast the jurisdiction of the ordinary Courts of the country, the words of the enactment excluding their jurisdiction must be clear. The question is whether s. 95 says that this particular suit shall not be brought. The plaintiff might have applied to the Revenue Court for possession of the land on the ground of having been wrongfully dispossessed; and I am inclined to think that, if he had sought for possession of the land in this suit, his claim would have been exclusively cognizable in the Revenue Court. But when a man's land is interfered with, he may bring an action of trespass. The plaintiff brings this suit to restrain trespass on his land, and I think that the suit is not one which is made by section 95 exclusively cognizable in the Revenue Court.

Oldfield, J.—The suit as brought is one for the Civil Courts to try. The question whether, if the plaintiffs had claimed possession, the suit would have been cognizable in the Civil Courts, does not arise. I am inclined to think that, even had he made such a claim, the suit would have been cognizable in the Civil Courts. The policy of the Rent Act is to exclude the jurisdiction of the Civil Courts in cases relating to disputes arising out of the relationship of landlord and tenant. Where the person sued disputes that relation, the Revenue Court would not have exclusive jurisdiction. In such a case the tenant could not, by making an application under section 95 (n) of the Rent Act, obtain entire relief. That clause refers to the case of a landlord who has ejected an acknowledged tenant otherwise than under the provisions of the Rent Act.

[191] Brodhurst, J.—I agree.

Mahmood, J.—I have no doubt that the suit as brought is cognizable in the Civil Courts. I need not consider the question whether, if the plaintiffs claimed possession, the suit would be cognizable in those Courts.

Duthoit, J.—The suit as brought is, in my opinion, cognizable in the Civil Courts.

NOTES.

[See also (1893) 15 All., 387 ; (1896) 18 All., 270.]

[7 ALL. 191]

APPELLATE CIVIL.

The 3rd December, 1884.

PRESENT :

MR. JUSTICE BRODHURST AND MR. JUSTICE MAHMOOD.

Tika Ram and others.....Defendants

versus

Khuda Yar Khan.....Plaintiff.*

Jurisdiction—Civil and Revenue Courts—Resumption of rent-free grant—

Act XII of 1881 (N.-W. P. Rent Act), ss. 30, 95 (c)—Act XIX of

1873 (N.-W. P. Land Revenue Act), s. 241 (h).

A zamindar brought a suit to recover possession of certain land in the village which was held by the defendants rent-free, in consideration of rendering services as *khera-patis*, on the ground that he was entitled, as zamindar, to dispense with their services, and that therefore they no longer possessed any right to hold the land. The claim was resisted by the *khera-patis* on the ground that for many years they had been in possession of the land as muafiholder.

Held, that the dispute so raised was a matter which could form the subject of an application to resume a rent-free grant within the meaning of s. 30 of the N.-W.P. Rent Act (XII of 1881), and that the cognizance of the suit by the Civil Court was therefore barred by cl. (c) of s. 95 of that Act, and that, for similar reasons, the Civil Court, under cl. (h) of s. 241 of the N.-W.P. Land Revenue Act (XIX of 1873) could not exercise jurisdiction over the matter of the suit.

THIS suit was instituted in the Civil Court. The plaintiff was the proprietor of a *patti* of a mahal in which the defendants held certain land. He sued the defendants for possession of this land. He alleged that "the defendants had been appointed '*Khera-patis*' † by the former proprietors of the village; that in consideration of their services as such, the produce of the land was remitted to them, and they were entitled to hold the land simply to enjoy the produce thereof so long as they held the said office, the tenure of which depended on the will of the zamindar; that they had wrongfully [192] planted a grove on the land; that on the 1st July 1882, all the inhabitants of the village and the plaintiff had dismissed them from their posts by reason of their misconduct and drunkenness." The defendants set up as a defence to the suit that the land had been granted to them four hundred years ago, and they had since that time been "in proprietary possession of it without paying rent," and the plaintiff had no right in the land. They alleged as follows:—"The plaintiff has no right, inasmuch as the former zamindar, the predecessor of the plaintiff, did not interfere with the defendants' proprietary right; that the post of '*khera-pati*' is a religious one and is not a village office: that the duty of a '*khera-pati*' is to set fire to the *holi*; and the plaintiff, as a Muhammadan, is not competent to dismiss the defendants or interfere with religious matters." The first issue fixed for trial by the Court of First Instance (Munsif of Pilibhit) was as

* Second Appeal No. 44 of 1884, from a decree of Maulvi Muhammad Abdul Qaiyum Khan, Subordinate Judge of Bareilly, dated the 21st November 1883, reversing a decree of Maulvi Muhammad Aziz-ud-din, Munsif of Pilibhit, dated the 26th May 1883.

† *Khera-pati*—A Brahman entitled to perform certain religious ceremonies, and to receive the fees appertaining thereto.—FALLON.

follows:—"Is the land in suit revenue-paying land belonging to the zamindar, or *muafi* land belonging to the defendants? How long is it since the defendants have been in possession? What is the nature of their tenure? Did they ever pay any rent?"

Upon this issue the Court found as follows:—"As to the first issue, I find that the land in suit is revenue-paying land granted to '*Khera-patis*' by the zamindars. The witnesses for the defendants fully show that the defendants and their ancestors have been in possession of this land for more than 50 or 60 years. Even the witnesses for the plaintiff do not state that the defendants have recently got possession; they simply say that the defendants have recently planted the grove. The defendants are in possession as *muafidars*, and have never paid any rent." Deciding the other matters in dispute in the suit in favour of the defendants, the Court of First Instance dismissed the suit. On appeal by the plaintiff, the Lower Appellate Court (Subordinate Judge of Bareilly) remanded the case for the trial of certain issues relating to the custom prevailing in the village regarding the appointment and dismissal of a "*khera-pati*," and of the questions whether the plaintiff had, as zamindar, dismissed the defendants from their office, and whether the plaintiff, in that capacity, was competent to dismiss them. It observed:—"It is an admitted fact that the defendant holds possession of the disputed land in lieu of his rendering service as [193] '*khera-pati*.' He does not state that he holds possession of it in any other right. Therefore, agreeably to *Hurrogobind Raha v. Ramrutno Dey*, I. L. R., 4 Cal., 67, it cannot be admitted that the defendant has any right left to him after his services have been dispensed with, or that the expiration of any period is beneficial to him and prejudicial to the plaintiff, the zamindar." These issues were found by the Court of First Instance against the defendants. On the return of the findings, the defendants took an objection to the jurisdiction of the Civil Courts to try the suit, contending that it was one cognizable exclusively in the Revenue Courts. This objection the Lower Appellate Court disallowed, and, in accordance with the findings on remand, gave the plaintiff a decree for possession of the land in dispute.

On second appeal, the defendants contended that the cognizance of the suit by the Civil Courts was barred by s. 95 of the N.-W. P. Rent Act (XII of 1881).

Munshi Hanuman Prasad, for the Appellants.

Babu Jogindro Nath Chaudhri, for the Respondent.

The Court (BRODHURST and MAHMOOD, JJ.) delivered the following judgment:—

Mahmood, J.—The first ground of appeal must prevail. The Court of First Instance found that "the defendants and their ancestors have been in possession of this land for more than 50 or 60 years," and that they "are in possession as *muafi*-holders, and have never paid any rent." The finding has not been disturbed by the Lower Appellate Court, and indeed the plaintiff's claim proceeds upon admission of these facts. The suit has been instituted on the ground that the plaintiff, as zamindar of the *patti* in which the land in suit is situate, had the right of dismissing the defendants from the religious office of *khera-pati*, in lieu of which they held the land; that their services, being no longer required, have been dispensed with, and they therefore no longer possess any right to hold the land. The main object of the suit is to oust the defendants from the land.

The defendants resisted the suit on various grounds, but they did not base their defence on any title higher than that of being [194] grantees of the rent-free tenure as *khera-patis* of the village.

We are of opinion that the dispute so raised in this suit is a matter which could form the subject of an application to resume a rent-free grant within the meaning of s. 30 of the Rent Act (XII of 1881), and that the cognizance of the suit by the Civil Court was therefore barred by cl. (c) of s. 95 of the Act, and that, for similar reasons, the Civil Court under cl. (h) of s. 241 of the Revenue Act (XIX of 1873) could not exercise jurisdiction over the matter of the suit.

The cross-objections under s. 561 of the Civil Procedure Code have been abandoned by the learned pleader for the respondent.

We decree the appeal, and, setting aside the decree of the Lower Appellate Court, restore that of the Court of First Instance. Costs in all Courts will be paid by the plaintiff-respondent.

Appeal allowed.

NOTES.

[See also (1886) 8 All., 552.]

[7 All. 194]

The 4th December, 1884.

PRESENT :

MR. JUSTICE MAHMOOD AND MR. JUSTICE DUTHOIT.

Har Dayal and others.....Judgment-debtors

versus

Chadami Lal.....Decree-holder. *

Decree for sale of mortgaged property—Execution of decree—Application for execution before time allowed for payment—Act IV of 1882 (Transfer of Property Act), ss. 86, 88.

An application for execution of a decree for sale of mortgaged property passed under s. 88 of Act IV of 1882 (Transfer of Property Act), and which directed that if the decree were not satisfied within two months the property should be sold, ought not to be allowed before the expiration of the period therein provided.

A DECREE for the sale of mortgaged property, dated the 17th January 1884, exempted the person of the judgment-debtor, and directed that if the decree was not satisfied within two months, the judgment-debtors' 6 biswansis 15 kachwansis of land "with its groves, tanks, and other appurtenances" should be sold. On the 14th February 1884, or before the expiration of the period provided by the decree, the decree-holder applied for the attachment and sale of the crops growing on the land. The judgment-debtors objected to this application on the ground that the crops [195] were not part of the mortgaged property, and that application for execution had been made before the expiration of the period provided by the decree. The Court of First Instance (Munsif of Farakhabad) disallowed this objection, observing as follows:—"In my opinion both the objections should be disallowed. In the first place, the decree does not declare that any other property than that hypothecated would not be liable. The hypothecated property consists of

* Second Appeal No. 62 of 1884, from an order of C. J. Daniell, Esq., District Judge of Farakhabad, dated the 6th May 1884, affirming an order of Sayyid Zakir Husain, Munsif of Farakhabad, dated the 29th March 1884.

6 biswansis 15 kachwansis and a fraction including sir-lands, ponds, groves, and other appurtenances; but it is the produce of sir-lands which is now in question; and I think it is properly liable to be taken in execution of the decree. No doubt the decree authorizes the sale of the hypothecated property in case the amount thereof is not paid within two months; but the fact of allowing a time under s. 88, Act IV of 1882, does not mean that the decree-holder shall in no case have the power to execute his decree before that time. The Legislature has authorized the Court to allow time at its discretion, in order that judgment-debtors should have an opportunity to take proper steps to protect their property, and not in order to prevent the execution of decree within that time. It is evident that, as yet, the hypothecated property has not been brought to sale. The judgment-debtor, instead of taking steps to satisfy the decree and save his property, seems to be anxious to have his property sold by the decree-holder; he only wishes to prevent the attachment of his grain produce. I do not think that the judgment-debtor's pleas have any weight."

On appeal by the judgment-debtors, the Lower Appellate Court (District Judge of Farakhabad) affirmed the order of the Court of First Instance. It observed as follows:—

"This decree-holder seeks to execute within the prescribed period of two months, on the ground that the judgment-debtor is making away with the 'appurtenances,' that is, the crop growing on the land. The Court executing the decree allowed execution up to the point of attachment of the property, and, in respect of the crops, ordered their sale, and that the proceeds of the sale should be paid into Court. It is objected that no-attachment or any process in execution of the decree could take place within the prescribed period of two months. I do not, however, take this view of the operation of ss. 86 and 88 of the Transfer of Property [196] Act. A Court executing a decree is bound to take all reasonable means for securing the object of the decree, which was the sale after a fixed date of certain property, and to this end it attached the property on the ground that, if it were not attached, part of it would not on the date fixed be in existence. Next, it sold this part of the property, which proceeding appears to conflict with the terms of the decree; but the property so sold was agricultural produce of a perishable nature, and its sale was made as much in the interests of the judgment-debtor as of the creditor. If the grain &c., had not been sold, its value might have diminished by the time the two months were over, and the judgment-debtor would have been so much the worse off. The house which was attached was not included in the order fixing the sale after two months, so no objection can be made to that. No part of the attached property except the grain was ordered to be sold within the two months. The Court executing the decree was the same Court that issued it. I find that the objections to the execution order must fail."

In second appeal, the judgment-debtors again contended that the execution of the decree before the expiration of the two months provided by the decree should not have been allowed.

Mr. A. Carapet and Lala Lalta Prasad, for the Appellants.

• Babu Jogindro Nath Chaudhri, for the Respondent.

The Court (MAHMOOD and DUTHOIT, JJ.) delivered the following judgment:—

Mahmood, J.—The decree of the 17th January, 1884, provided that execution thereunder was not to take place before the expiry of two months. The decree exempted the person of the judgment-debtor, and was capable of execution only against the hypothecated property. The application for execution

which commenced this litigation was made on the 14th February 1884, that is, before the lapse of the period provided by the decree. We are of opinion that such an application should have been rejected by the lower Courts as premature. We decree the appeal, and set aside the orders of both the lower Courts, but, under the special circumstances of the case, make no order as to costs.

Appeal allowed.

[197] *The 4th December, 1884.*

PRESENT:

MR. JUSTICE MAHMOOD AND MR. JUSTICE DUTHOIT.

Gannu Lal.....Judgment-debtor

versus

Ram Sahai.....Decree-holder.*

Decree for possession of immoveable property—Execution of decree—Reversal of decree on appeal—Mesne profits—Civil Procedure Code, ss. 244, 583.

G obtained a decree against R for possession of a house, and in execution thereof obtained possession. On appeal, the decree was set aside by the High Court, whose decree did not direct that the appellant should be restored to possession and was silent as to mesne profits.

Held, that with reference to s. 583 of the Civil Procedure Code, R was entitled to recover possession of the property in execution of the High Court's decree, but that, with reference to the decision of the Full Bench of the Court in *Ram Ghulam v. Dwarka Rai*, ante, p. 170, he could not, in execution of that decree, recover mesne profits.

ON the 10th September 1880, Gannu Lal, the appellant in this case, sued Ram Sahai, the respondent, for possession of a house, and on the 23rd September 1880, obtained a decree for possession of the same. This decree was affirmed on appeal, on the 24th December 1880. On appeal from the appellate decree the High Court, on the 19th November 1881, set aside both decrees and dismissed the suit. In the meantime, on the 13th April 1881, Gannu Lal had obtained possession of the property, by execution of decree. Ram Sahai subsequently sued Gannu Lal for possession of the property and for mesne profits. He obtained a decree in this suit on the 26th July 1883. This decree was set aside by the Appellate Court, which directed him to proceed by way of execution of the High Court's decree. Ram Sahai accordingly made the application out of which this appeal arose. He applied in execution of the High Court's decree to recover possession of the property and mesne profits for the period he was out of possession. It was contended for Gannu Lal that, as the High Court's decree did not mention mesne profits, they could not be allowed, and further that that decree merely reversed the orders giving Gannu Lal possession, and did not give Ram Sahai possession, and the latter was only entitled to recover his costs under that

* Second Appeal No. 56 of 1884, from an order of W. Young, Esq., District Judge of Allahabad, dated the 21st March 1884, affirming an order of Pandit Indar Narain, Munsif of Allahabad, dated the 22nd December 1883.

decree* and no more. Both the lower Courts disallowed this contention, and granted Ram Sahai's application both in respect [198] of delivery of possession and mesne profits. The Lower Appellate Court, after observing that, if the Courts executing the decree had the right to allow mesne profits, the amount allowed by the Court of First Instance was not excessive, continued as follows :—

"Such right, I think, it does possess, for under cl. (c), s. 244, Act XIV of 1882, very general power is given to do what is requisite to give full effect to the decree. Now, I take it that the meaning of the High Court's decree, dated 19th November 1881, was this, viz., that Ram Sahai, not Gannu Lal, was to be deemed the rightful proprietor of the house, and that Gannu Lal's possession was to be reversed, and I take it further that the scope of this decree must be taken as applying from the beginning of the litigation on these facts between the parties; and as the High Court expressly reversed the orders of the two lower Courts, it must be taken to have reversed the consequent steps taken *pendente lite* by Gannu Lal to put into execution the orders of the said two lower Courts: that is, it must be taken to reverse the orders by which, on the 13th April 1881, Gannu Lal had got possession of the house, and consequently it follows that from such date mesne profits are due to Ram Sahai (High Court appellant). And for similar reasons, I also hold that the lower Court's order putting Ram Sahai in possession of the house is right, and is a proper interpretation of the duty of the execution-department in execution of the High Court's order, dated 19th November 1881."

On second appeal it was contended for Gannu Lal, appellant, that Ram Sahai was not entitled either to possession or mesne profits under the High Court's decree, that decree not awarding possession, but merely dismissing Gannu Lal's suit, and further being silent as to mesne profits.

Babu *Ram Das Chakarhat* and Munshi *Sukh Ram*, for the Appellant.

Babu *Sital Prasad*, for the Respondent.

The Court (MAHMOOD and DUTHOIT, JJ.) delivered the following judgment.—

Mahmood, J.—It is admitted that the decree of 23rd September 1880, in execution of which the appellant obtained possession of the property, made no provision as to mesne profits, and that [199] he realized none in execution of that decree. The decree was finally reversed by this Court on the 19th November 1881, and in executing that decree the lower Courts have restored the respondent to possession and also allowed him mesne profits.

So far as the question of possession is concerned, the order of the lower Courts was right with reference to s. 583 of the Civil Procedure Code. But the question of recovery of mesne profits is governed by the recent Full Bench ruling in *Ram Ghulam v. Dwarka Rai*, ante, p. 170, and we therefore partially decree the appeal and set aside the order of the lower Courts so far as it awards mesne profits to the respondent. Under these circumstances we make no order as to costs.

Appeal allowed.

NOTES.

* [See the notes to 7 All., 170]

[7 All. 199]

The 5th December, 1884.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND
MR. JUSTICE BRODHURST.

Shah Muhammad and others.....Defendants

versus

Kashi Das.....Plaintiff*

Declaratory decree—Abstract right—Cause of action—Costs.

A Hindu brought a suit in which he alleged that the Hindu community had acquired by long established custom an exclusive right to use for religious purposes a Ghat situate on the river Ganges, but that the Muhammadans were in the habit of interfering with the exercise of such right by bathing at the Ghat. He prayed for a declaration of the right, and for a perpetual injunction to be issued to the Muhammadans generally forbidding them to resort to the Ghat. No act of trespass was charged against any of the defendants. The defence was that the Muhammadans were entitled to use the place, and that their use of it did not cause any inconvenience to the plaintiff.

Held, that the suit was not maintainable, since the Court had no power to pass a decree against persons who had never interfered with the property in dispute, or to issue an injunction against the whole Muhammadan world; but that, inasmuch as the defendants had fought the case all along as if the suit were maintainable, and upon a false issue, both sides must pay their own costs.

THE plaint in this case stated that for many years there had existed in mohalla Mughalpur, in the city of Ghazipur, a "ghat" on the river Ganges, known as the Pushto Ghat; that close to the ghat there was a "sangar" (place of worship) for holy men; that the Pushto Ghat and the "sangar" had been constructed by Hindus [200] more than one hundred years ago, and for the purpose of management of the "sangar" the Hindus had created the office of "Mahant," and since the creation of that office the "sangar" had been managed by the "Mahant," that the plaintiff was the "Mahant" and the "sangar" was under his management; that it was an ancient custom for "Hindus, holy men, Goshains and Brahmans," to resort to the Ghat for the purposes of worship and bathing, and performance of religious rites; that the repairs of the Ghat and "sangar" had been the duty of the "Mahant," and such repairs had been defrayed by subscriptions by the Hindus who used the Ghat for purposes of worship, etc.; that about twenty-five years before the institution of the suit the Ghat had been widened and in other ways improved by the plaintiff with moneys collected from Hindus; that the Ghat had not been used by the Muhammadans at any time; that in the year 1880 Muhammadans, mostly residents of mohalla Mughalpur, began to resort to the Ghat on the pretence of bathing; that this conduct led to a dispute between the Hindus and Muhammadans, which came before the Magistrate; that the Magistrate made an order that the Ghat should be open to the public from 11 A.M. to 4 P.M. and its use for the rest of the day should be confined to Hindus. The plaint then ran as follows:—

"(10) The Muhammadans, taking advantage of this order, which was passed contrary to the old established usage, gave trouble to the Hindus when

* Second Appeal No. 1125 of 1883, from a decree of J. W. Power, Esq., District Judge of Ghazipur, dated the 12th April 1883, modifying a decree of Babu Nilmadhub Roy, Munsif of Ghazipur, dated the 22nd December 1882.

engaged on the said Ghat in their worship according to their religion: interrupted the performance of the religious duties of the Hindus (who consider the offering of prayers at such a sacred place three times a day, *i.e.*, in the morning, at noon and in the evening, necessary and a part of their duty); and injured their right which they had enjoyed for more than a century, and to maintain which they frequently spent money out of their own pockets.

"(11) When this Ghat has of old been appurtenant to the "*sangat*" of the Hindus, and in exclusive enjoyment of the followers of the "*sangat*" and of other sects of the Hindus, the Magistrate had no power to interfere by fixing a time for the use of the Ghat by Musalmans, and by passing an order giving opportunity to those persons (who have a religion quite opposed to that of the [201] Hindus), to interrupt and inconvenience the Hindus in the performance of their religious duties.

"As it is not hidden from the Courts of Justice that by the frequent resort of the Musalmans to a place where the Hindus bathe, worship, and perform their religious ceremonies, great interruption is caused, and according to the Hindu religion both the water and the spot are considered polluted and, unclean, hence—

"The plaintiff prays for the following reliefs:—(1) That a decree be passed for the establishment of the fact that the ghat known as the Pushto Ghat has been for a long time appurtenant to the "*sangat*," and has been built at the expense of the Hindus; and that by virtue of old established usage, it has been used exclusively by the Hindus for the purposes of bathing and the performances of other religious duties. (2) That after the fact having been proved that the Pushto Ghat has been built solely for the use of the Hindus, by their own exertions, and from their own pockets, and that only the Hindus have for a long time (more than twenty years) enjoyed the right of resorting to bathe and worship at the Ghat, without any specification of time, a perpetual injunction be issued to the defendants, and generally to all the Muhammadans, forbidding them from resorting to the Ghat under the pretence of bathing, and from causing any kind of interruption to the comfort and convenience of the Hindus, by polluting and fouling the water and spot, or from doing any other act. (3) That the orders of the Criminal Court, dated 26th August 1880, and 4th January 1881, which have been passed contrary to old established usage and right, and all the orders passed for fixing and specifying the time prejudicial to the plaintiff, be held invalid and inoperative. It may be noticed that Rs. 10 have been paid for establishment of right, Rs. 10 for the injunction, and Rs. 10 for the invalidation of the Criminal Court's proceedings. And as the relief sought, *i.e.*, that the Pushto Ghat be used for the purposes of bathing and performing the religious rites of the Hindus, is of such a nature that it is impossible to value it for the purpose of the jurisdiction of the Court, it has been valued at Rs. 10."

[202] The suit was instituted in the Court of the Munsif of Ghazipur. The defendants, 58 in number, were all Muhammadans. One of them alone defended the suit. His defence was to the effect that the Ghat was built by Muhammadans; that Muhammadans were entitled to use the Ghat; and that Hindus were not in any way inconvenienced by the use of the Ghat by Muhammadans. The other defendants did not appear. Among the issues fixed by the Munsif were the following:—

"Was the Ghat in dispute built by Hindus alone or by Muhammadans alone?"

"Was it built by Hindus or Muhammadans?"

"Have the Muhammadans a prescriptive right to use the Ghat in dispute?"

"According to Hindu ideas, will the Ghat be polluted if Muhammadans are allowed to bathe at it?"

A preliminary objection to the jurisdiction of the Munsif, regard being had to the value of the Ghat, was overruled by the Court.

The Court found, with reference to the issues set out above, that the origin of the Ghat was unknown; that the Ghat had been widened and improved at the cost of Hindus and Muhammadans alike; that both Hindus and Muhammadans had a prescriptive right to use the Ghat; and that it was not advisable to allow Hindus and Muhammadans to bathe at the Ghat promiscuously. The Court, with reference to these findings, made a decree directing that the plaintiff should be allowed the exclusive use of three-fourths of the Ghat and the Muhammadans of one-fourth, and the Ghat should be partitioned accordingly, and that the Magistrate's order should remain in force so long as the decree did not become final.

On appeal by the plaintiff, the Lower Appellate Court (District Judge) found that the Ghat had a Hindu origin; that it had been widened and improved at the expense of the Hindus alone; and that for upwards of twenty years the Ghat had been in the exclusive use of the Hindus. With reference to these findings, the Lower Appellate Court gave the plaintiff a decree as claimed.

[203] The defendants appealed to the High Court.

Mr. W. M. Colvin and Mr. C. H. Hill, for the Appellants.

Mr. T. Conlan, Pandit Ajudhia Nath and Lala Lalta Prasad, for the Respondent.

For the appellants it was contended that the Munsif had not jurisdiction to try the suit. The value of the ghat and "*sangat*" admittedly exceeds Rs. 1,000. Where the property in respect of which a declaration of right is sought exceeds Rs. 1,000 in value, the Munsif cannot make such a declaration. He cannot give a decree for possession of property exceeding that value, and therefore cannot declare the title to property exceeding that value.

PETHERAM, C.J.—I should like to hear Mr. Conlan on the question whether there is a cause of action disclosed against the defendants. There seems to be none alleged.]

Mr. T. Conlan.—The provisions of s. 30 of the Civil Procedure Code should have been followed in this case. The defendants should have been sued on behalf of the Muhammadan residents. The injunction sought would then be effectual. PETHERAM, C.J.—The suit does not seem to be maintainable. Perhaps, as regards a declaration of right, the suit is maintainable, though not as regards the injunction. The declaration of right is claimed by reason of trespass on the property. PETHERAM, C.J.—There is no act of trespass charged against the defendants or any of them. I think that the case has gone to trial under a misconception by the parties and the Court as to the real issues. The proper course would be to allow the appeal and order each party to pay their own costs. It is doubtful whether the Munsif should have tried the suit. When the question is settled as to the Court which should try the suit, then the question as to whether there is a cause of action should be settled, and by that Court. I would suggest that, if your Lordships think the Munsif had no jurisdiction, the plaint should be returned for presentation to the proper Court. [PETHERAM, C.J.—I do not think this can be done. The point is whether a claim for a declaration of abstract right is maintainable.] If the suit is dismissed, it may be that the plaintiff will be barred from bringing a fresh suit. PETHERAM, C.J.—I do not think so; a suit properly framed might be brought.]

[204] Mr. *C. H. Hill*, in reply, contended that the objection that the Munsif had no jurisdiction was a good objection. It was taken from the very beginning of the litigation. If a good one, the appellants should be allowed their costs in all Courts.

The Court (PETHERAM, C.J., and BRODHURST, J.) delivered the following judgment:—

Petheram, C.J.—I am of opinion that this appeal must be allowed and the suit dismissed. The suit was brought to try a right to use a certain flight of steps in the city of Ghazipur, which led from a street in the city to the river Ganges. The plaintiff alleges that the steps are his own private property, and that nobody else, without leave from him, has any right to use them. The defendants allege that the steps are not the property of the plaintiff; and further, that even if they were, the public have a right to use them. Now, if the suit had been properly framed, that issue should be tried. But the persons conducting the litigation mistook the powers which the Courts have; and instead of bringing a suit for trespass or asking for an injunction to prevent persons from trespassing, they brought a suit against persons who had never interfered with the steps at all, and prayed for an injunction against the whole world. Now, no Court in existence has or can have such powers, and therefore the suit must be dismissed. Then it is said that, this being so, the defendants should have their costs, and that would be proper if at the beginning the defendants had taken the point that the suit was not maintainable. But instead of doing so they fought the case all along as if the suit was maintainable, and upon a false issue. The litigation, owing to the mistake of both sides, has been wholly fruitless. I think therefore that both sides should pay their own costs.

Mr. *Hill* contended that the appeal should be allowed on the question of jurisdiction, and that his clients should be allowed their costs, the plea that the Munsif had not jurisdiction having been taken from the beginning of the litigation. It seems to me that the relief which the plaintiff claimed was valueless. Had he obtained a decree, it would have been worth nothing to him. Therefore it cannot be said that the relief sought by him exceeded in value the Munsif's pecuniary jurisdiction. If the plaintiff had sued in proper [205] form, the relief which might have been granted might have been very valuable.

Brodhurst, J., concurred.

Appeal allowed.

[7 All, 205]
FULL BENCH,

The 6th December, 1884.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE
OLDFIELD, MR. JUSTICE BRODHURST, MR. JUSTICE
MAHMOOD, AND MR. JUSTICE DUTHOIT.

Queen-Empress
versus
Taki Husain.

*Defamation—Communication of defamatory matter to complainant only—Act
XLV of 1860 (Penal Code), s. 499—"Making"—"Publishing."*

Held, by the Full Bench (DUTHOIT, J., dissenting) that the action of a person who sent to a public officer by post in a closed cover a notice under s. 424 of the Civil Procedure Code, containing imputations on the character of the recipient, but which was not communicated by the accused to any third person, was not such a making or publishing of the matter complained of as to constitute an offence within the terms of s. 499 of the Penal Code.

THIS was an application for revision of an order of Mr. T. B. Tracy, Sessions Judge of Bareilly, dated the 18th July 1884, affirming an order of Mr. J. Nugent, Joint Magistrate of Bareilly, dated the 10th July 1884. It appeared that the house of the applicant, Taki Husain, was searched by the police without a warrant for stolen property. Thereupon the applicant sent by post to Basawan Singh, Inspector of Police and Kotwal of Bareilly City, in a registered cover, a notice, in Urdu, the terms of which were in effect as follows:—

"I, Taki Husain, hereby give notice to you, Basawan Singh, Kotwal of Bareilly, under s. 424 of the Code of Civil Procedure, that I will sue on the 12th March 1884, for Rs. 100, as per account given below, to the effect that on the 5th January 1884, you took away, or caused to be taken away, my property, worth Rs. 30, not in good faith, but in bad faith and maliciously. That property is now in your possession, and it was taken by you with the bad intention, that you subsequently restore it to me on taking some money, or that you institute a false suit in the Criminal Court after procuring false witnesses. Rs. 70 are for damages on account of your defaming me by thus taking away my property. The damages claimed have been undercharged, be- [206] cause you are so notorious a getter-up of false cases that there is but a very limited number of respectable persons who may be inclined to believe that there is some truth in your thus taking away my property, and therefore injury to reputation is little. I give you also notice hereby that if you suborn any false witness against me, I will bring a separate suit against you for damages therefor. This notice is given because it is doubtful whether or not the kotwal of Bareilly city gets up false cases in his capacity as kotwal."

After receiving this notice, Basawan Singh, having obtained leave to do so from his superiors, prosecuted Taki Husain for defamation. With regard to the making of the notice, Taki Husain said on one occasion, on being examined by the Joint Magistrate, as follows:—"I wrote the notice produced, but do not understand it all The notice was first written in English, and was

translated by me." On a subsequent occasion he stated :—" The notice was written by Mr. Vansittart in English and translated by Ashaq Ali." Mr. Vansittart was Taki Husain's legal adviser, and Ashaq Ali was Mr. Vansittart's clerk ; and it appeared that Mr. Vansittart wrote the notice in English and gave it to his clerk and Taki Husain to translate, and that when it was translated, Taki Husain despatched it by post to Basawan Singh.

The Joint Magistrate, by an order dated the 10th July 1884, held that the notice was " palpably slanderous," and that although the question did not appear to have been definitely settled, whether the sending of defamatory matter to the person defamed alone amounted to an offence under s. 499 of the Penal Code, the communication to counsel and his clerk was a sufficient publication ; and that the communication could not be regarded as privileged. He therefore sentenced the prisoner, under s. 500 of the Penal Code, to suffer simple imprisonment for one month, and to pay Rs. 250 fine, or, in default, to suffer a further term of imprisonment for one month.

On appeal, the Sessions Judge, by an order dated the 18th July 1884 affirmed both the conviction and sentence. He observed :—" As to the contention that ' publication ' was necessary, and that no person knew of the notice except accused, his counsel, and the ' clerk,' the accused was not charged with having commu-[207]nicated the libel to his own legal adviser, but to the complainant. The sending to the latter of a defamatory notice, which he was under the strongest conceivable obligation to bring to the notice of his superior officers, appears to me to amount to the offence made punishable by s. 499 of the Penal Code. Further, I am not aware on what authority it is contended that it is essential to constitute the offence of defamation that the libel should be published. The words in s. 499 are " whoever makes or publishes, &c." "

The application for revision came before PETHERAM, C.J., and DUTHOIT, J., who referred the following question to the Full Bench :—

" Assuming, for the purposes of argument, that the matter contained in the notice sent by the applicant to Basawan Singh was defamatory in the sense of Explanation 4 to s. 499 of the Indian Penal Code, and that none of the Exceptions provided under that section can be established, then was the action of the applicant in sending the notice in a closed cover by post to Basawan Singh such a making or publishing of the defamatory matter as to constitute an offence within the terms of s. 499 of the Indian Penal Code ? "

Mr. J.D. Gordon, for the Applicant. (PETHERAM, C.J.—You must not confine your argument to the question merely whether the despatch of the notice by post to Basawan Singh amounted to a publication. The order of reference was intended to cover everything that the prisoner did up to and including the despatch of the notice.)

The essence of the offence of defamation under the law of India is the injury to the individual attacked and not as in England the danger of a breach of the public peace. But here the matter complained of was made known to the prosecutor alone, and his reputation could not be injured, within the meaning of Explanation 4 of s. 499 of the Penal Code, when no other person was aware of the attack made upon him. It was in the power of Basawan Singh to prevent all possibility of injury by destroying the notice received by him.

(DUTHOIT, J.—Was it not his duty as a public servant to show the notice to his superiors ?) There was no legal obligation on him to do so. (PETHERAM, C.J.—The *Illustrations* to s. 499 refer [208] only to communications made to a third person. This seems to suggest that the communication of defamatory

matter merely to the person attacked is not a publication within the meaning of s. 499. **OLDFIELD, J.**—It may be said that the petitioner intended to bring a suit, and must have known, when he sent the notice, that in that suit the notice would be given in evidence.]

The *Junior Government Pleader* (Babu Dwarka Nath Banerji), for the Crown.—There is sufficient evidence to show that the petitioner "made" the imputation upon the character of the complainant. The clerk, who translated the notice before it was sent, was a third person, and the communication to him amounted to publication. Illustration (2) of art. 270 of Stephen's *Digest of the Criminal Law* shows that the posting of a libellous letter is in itself a publication. **PETHERAM, C.J.**—That illustration belongs to a class of cases which relate to the subject of *venue*, and the question which arose in these cases was in which county the crime was committed, the county from which a letter was sent, or that in which it was received.]

The following **judgments** were delivered by the **FULL BENCH**:—

Duthoit, J.—Assuming that the notice contained defamatory matter within the terms of Explanation 4, s. 499 of the Indian Penal Code, and that the communication was not privileged, and taking the facts to be as they were found by the Magistrate, *viz.*, that the notice was concocted between Mr. Vansittart and the petitioner, that, after it had been written in English, the petitioner helped to translate it, and himself sent it by post to Basawan Singh, I am of opinion that the petitioner committed the offence described in s. 499 of the Indian Penal Code, both by "making" and by "publishing."

Before I proceed to discuss the question further, I must say a few words upon a point which was, I consider, not sufficiently debated at the hearing. It was assumed at the hearing that the English Common Law offence of libel was something essentially different from the offence of defamation as set out in the Indian Penal Code. And this was said to be so because the reasons for making slanderous imputations indictable were different under the two systems. These statements are, in my opinion, far too [209] broad; and, so being, are not consonant with fact. The material points of difference between the English Criminal Law of defamation [*sic*] are, I take it, the following:—

I.—Whereas the English Common Law makes punishable—

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|---|----------------------------|
| (1) libels on private individuals, | |
| (2) libels on bodies of men and corporations, | |
| (3) libels on official persons, | } specially reprehensible. |
| (4) libels on foreigners of distinction, | |
| (5) libels on the dead, | |
| (6) seditious libels, | |
| (7) obscene and blasphemous libels, | |

the Indian Penal Code provides elsewhere for seditious and obscene and blasphemous libels; and whilst providing in its XXIst Chapter for the punishment of the other libels set out above, marks none of them in particular as deserving special reprehension.

II.—Whereas the English Law does not, except in certain special cases, make defamatory words, not reduced to writing, punishable, the Indian Law makes them punishable.

III.—Whereas the Indian Law constitutes the "making" of a libel an offence distinct from the "publishing," the English Law has not as yet made this distinction, but treats the "making" as an attempt to commit, or as an

abetment of the substantive offence of "publishing." The language of the Indian Statute (s. 499 of the Indian Penal Code) is "*whoever makes or publishes*," the language of the English Statute (6 and 7 Vic., cap. 96, ss. 4 and 5) is "*if any person shall maliciously publish*."

The statement that the English Law makes the offence of publishing a defamatory libel penal, solely because of the tendency of such libels to provoke breaches of the peace, and that the Indian Law disregards this tendency as a reason for constituting the offence, is, in my opinion, doubly inaccurate, if written or printed libels are referred to. I can find in the Statute Law of neither system any foundation for it at all; and, so far as I am aware, there are no Indian cases in which the question has been raised. If restricted to words *spoken* to private individuals, the statement (*cf. Russell [210] on Crimes*, 4th ed., Vol. I, page 343*), so far as the English Law is concerned, is no doubt correct, but we are not now engaged with defamatory matter conveyed by words spoken.

Chapter XXI of the Indian Penal Code, forming, as it does, part of a Code, has no preamble setting out the reason for its enactment, but the Indian Law Commissioners, in para. 396 of their Report, dated the 24th June 1847 (Parl. Papers, Indian Law Commission, 1848, No. 330, page 48), write:—"We shall only observe that it would be more proper to describe the Code as disallowing the tendency to irritation not as any criterion, but as the *sole* criterion of criminality in defamation. It makes defamation an offence independently of any such tendency, because defamatory imputations of the worst kind may have no tendency to cause acts of violence, but the tendency of calumnious imputations to provoke breaches of the peace is undoubtedly one of the reasons for making defamation an offence." The preamble of "Lord Campbell's Act" (6 and 7 Vic., cap. 96), the statute under which libels defamatory of private individuals are now punishable in England, runs thus:—"For the better protection of private character, and for more effectually securing the liberty of the Press, and for better preventing abuses in exercising the said liberty, be it enacted, &c." The English and American text books treat their tendency to create breaches of the peace as the *principal*, but not as the *sole* reason why libels against individuals are indictable. The indictment, according to the form commonly used in England, charges the libel as "against the peace of our Lady the Queen, her Crown and dignity;" but it also charges it as "being to the great damage, scandal, and disgrace of J. N., and to the evil example of all others in the like case offending." I feel myself then at liberty to use English and American cases by way of throwing light upon the points now under discussion. And I would further remark, that [211] it is from the English books that the meaning of many of the expressions used in s. 499 of the Indian Penal Code must be gathered; for an examination of the entire section, with its explanations and exceptions, shows that its phraseology is not that of the old Regulations, but that of the English books. The language of Explanation 4, for instance, is practically the same as that used in the English text books to describe the cases in which an action will lie without laying special damage, being those in which (*cf. Arch.*, 19th ed., p. 917) an indictment will also lie.

* The author is treating of libels on private individuals, and the passage runs thus:—"Words spoken, however scurrilous, even though spoken personally to an individual, are not the subject of an indictment unless they directly tend to a breach of the peace, as if they convey a challenge to fight. But words, though not scandalous in themselves, if published in writing, and tending in any degree to the discredit of a man, have been held to be libellous." Defamatory words uttered to Magistrates in the execution of their duty, or affecting them directly in their office, which bring the administration of justice into contempt, are indictable without regard to their tendency to provoke a breach of the peace.—*cf. Russell*, 4th ed., Vol. 1, p. 342.

In this part of India the offence now called defamation used to be called "calumny." The offence was not defined in the Regulations, but its punishment was provided in s. 8 of Bengal Regulation IX of 1793 (VI of 1803). In the Indian Penal Code, as originally framed, the offence of defamation was thus defined:—"Whoever, by words, etc., attempts to cause any imputation concerning any person to be believed in any quarter, knowing that the belief would harm the reputation of that person in that quarter, is said," etc.

The words of s. 499 of the Indian Penal Code with which we are now concerned are the following:—

"Whoever, by words intended to be read, makes or publishes any imputation concerning any person, intending to harm the reputation of such person, is said to defame such person."

That the words of the notice were intended to be read is so plain that I shall not stay to discuss the point.

It remains to be seen—

- (1) Whether the petitioner "made" the notice.
- (2) Whether he "published" it.
- (3) Whether, in making or publishing it, he had, or had not, the intention of harming the reputation of Basawan Singh.

I will consider each of these points in order.

(1) "If one man repeats a libel, another writes it, and a third approves what is written," says Russell, quoting Bacon's Abridgment, "they will all be makers of the libel." And if the writing now in question was prepared in the way in which the Magistrate has found it to have been prepared, there can, I think, [212] be no doubt, with reference to the terms of ss. 107 and 114 of the Indian Penal Code, that the petitioner is as much liable to conviction for "making" the imputation as he would have been had he been the sole person concerned in composing and committing to writing the defamatory letter.

(2) "*Publishing*," as used in the law under consideration, is clearly a word of second intention. It has come down to us from the Roman Law, and takes the place of *edere*. What its legal signification is was considered in 1820, in the celebrated case of the *King* against *Sir Francis Burdett*, by four Judges (BEST, BAYLEY, HOLROYD, J.J., and ABBOTT, C.J.); and I have not been able to find that the opinions then expressed regarding it have since been overruled.

The defendant had been convicted, but it was urged, *inter alia*, in support of a rule for a new trial, that the mere posting of a letter containing libellous matter was not a publication. The addressee was a third person (the libel was a seditious libel), but it had, in 1798, been laid down in *Phillips v. Jansen*, 2 Esp., 624, that a libel sent to the person libelled might be the object of an indictment. BEST, J., said (5 B. and Ald. at p. 126):—"It is assumed that publication means a manifestation of the contents. I deny that such is the meaning of the word 'publication.' In no part of the law do I find that it is used in that sense. A man publishes an award, but he does not read it. Again, he publishes a will, but he does not manifest its contents to those to whom he makes the publication; he merely desires the witnesses to take notice that the paper to which they affix their different attestations is his will. So in the case of a libel, publication is nothing more than doing the last act for the accomplishment of the mischief intended by it. The moment a man delivers a libel from his hands, his control over it is gone; he has shot his arrow, and it does not depend upon him whether it hits the mark or not. There is an end of the *locus penitentie*; his offence is complete; all that depends on him is consummated, and from that moment, upon every principle of common sense, he is

liable to be called upon to answer for his act. . . . The description of a libeller in our indictments seems to me to have been borrowed from the [213] Civil Law, and I agree that the word *edo* is represented by our word, *publish*; but I deny that *edere* means to manifest the contents of a paper. Both in the Roman classics and law books it means the act of *delivery*, which precedes the manifestation of the contents; and the subsequent manifestation is expressed by some other term, as *exponere* or *manifestari*." HOLROYD, J., said (5 B. and Ald. at p. 143):—"In 5 Co. Rep. 126 A., it is laid down that a scandalous libel may be published *traditione* when the libel, or any copy of it, is *delivered* over to scandalize the party. So that the mere delivery over or parting with the libel with that intent is deemed a publishing. It is an uttering of the libel, and that I take to be the sense in which the word *publishing* is used in law. Though in common parlance that word may be confined in its meaning to making the contents known to the public, yet its meaning is not so limited in law. The making of it known to an individual only is, indisputably, in law, a publishing. . . . In the cases of wills and awards, they are constantly made and published without the contents being made known even to the witnesses in whose presence they are published. So that the making known the contents is not in some cases at least, *ex vi termini*, essential to the constitution of an act of publishing."

BAYLEY, J., gave no opinion upon the point raised, as he considered that the question of fact, whether the defendant had or had not actually posted the letter containing the libel, or caused it to be posted, was one upon which a special verdict should have been taken.

ABBOTT, C.J., said (5 B. and Ald. at p. 160):—"It was further contended that the word publication denotes an actual communication of the contents of the writing by the publisher to some other person, and we were referred to dictionaries for the sense of the word publication. But in the law, as indeed in other sciences and arts, some words are used in a peculiar sense, differing in a certain degree from their popular meaning. Thus in the language of the law, we speak of the publication of a will, and the publication of an award, without meaning to denote by that word any communication of the contents of these instruments, and meaning only a declaration by the testator or arbitrator, in the presence of witnesses, that the instrument is his testament or [214] award. In like manner the publication of a libel does not, in my opinion, mean an actual communication of the contents of the paper."

There can then, in my judgment, be no doubt that the posting of the defamatory matter by the petitioner was a "publishing."

(3) In considering the third point, it is immaterial whether the petitioner both made and published, or only made or published, the defamatory matter. Neither the making, nor the publishing, was an offence, unless it was made with the intention of harming the reputation of Basawan Singh. And it is contended on behalf of the petitioner that he had no such intention.

* The form which was given to this contention in the written grounds of revision was the following:—

"It is proved that the words in the notice sent by your petitioner were suggested and written by a competent legal adviser, and consequently it is not right to infer that the allegation they contain was made maliciously and with intent to defame."

And it has also been suggested—

(a) That under no circumstances can a writing which is sent in a closed cover to the person whose reputation is aspersed by it be said to be sent with

intent to defame; for if on receiving it that person at once destroys it, defamation by it becomes impossible.

(b) That the Courts, both in England and in India, have held this to be so.

As to the plea taken in the written grounds of appeal, I observe that if Mr. Vansittart had supposed the despatch of the notice to be likely to result in the conviction and punishment of his client, it is improbable that he would have allowed it to be despatched; but it is very probable that Mr. Vansittart suggested the form in which the writing was despatched as one which would be absolutely privileged. There is, therefore, in my opinion, no force in this contention.

Regarding the former of the verbal pleas, I remark that if it were certain that a person slandered by a writing sent to him would be sure to destroy the writing, and thus prevent his reputation being harmed by it, the plea would be unanswerable. But [215] is it certain that this is the course which every person slandered would, or with reference to the circumstances of his position, could adopt? I think not. It is, I think, easy to conceive of cases in which the probabilities would lie in the opposite direction. Take, for instance, the case (a by no means improbable case in this country) of a spiteful master, from whose service an illiterate servant has asked for his discharge, and a certificate of good character on leaving; of the master saying—"All right, be off; I haven't time to write a certificate now, but give me your address, and I'll send one after you." Afterwards the master, knowing that what he was writing was false, and that the natural course for the servant to follow on receiving the certificate would be to take it to some one to be read, or direct to his next employer, sends in a closed cover to the servant a certificate in which he describes the servant as a rogue and a thief. I cannot doubt that the offender in such a case would be punishable for defamation. Section 114 of the Indian Evidence Act, 1872, provides that the Court "may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case." And it seems to me impossible to lay down a hard-and-fast rule of the nature contended for on behalf of the petitioner. It seems to me possible to conceive that in some cases the sender of slanderous matter to the person slandered might have no reason to suppose that the receiver would let it go further; but, on the other hand, it seems to me just as possible to conceive that in some such cases the slanderer might have every reason to suppose that the receiver would be compelled, by the exigencies of his official position or other causes, to allow the slander to become known to others; and when the sender has "reason to believe" that will be so, he surely, as it seems to me, brings himself—all other conditions being satisfied—within the terms of s. 199 of the Indian Penal Code.

I now come to the latter of the verbal pleas, viz., that the Courts, both in England and in India, have held a libel addressed to the person slandered not to be within the grasp of the law. The only Indian cases in which the point has been directly raised [216] which were cited, and I have been able to find, are *Komul Chunder Bose v. Nobin Chunder Ghose*, 10 W. R., 184, and *Mahomed Ismail Khan v. Mahomed Tahir*, N.-W. P. II. C. Rep., 1874, p. 38. The latter case merely follows and approves the former, and the report is so meagre that but little can be ascertained from it. In *Komul Chunder Bose v. Nobin Chunder Ghose*, 10 W. R., 184, MACPHERSON, J., said:—"I am of opinion that this appeal ought to be dismissed, because I think that the judgment of the Lower Appellate Court is substantially right. The suit is brought for damages for defamation of character. The defamation is contained in a

letter written and sent by the defendant to the plaintiff. The damage alleged is the injury to the plaintiff's feelings; and in the plaint no allegation is made of any publication of the libel beyond its being stated that the letter was sent to, and read by, the plaintiff himself. It appears to me that the plaintiff's case is deficient in several respects. In the first place it is not proved that there was any publication, for it is admitted that the letter was addressed to the plaintiff himself, and it was not proved that the letter was read by anybody excepting the plaintiff. It is now said that it might have been proved that the letter was in fact received in the first instance and opened by the nephew of the plaintiff. Admitting, however, that the plaintiff could have proved this, the fact of the letter being opened by the nephew, or by any one else, would not constitute publication by the defendant, unless the plaintiff could have gone further and also proved that the defendant, when he despatched the letter, knew that in the ordinary course of business in the plaintiff's house the letter would be opened and read by the nephew or by some one else other than the plaintiff himself."

In holding that the sending of the writing to the party himself, without proof that it was read by any other person, did not constitute publication, the learned Judge was no doubt following the case of *Phillips v. Jansen*, 2 Esp. 624, and in suggesting that if it had been shown that the defendant knew it to be the ordinary course of business in the plaintiff's house for letters to be opened and read by the plaintiff's nephew, or some one else, there would have been publication, he was probably following *Delacroix v. Thevenot*, [217] 2 Starkie, 63. But all these cases (both English and Indian) are cases of civil actions, and in *Phillips v. Jansen*, 2 Esp. 624, it was said that delivery to the party libelled was a sufficient publication to support an indictment. The English and American law upon the point seems to be settled. In *Russell on Crimes* (1st ed., Vol., p. 356), it is said:—"Proof that the libel was contained in a letter addressed to the party, and delivered into the party's hands is sufficient proof of publication upon an indictment or information," and in a foot-note Mr. Greaves brings out the difference in this respect between an indictment and an action. Mr. Bishop (*Bishop's Commentaries on the Criminal Law*, Boston, 1877, Vol. II, p. 576), writes:—"The full criminal offence is committed by sending the libel to the one libelled, though it reaches the ears of no third person. But for this the civil action cannot be maintained."

It has been contended, as has been noted above, that the reason for this difference between the law applicable to a civil action and to a criminal indictment is, that in the criminal indictment the law concerns itself solely with the tendency of a defamatory libel to provoke a breach of the peace, and that the danger of that result is as great when the libel is communicated to the person libelled as it is when the libel is communicated to others as well. I have already indicated my opinion that this contention is erroneous. And I find that in *Reg. v. Brooke*, 2 Cox, C. C., 251, (a case of 1856, and so far as I have been able to ascertain the latest case on the point) on the trial of an indictment for libel, the only evidence of the publication of which was the sending of it in a letter to the prosecutor himself, and the receipt of it by him, it was held (against the contention of the counsel for the defendant, that it was absurd to say a man was injured in his reputation by a letter addressed only to himself) that there was sufficient evidence to go to the jury, although the indictment contained no allegation of an intent or a tendency to provoke a breach of the peace. So also in an American case cited by Mr. Bishop (*ibid* p. 579) it was held that a letter by a man to the wife of another (in a

State where adultery is felony), implying that she had acted libidinally towards the writer, and had invited him to have adulterous inter-[218]course, the object of the letter being to insult and abuse her, debauch her affections, alienate them from her husband, entice her into adultery, and bring her into disgrace and contempt, was an indictable libel. And in an Indian case which was cited to the Chief Justice and myself at the first hearing viz., *Shepherd v. The Trustees of the Port of Bombay* I. L. R., 1 Bom., 477, GREEN, J., remarked:—The sending of defamatory matter to the person himself who is affected by it, though it may form a ground for criminal proceedings, is, so far as a civil action for damages is concerned, protected, and does not constitute a cause of action." There seems to me to be good reason why this should be so, independently of the tendency of slander to provoke a breach of the peace. In a civil action, with reference to the damage caused to the plaintiff, "*actus facit reum*." In a criminal action "*actus non facit reum, nisi mens sit rea*." It is the evil mind which makes the defendant liable, and not the actual damage caused by the act. The reason of the existence both of the civil and of the criminal action for slander is the same, the necessity, namely, of providing a remedy to which an injured person may resort, and may thus be prevented from avenging himself; but in the one case, if the libel passes direct to the person libelled, the damage for which compensation is given must, if sustained, have been to some extent caused otherwise than by the act of the defendant—the plaintiff must, in fact, have contributed to it. In the other case the evil mind which the law punishes is made apparent, and the guilt of it is fixed as soon as the "arrow is shot."

A man is held in law to intend the natural consequences of his acts, and in considering the case now before us, we must apply the provisions of s. 114, Act I of 1872. So doing, I note that the petitioner asserts his intention to have been to bring a suit as declared in the notice; that if the suit had been brought, the first thing to have been proved in it would have been the notice itself; that if a suit had been brought, it would have been brought against Basawan Singh on account of a thing purporting to have been done by him in the execution of his duty, that Basawan Singh would surely have moved Government to defend the suit on his behalf; that the officer of Government to whom such [219] application might have been made, would surely have asked Basawan Singh if notice of the action had been received, and on being told that it had been, would have called on Basawan Singh to produce it; that knowing that this would be so, and having no reason to suppose that a suit would not be brought against him, Basawan Singh would naturally think it best to show the notice at once to his superior officers; that, as a fact, this is what Basawan Singh did, and that the appellant is a man of intelligence and position, with means of knowing what would be the line of conduct which Basawan Singh would be likely to adopt.

Upon this view of the case, I find it impossible to doubt that, in sending the notice to Basawan Singh, the petitioner intended to harm the reputation of Basawan Singh. My reply therefore to the question put to the Full Bench must be, as indicated at the outset of these remarks, that, assuming the points conceded for the sake of argument by the order of reference, the petitioner has been rightly convicted under s. 499-500 of the Indian Penal Code.

Mahmood, J.—I regret that I am unable to agree with my brother DUTHOIR in the conclusion which he has arrived at upon the question referred to us. I take it that in the Full Bench we are not in possession of the whole case, so far as regards the minute details of evidence, or as regards the punishment which has been inflicted. The question before us is an extremely limited one,

namely, whether or not a libellous communication made only to the person whose character is attacked amounts to the offence of defamation as defined in s. 499 of the Indian Penal Code? I am anxious to say that the question we have to consider is so limited, because the paper-book shows that the accused in the present case was never tried for any other publication than that which consists in making a communication to the prosecutor himself. Now, in the first place, without considering it necessary to refer to the English authorities, I take it that, according to both the English and the Indian Law, communication of libellous matter to the complainant only is not sufficient to sustain a civil-action. So far as criminal indictments are concerned, the rule of English Law as to publication seems to be similar to that in civil cases, but subject to an important proviso, namely, that [220] where defamatory matter has been communicated to the prosecutor only, and it is established that such communication was made with the object of provoking the prosecutor to commit a breach of the peace, the libel would amount to a criminal offence. If it could not be proved that the publication to the prosecutor only was intended or calculated to provoke a breach of the peace, there would be nothing to support an indictment, even though the tendency of the libel be to vilify the prosecutor and degrade him socially or professionally, if the libel were communicated to third parties.

Now, to arrive at a conclusion as to the law of India upon this point, we must look to the terms of s. 499 of the Penal Code, read as a whole, with all the explanations, illustrations, and exceptions which it includes. In the first place, the words in the body of the section itself must be considered:—"Whoever, by words, either spoken or intended to be read, or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing, or having reason to believe, that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person." This is the substantial part of the section, and it appears to me that the most important words in it are: "intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person." I lay special stress upon the word "harm," because the words "makes or publishes" are governed by the meaning which we must attach to "harm." Now, the meaning which should be attached to "harm" is not the ordinary sense in which the word is used, because a special meaning is given to it by the statute, and I feel convinced that if we interpreted the expression in the ordinary way, we should interpret it erroneously. This is shown beyond a doubt by Explanation 1, which provides that—"No imputation is said to harm a person's reputation unless that imputation, directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful." This explanation convinces me that by [221] "harm" is meant imputations on a man's character made and expressed to others, so as to lower him in their estimation, and that anything which lowers him merely in his own estimation, certainly does not constitute defamation. Now, in the case which has been referred to us, taking the reference as it stands, there were imputations communicated to the prosecutor only, and therefore they cannot be treated as defamatory. The letter could not have injured the prosecutor in the estimation of others, and of course it is not likely that it injured him in his own estimation, and I am unable to hold that a man's opinion of himself can be called his reputation. Further, the words "directly or indirectly" in Explanation 1, mean that the person defamed must either be abused in express terms, or the wording of the communication must

convey such imputations as any person reading it must understand to impute misconduct or bad character. The words cannot, in my opinion, be understood to mean that the person libelled should himself be the direct means of publishing the libel to others. Taking the question before us as limited in the manner which I have described, I am of opinion that in the present case the act of the petitioner was not such a "making" or "publication" as could "harm" the prosecutor in the sense given to that word in Explanation 4 of the section.

To return for a moment to the English Law on the subject, the essence of libel as a criminal offence is its tendency to provoke a breach of the peace. This is the turning-point of the offence in cases where the matter complained of is communicated to the prosecutor alone. Now s. 504 of the Indian Penal Code meets such a case exactly. It provides that "whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both." This provision corresponds precisely with those cases in which, under the English Law, defamatory matter published to the prosecutor alone would be indictable as libellous.

[222] In the present case the accused was not tried for publishing the libel to Mr. Vansittart or to the clerk, and even if he had been so tried, he might possibly have pleaded that the communication made by him was privileged, and could not be proved, and he might have raised other pleas in his defence. But with such questions as these we are not now concerned. The charge was made solely in respect of the communication of the letter to the prosecutor, upon whom it was incumbent to prove that the letter was so made or published as to do him "harm" within the meaning of s. 499 of the Penal Code. I hold that, taking the case as it has been referred to us, no such charge has been established. If the accused were charged with having intended that the letter sent by him should cause a breach of the peace, he might have been punishable under s. 504, but it has practically been admitted that he had no intention of the kind. My reply to the reference, therefore, is that the elements of the offence punishable under s. 499 of the Penal Code have not been proved by the prosecution, and that the question must be answered in the negative.

Brodhurst, J.—I also am of opinion that the act of the petitioner was not such a making or publishing as is contemplated by s. 499 of the Indian Penal Code.

Oldfield, J.—We have to determine the question before us only with reference to the provision in s. 499 of the Penal Code, and to no other law. Where the words containing the imputation are in writing, it is necessary, in order to constitute the offence of defamation under s. 499 of the Penal Code, that the maker of the imputation shall intend that the words shall be read, that is, read by some other person than the person defamed, or, in other words, that they shall be made public, for the essence of the offence of defamation in the Penal Code is the intention to harm reputation, and that necessarily requires publicity to be given to the imputation. The offence is not dependent on there being provocation to cause a breach of the public peace, that offence being otherwise provided for in the Code.

We have to determine this intention from the facts in each case. Where the only act is to send a letter under a closed cover [223] to a person, containing imputations against him, the intention to make public its contents so as to harm his reputation cannot be inferred, and I see no difference in this case, where the writing took the form of a notice of an action, and no more

was done than to send it to the complainant under a closed cover. Any publicity given to its contents, and consequent harm to reputation, was or could be only by the act of the complainant, and not by that of the accused. It rested with the former to publish the contents or not; the latter might have taken steps in other ways to give it publicity, but did not; and the circumstances will not justify us in holding that he intended that the contents should be made public, and so harm the reputation of the complainant. In my opinion, therefore, the answer to the reference should be in the negative.

Petheram, C.J.—As one of the Judges who referred this case to the Full Bench, I wish to say that the words in the order of reference, "in sending the notice in a closed cover by post to Basawan Singh," should be struck out; and the question will then stand whether the whole action of the appellant did or did not constitute an offence under s. 499 of the Penal Code. That was what we intended to refer to the Full Bench.

In my opinion there was no evidence against the defendant of the commission of any offence whatever. The question before us is a very small one—simply the construction to be placed upon s. 499. Before the Penal Code was passed, there was under the native laws no such offence as slander, and the offence was in fact created by s. 499. This is in itself a short section, but it contains many illustrations and exceptions. If we look at these illustrations, we must observe that they all deal with such communications only as are made to third persons. So also each of the exceptions relates to such communications, and not to publications only to the person defamed. It is therefore no violent presumption that the framers of the Penal Code did not intend to create a new offence in that sense. The only question is, whether the terms of the section are so distinct as to make the action of the appellant in this case a crime. The only way in which you can make it a crime is to hold that by doing something which makes, or is likely [224] to make, the prosecutor *harm himself*, the provisions of s. 499 are violated. But the section itself does not say so. Here no imputation was made except to the policeman himself. How could such an imputation possibly injure his reputation? A man has no "reputation" to himself, and therefore the section does not make an act of this nature a crime. It follows that the sending of the letter was not "making" or "publishing" an imputation within the meaning of s. 499. As to the rest of the charge against the prisoner, there was no reliable evidence to support it. The only evidence at all consisted of two statements made by the prisoner in the presence of the Magistrate, but it is only by straining the language of these statements that they can be regarded as confessions, for it is clear that the prisoner did not mean to say either that he composed the letter himself, or that he was aware of its contents. I am therefore of opinion that the conviction should be set aside; that the fine which has been paid should be remitted; and that, if any further reparation to the prisoner is possible, such reparation ought to be made.

[7 All. 225]

The 6th December, 1884.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE OLDFIELD,
MR. JUSTICE BRODHURST, MR. JUSTICE MAHMOOD, AND
MR. JUSTICE DUTHOIT.

Tota Ram and others.....Plaintiffs

versus

Har Kishan and others.....Defendants*

Res judicata—*Civil Procedure Code, s. 13—Act XIX of
1873 (Land-Revenue Act), ss. 56, 62, 64, 241 (g).*

Held that an order by a Settlement Officer directing that certain persons should be recorded as the sub-proprietors of certain land, as they claimed to be, and not as lessees, as certain other persons asserted that they were, did not operate as *res judicata* in a suit by the latter persons against the former for a declaration that the former were not sub-proprietors of the land, but lessees thereof, the Settlement Officer not being competent, under Act XIX of 1873 (N.-W. P. Land-Revenue Act), to try such a question of right.

THE plaintiffs in this case stated in their plaint that they were zamindars of mauza Panwari, pargana Itimadpur, zila Agra, in which there was a hamlet, 180 bighas 10 biswas in area. The defendants were the lessees of the hamlet, but they applied to the Settlement Officer to be recorded as its inferior proprietors. The [225] plaintiffs opposed this application, but their objections were overruled, and defendants were ordered to be recorded as inferior proprietors of the village. Upon these allegations the plaintiffs claimed a declaration that the defendants were not inferior proprietors of the hamlet, but merely lessees thereof. The defendants contended that the question whether they were inferior proprietors or lessees of the hamlet was *res judicata*, with reference to the order of the Settlement Officer. The Court of First Instance (Subordinate Judge of Agra) allowed the defendants' contention and dismissed the suit, holding that the suit was barred by s. 13 of the Civil Procedure Code. In so holding, it relied on *Rup Singh v. Sukhdeo*, Weekly Notes, 1882, p. 111. On appeal by the plaintiffs, the Lower Appellate Court (District Judge of Agra), having regard to the decision in the same case, affirmed the decree of the Court First Instance.

In second appeal, the plaintiffs contended that "s. 13 of the Civil Procedure Code was no bar to the institution of the present suit to establish a right to the property."

The Division Bench (STRAIGHT, Offg. C.J., and MAHMOOD, J.) hearing the appeal referred the question, whether the suit was barred by s. 13 of the Civil Procedure Code, to the Full Bench, stating, in the order of reference, as follows :—

"We should have scarcely felt any difficulty in disposing of this appeal, but for a ruling of a Division Bench of this Court in *Rup Singh v. Sukhdeo*, Weekly Notes, 1882, p. 111, on which both the lower Courts have relied in support of the view that the order of the Settlement Officer, directing that the defendants were to be recorded as inferior proprietors of the hamlet in suit,

* Second Appeal No. 126 of 1884, from a decree of J. C. Leupolt, Esq., District Judge of Agra, dated the 31st July 1883, affirming a decree of Babu Mrittonjoy Mukarji, Subordinate Judge of Agra, dated the 22nd June 1882.

operated as *res judicata* so as to bar the present suit. The ruling is undoubtedly applicable to the present case, but it is in conflict with certain other published and unpublished rulings of this Court, of which *Birbal v. Tika Ram*, I. L. R., 4 All., 11. is an illustration. On the other hand, in the case of *Shimbhu Narain Singh v. Bachcha*, I. L. R., 2 All., 200, a full Bench of this Court was evenly divided on a cognate question."

The Senior Government Pleader (Lala Juala Prasad) for the Appellants.—The order of the Settlement Officer was made under [226] ss. 62 and 64 of the N.-W. P. Land Revenue Act, 1873. All orders under those sections are made on the basis of possession. The Settlement Officer is not authorized under those sections to try questions of title. If he tries such a question, his decision is not binding.

The Junior Government Pleader (Babu Dwarka Nath Banarji), for the Respondents. The Settlement Officer's order was made under s. 56 of the Land-Revenue Act. The order could not be made without determining the *status* of the plaintiffs in this suit. The Settlement Officer was competent to determine that *status*, and his order is binding. Under s. 95 (g) no Civil Court can exercise jurisdiction in respect of the matters provided for in s. 56.

The following judgments were delivered by the Full Bench :—

Petheram, C. J.—The matter in issue in this suit is, whether the defendants are inferior proprietors or lessees of certain land. This same question arose before the Settlement Officer. He decided that the defendants were inferior proprietors and not lessees. If he had jurisdiction to try this question, the matter is *res judicata*. Section 13 of the Civil Procedure Code says :—"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit, or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court." In the first place, there has been no litigation properly so called, and secondly, there was no competent Court. The Settlement Officer is said to have acted under ss. 62 and 64 of the Land Revenue Act. But those sections show that the entries are to be made on the basis of possession, they are to be entries of existing rights, there being no dispute as to rights. There is no provision in the Act which gives the Settlement Officer power to settle rights. His decision in this case is not, therefore, a binding decision. In my opinion, s. 13 of the Civil Procedure Code is not a bar to the institution of the present suit.

[227] **Mahmood, J.**—I am of the same opinion as the learned Chief Justice. The dispute between the parties to this case constitutes a suit of a civil nature within the meaning of s. 11 of the Civil Procedure Code, and would therefore be the subject of adjudication by the Civil Courts, unless it is shown that its cognizance is barred by any legislative enactment. The learned pleader for the respondents endeavoured to show that the matter of the dispute fell under the purview of cl. (g) of s. 241 of the Revenue Act, and that as the Settlement Officer must be taken to have acted under s. 56 of that Act, his order was within jurisdiction, and formed an adjudication which would bar the present suit under s. 13 of the Civil Procedure Code. The learned pleader also referred to s. 62 and 64 of the Revenue Act, but none of these sections can either be understood to bar the jurisdiction of the Civil Courts in respect of disputes of this nature, or to confer power on Settlement Officers to adjudicate upon rights such as are in issue in this litigation. To substantiate the plea of *res judicata* it is essential to show that the former adjudication was by a Court of com-

petent jurisdiction; but the Settlement Officer cannot be regarded as such a Court, and there was no adjudication.

For these reasons I am unable to agree in the rule laid down in *Rup Singh v. Sukhdeo*, Weekly Notes, 1882, p. 111, on which both the lower Courts have relied, and my answer to the question referred to us is in the negative.

Oldfield, Brodhurst, and Duthoit, JJ., concurred.

[7 All 227] *

The 13th December, 1884.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE OLDFIELD,
MR. JUSTICE BRODHURST, MR. JUSTICE MAHMOOD
AND MR. JUSTICE DUTHOIT.

Ramjiwan Mal and another.....Plaintiffs

versus

Chand Mal and others.....Defendants.*

*Suit for dissolution of partnership—Winding-up—Jurisdiction—Act IX
of 1872 (Contract Act), s. 265—Civil Procedure Code, ss. 11, 213, 215,
sch. IV, Form 113.*

The ordinary Civil Courts have jurisdiction to try a suit for dissolution of a partnership, their jurisdiction to try such suit, not being ousted by s. 265 of the Contract Act, 1872. *

[228] THIS was a reference to the Full Bench by BRODHURST and DUTHOIT, JJ. It arose out of the following facts. A suit for dissolution of a partnership, the relief sought in the plaint being stated in the terms of the 4th paragraph of Form No. 113, 4th, sch., Civil Procedure Code, was instituted in the Court of the Subordinate Judge of Azamgarh. The defendants set up as a defence to the suit, amongst other things, that the suit was not cognizable in the Subordinate Judge's Court, but should, under s. 265 of Act IX of 1872 (Contract Act), have been instituted in the District Court, inasmuch as the partnership had been dissolved before the institution of the suit, by mutual consent, and all that remained was to adjust the partnership accounts. The Subordinate Judge allowed this contention, relying on *Prosad Doss Mullick v. Russick Lall Mullick*, I. L. R., 7 Cal., 157, and *Ramayya v. Chandra Sekara Rau*, I. L. R., 5 Mad., 256, and made an order directing that the plaint should be returned to the plaintiffs for presentation to the proper Court. On appeal by the plaintiffs the District Judge affirmed the order of the Subordinate Judge, holding that, as a dissolution of the partnership had taken place, "the claim should be brought in the form of an application under s. 265 of the Contract Act, and could be entertained by a District Judge alone."

The plaintiffs applied to the High Court for revision under s. 622 of the Civil Procedure Code, on the ground that the Subordinate Judge was

* Application No. 331 of 1884, for revision under s. 622 of the Civil Procedure Code, of an order of H. D. Willock, Esq., District Judge of Azamgarh, dated the 21st September 1883.

competent to entertain the suit, and, had improperly refused to do so. The case came before BRODHURST and LUTHOIT, JJ. The learned Judges, after consideration of the following authorities—*Ramayya v. Chandra Sekara Rau*, I. L. R., 5 Mad., 256; *Prosad Doss Mullick v. Russick Lal Mullick*, I. L. R., 7 Cal., 157; *Ram Chunder Shaha v. Manik Chunder Banikya*, I. L. R., 7 Cal., 428; *Harrison v. The Delhi and London Bank*, I. L. R., 4 All., 437; *Kalian Das v. Ganga Sahai*, I. L. R., 5 All., 500; *Luchman Lal v. Ram Lal*, I. L. R., 6 Cal., 521,—referred the following question to the Full Bench:—“Is the jurisdiction provided by s. 265 of the Indian Contract Act, 1872, concurrent with, or does it oust, the jurisdiction of the ordinary Civil Courts, as described in Act VI of 1871 and in the Code of Civil Procedure?”

[229] Mr. T. Conlan (with him Babu Jogindro Nath Chaudhri).—Section 265 of the Contract Act is an enabling section only. Moreover, it refers to the case of partners between whom there is no sort of contention, and who only desire the aid of the Court in bringing the partnership business to a conclusion. The suit is one for dissolution of partnership; such a suit is cognizable in the ordinary Civil Courts. This is shown by the terms of s. 215 of the Civil Procedure Code, and of Form No. 113 in the 4th sch. to the Code.

Mr. G. T. Spankie (with him Mr. C. H. Hill, Mr. W. M. Colvin, and Babu Ratan Chand).—The partnership has been dissolved. The only relief which the plaintiffs can be granted is the winding-up of the partnership business. Their claim must be treated as one for winding-up. The winding-up of a partnership is a matter exclusively cognizable by the District Court. In support of this contention I rely on *Prosad Doss Mullick v. Russick Lal Mullick*, I. L. R., 7 Cal., 157, and *Ramayya v. Chandra Sekara Rau*, I. L. R., 5 Mad., 256.

The Court, having regard to the terms of the plaint, amended the question referred in the manner following:—“Whether the ordinary Civil Courts have jurisdiction to hear and determine this cause, or whether such jurisdiction is ousted by s. 265 of the Indian Contract Act?”

• The following judgments were delivered by the Full Bench:—

Petheram, C.J.—This suit is for dissolution of a partnership. This is in effect asking the Court to give effect to the partnership agreement. This is a relief which can be sought in the ordinary Civil Courts. S. 265 of the Contract Act is intended to meet a different state of things. The winding-up of a partnership is the taking by the Court into its own hands the settlement of the partnership concerns. It is a jurisdiction which is created by statute. If this was an application under s. 265 of the Contract Act, I am inclined to think that the District Court only could entertain it.

Oldfield and Brodhurst, JJ., were of opinion that the suit, being one for dissolution of partnership, was cognizable in the ordinary Civil Courts.

• **Mahmood, J.**—Judging by the allegations in the plaint and the nature of the reliefs prayed for, I am of opinion that this suit [230] is cognizable in the ordinary Civil Courts. It is a suit of a civil nature, within the meaning of s. 11 of the Civil Procedure Code, which provides the general jurisdiction of the Civil Courts subject to the provisions therein contained. There is no provision in the Code to bar the cognizance of such a suit; but, on the contrary, s. 215 contemplates such a suit. Nor am I aware of any enactment which bars the cognizance of such suits by the ordinary Civil Courts. Considering the terms of s. 215 with s. 213, and as well the language of No. 113, sch. iv, taken with s. 644 of the Code, it may be that in such a suit as this the Court will be called upon to take cognizance of matters which might have formed the subject of an application under s. 265 of the Contract Act.

But we need not go beyond the general character of the suit to see if it is cognizable by the ordinary Courts; but I wish to guard myself against being understood to lay down the rule that, even if the suit was one involving matters of the character mentioned in s. 265 of the Contract Act, the ordinary Civil Courts would be precluded from entertaining it.

Duthoit, J.—I am of opinion that a suit for dissolution of partnership is cognizable in the ordinary Civil Courts.

NOTES.

[In 1886, sec. 265 of the Indian Contract Act 1872 was amended by the Indian Contract Act Amendment Act IV of 1886 sec. 1, especially by the omission of the explanation defining the jurisdiction.]

[7 All. 230]

The 13th December, 1884.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE CLDFIELD,
MR. JUSTICE BRODHURST, MR. JUSTICE MAHMOOD,
AND MR. JUSTICE DUTHOIT.

Nidhi Lal.....Defendant

versus

Mazhar Husain and another.....Plaintiffs.*

Jurisdiction—Competency of Subordinate Judge to try Munsif's case—Act XVI of 1868, ss. 13, 15, 16—Act VI of 1871 (Bengal Civil Courts Act) ss. 19, 20—Civil Procedure Code, ss. 15, 25, 57 (a), 578.

Per PETHERAM, C.J., and BRODHURST, MAHMOOD, and DUTHOIT, JJ. The object of ss. 19 and 20 of the Bengal Civil Courts Act, 1871, was to create in the District Judge, Subordinate Judge, and Munsif concurrent jurisdiction up to Rs. 1,000.

Per PETHERAM, C.J.—S. 15 of the Civil Procedure Code is a proviso to those sections. The word "shall" in that section is imperative on the suitor. The word is used for the purpose of protecting the Courts. The suitor shall be obliged to bring his suit in the Court of the lowest grade competent to try it. The object of the Legislature is that the Court of the higher grade shall not be overcrowded with suits. Whenever an Act confers a benefit, the donee may [231] exercise the same or not at his pleasure. The proviso is for the benefit of the Court of the higher grade, and it is not bound to take advantage of it. If it does not wish to try the suit, it may refuse to entertain it. If it wishes to retain the suit in its Court, it may do so; it is not bound to refuse to entertain it.

Per DUTHOIT, J.—The words in s. 57 of the Civil Procedure Code "shall be" are an instruction which the Court is bound to follow; and they are therefore a restraint upon jurisdiction. The effect, therefore, of the concurrent jurisdiction of Subordinate Judges and Munsifs is not to allow to a Subordinate Judge discretion as to accepting or not accepting for trial by himself suits cognizable by the inferior tribunals.

BRODHURST and MAHMOOD, JJ.—S. 15 of the Civil Procedure Code is a rule of procedure, not of jurisdiction, and whilst it lays down that a suit shall be instituted in the Court of the lowest grade, it does not oust the jurisdiction of the Courts of higher grades.

Russick Chunder Mohunt v. Ram Lal Shaha, 23 W.R., 301, and *Sufesool-lah Circar v. Begum Bibi*, 25 W.R., 219, followed.

* Second Appeal No. 1176 of 1883, from a decree of F. E. Elliot, Esq., District Judge of Mainpuri, dated the 17th May 1883, affirming a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 29th January 1883.

Per OLDFIELD, J.—S. 15 of the Civil Procedure Code is a provision entirely of procedure as distinct from jurisdiction, and its effect on s. 19 of the Bengal Civil Courts Act is that the jurisdiction of the District Judge and Subordinate Judge extends to all original suits cognizable by the Civil Court, subject in its exercise to a certain procedure, namely, that the suits be instituted in the Court of lowest grade competent to try them.

Held, therefore, by PETHERAM, C. J., and OLDFIELD, BRODHURST, and MAHMOOD, C.J., where a Subordinate Judge had tried a suit which a Munsif, a Court of a lower grade, might have tried, that the Subordinate Judge had not acted without jurisdiction.

The plaint in such suit had been in the first instance presented to the Munsif, who had returned it, to be presented to the Subordinate Judge.

Per DUTHOIT, J.—The decree of the Subordinate Judge would not be liable to be reversed in appeal for want of jurisdiction, for the jurisdiction was there, though it ought not to have been exercised. This view of the matter was consistent with the received cannon of construction, that unless the Legislature uses negative words, or words showing an intention to treat the observance of a rule of procedure as essential, the rule will ordinarily be treated as a direction only. Under the circumstances, therefore, the District Judge had, in appeal, correctly refused to entertain the plea of defect in jurisdiction.

Per MAHMOOD, J.—The institution of a suit in a Court of higher grade than the Court which is competent to try it, is not a question either as to the jurisdiction or affecting the merits of the case. It is a question of the kind provided for by s. 578 of the Civil Procedure Code, and the irregularity is not one which affects "the merits of the case or the jurisdiction of the Court," within the meaning of that section.

[232] The plea of want of jurisdiction can be entertained for the first time at any stage of a suit, provided there is on the record sufficient material to substantiate it.

THIS was a reference to the Full Bench by STRAIGHT, Offg. C. J., and DUTHOIT, J. The facts of the case and the point of law referred are stated in the order of reference, which was dated the 12th May 1884, and was in the following terms:—

"This is an appeal from a decree of the District Judge of Mainpuri, affirming a decree made by the Subordinate Judge of Mainpuri in favour of the plaintiffs (respondents), for possession by redemption of mortgage of a certain "pucka shop," upon payment into Court of Rs. 275, being Rs. 75 on account of the mortgage-debt and Rs. 200 on account of expenses incurred by the mortgagee in re-constructing the mortgaged property.

"In the opening portion of his judgment, the District Judge has made the following remarks:—

"A preliminary objection is taken by the appellant, viz., that as the suit was cognizable by the Munsif, but was heard by the Subordinate Judge, the Subordinate Judge's proceedings were without jurisdiction and must be set aside.

"It appears that the suit was originally filed in the Court of the Munsif, who returned the plaint to be filed before the Subordinate Judge, on the ground that the market-value of the property (which exceeds Rs. 1,000) was the value of the subject-matter of the suit. The plaint was admitted by the Subordinate Judge, and the case tried and decided by that officer.

"The Munsif's order was wrong: see *Kubere Singh v. Atma Ram*, Weekly Notes, 1883, p. 47: the amount of the mortgage-money only (Rs. 75) was in question. But this is no reason for setting aside the Subordinate Judge's order on a purely technical point, when this Court has before it all the materials necessary for deciding the case. Even if the circumstances were reversed, and the suit cognizable by the Subordinate Judge had been heard by the Munsif, this Court would not have set aside the decision unless it appeared that the appellant had been prejudiced by the mistake. But if a Subordinate Judge is competent to try cases in which the value of the subject-matter exceeds

Rs. 1,000, [233] he is practically competent to try a case in which it is less than Rs. 1,000; and though the case was not within his jurisdiction, yet as it has been tried, the irregularity is not such as to vitiate his proceedings."

"In appeal to this Court it is contended that the order of the Munsif returning the plaint and referring the plaintiff's to the Court of the Subordinate Judge could not confer upon that Court a jurisdiction not vested in it by law; that the reasons assigned by the Judge for overruling the plea of jurisdiction are erroneous; and that the decision of the Lower Appellate Court is contrary to law, inasmuch as, when it found that the suit had been heard and determined by a Court which had no jurisdiction regarding it, it should have decreed the appeal and dismissed the plaintiffs' suit.

"We have considered the following law and authorities:—Act XVI of 1868, ss. 13 and 15; Act VI of 1871, s. 19; Act XIV of 1882, ss. 15, 57, 578 and 584; *Mackintosh v. Kashee Nath Biswas*, 21 W. R., 450; *Russick Chander Mohunt v. Ram Lal Shaha*, 22 W. R., 301; *Sufecoolah Sircar v. Begum Bibi*, 25 W. R., 219; *Rajendro Lal Gossami v. Shama Churn Lahori*, I. L. R., 5 Cal., 188; *Kushi Ram v. Daljit Khan*, Weekly Notes, 1882, p. 45;

"and as it appears to us that the question is one which should be settled by a Full Bench, we refer the following question:—

"If, by *bona fide* mistake of the parties, or under mistaken action of the Courts, a suit cognizable by a Munsif has been heard and determined by a Subordinate Judge, and the District Judge in appeal has refused to entertain the plea of defect in jurisdiction, is such refusal erroneous; and, if it be, can it be made ground of second appeal to this Court?"

Pandit *Ajudhia Nath* and *Babu Baroda Prasad*, for the Appellant.

The *Junior Government Pleader* (*Babu Dwarka Nath Banarji*) and *Munshi Hanuman Prasad*, for the Respondents.

The following judgments were delivered by the Full Bench:—

Petheram, C.J.—The question raised by this reference is whether a District Judge or Subordinate Judge has any jurisdiction [234] to try a suit in which the value of the subject-matter in dispute is less than Rs. 1,000. The question arises on the construction of ss. 19 and 20 of the Bengal Civil Courts Act, and s. 6 of the Civil Procedure Code, 1859, for which ss. 15 and 25 of the present Civil Procedure Code have been substituted. The sections must all be read together. Reading them together, it appears that the jurisdiction of the District Judge or Subordinate Judge extends to all suits cognizable by the Civil Court, whatever the value of the subject-matter in dispute may be. The jurisdiction of the Munsif extends to all like suits the value of the subject-matter in dispute in which does not exceed Rs. 1,000. That is to say, up to Rs. 1,000 the Munsif and the District Judge or Subordinate Judge have concurrent jurisdiction. Then comes s. 6, which must be read in as a proviso. The section which has been substituted is practically the same. The word "shall" is, in my opinion, imperative on the suitor. The word is used for the purpose of protecting the Courts. The suitor shall be obliged to bring his suit in the Court of the lowest grade competent to try it. The object of the Legislature is, that the Court of the higher grade shall not be overcrowded with suits. Whenever an Act confers a benefit, the donee may exercise the same or not at his pleasure. The proviso is for the benefit of the Court of the higher grade, and it is not bound to take advantage of it. If it does not wish to try the suit, it may refuse to entertain it. If it wishes to retain the suit in its Court, it may do so; it is not bound to refuse to entertain it. Consequently, I am of opinion that the Subordinate Judge had jurisdiction in the present case.

Oldfield, J.—By s. 19, Act VI of 1871, the jurisdiction of the District Judge and Subordinate Judge extends, subject to the provisions of s. 6, Act VIII of 1859, to all original suits cognizable by the Civil Court. S. 6 provided that every suit shall be instituted in the Court of the lowest grade competent to try it, and this provision is re-enacted in s. 15 of the present Code of Civil Procedure. This last provision is one entirely of procedure as distinct from jurisdiction, and the effect is that the jurisdiction of the District Judge and the Subordinate Judge extends to all original suits cognizable by the Civil Court, subject in its exercise [235] to a certain procedure, namely, that the suits be instituted in the Court of lowest grade competent to try them.

S. 15 does not in any sense affect jurisdiction, and in the case before us the Subordinate Judge had jurisdiction, although there may have been a transgression of the rule of procedure laid down in s. 15.

I may add that in the case of *Gulzari Lal v. Jadaun Rai*, I. L. R., 2 All., 799, the decision turned on a question of valuation, and the point now before us was not, it would seem, raised or discussed.

Brodhurst, J.—For the purpose of disposing of this reference, it is desirable, at the outset, to look at Act XVI of 1868, which was repealed by Act VI of 1871, the Bengal Civil Courts Act now in force.

By referring to ss. 13, 15 and 16 of the former Act, it will be seen that, whilst Munsifs were empowered to try all original suits cognizable by the Civil Court of which the subject-matter did not exceed in value or amount Rs. 1,000, Subordinate Judges were empowered to try all suits cognizable by the said Courts, of which the subject-matter exceeded in amount or value Rs. 1,000, and they were debarred from trying suits of less value unless they had been invested by the Local Government with the powers of a Munsif under s. 13, or such suits had been transferred to them by the District Judge under the Code of Civil Procedure.

The jurisdiction of a Munsif under s. 20, Act VI of 1871, is exactly the same as it was by s. 13, Act XVI of 1868, but the jurisdiction of a Subordinate Judge has been enlarged by the Act in force, for s. 19 declares that his jurisdiction "extends, subject to the provisions in the Code of Civil Procedure, s. 6, to all original suits cognizable by the Civil Court."

Act VIII of 1859 was the Code of Civil Procedure at the time that Act VI of 1871 came into force, and ss. 15 and 25 of Act XIV of 1882, the Civil Procedure Code now in force, correspond with s. 6, Act VIII of 1859.

The provision of the latter section was, as held by AINSLIE and McDONELL, JJ., in their judgment in *Russick Chunder Mohunt v. [236] Ram Lal Shaha*, 22 W. R., 301, to be, "a provision intended to regulate the practice of the Courts," and "not intended to take away jurisdiction from any Court which has general jurisdiction;" and GARTH, C.J., and BIRCH, J., in their judgment in *Sufee-ool-lah Sircar v. Begum Bibi*, 25 W. R., 219, observed:—"The Subordinate Judge is empowered by s. 19 of Act VI of 1871 to try causes of any value, although he might very properly, if he had found the subject-matter of the suit to be under Rs. 1,000, have sent it to the Munsif's Court to be tried there; he had clearly jurisdiction to try it himself, and the fact that he did so try it is no ground of error in special appeal."

Concurring in those rulings, I consider that ss. 15 and 25, as also cl. (a), s. 57 of Act XIV of 1882, refer to procedure only, and regulate the practice of the Courts, but do not deprive them of jurisdiction which they may otherwise possess.

The suit which has occasioned this reference was originally instituted in the Munsif's Court, but the Munsif, being of opinion that it was beyond his

jurisdiction, returned the plaint to be filed in the Court of the Subordinate Judge; it accordingly was filed in that Court; no objection was then taken; the Subordinate Judge had jurisdiction to try the suit, and he did try it. The appeal came before the same Judge that would have tried it had the original suit been decided by the Munsif, and neither party appears to have been prejudiced by the case having, under a misapprehension, been decided by the Subordinate Judge, who had more experience, and was holding a higher position in the judicial service than the Munsif, and the District Judge was, I think, right in declining to set aside the Subordinate Judge's proceedings on the ground of their being without jurisdiction.

Mahmood, J.—I am of the same opinion; but I wish to explain briefly the manner in which my own mind has arrived at this conclusion. My brother BRODHURST has explained the circumstances of the suit. It was originally instituted in the Court of the Munsif, who returned the plaint under s. 57, cl. (a) of the Civil Procedure Code, because he held that the value of the subject-matter of the suit was more than Rs. 1,000, and, therefore, beyond his jurisdiction. No appeal was preferred from the Munsif's order, [237] although it was appealable under s. 588 of the Civil Procedure Code, and the plaint was taken back by the plaintiff and filed in the Court of the Subordinate Judge. That officer accepted it, tried the case, and passed a decree. The decree was appealed to the District Judge, in whose Court the question was raised, practically for the first time, whether the Subordinate Judge had jurisdiction to try the suit, and this plea rested on the contention that the value of the subject-matter was less than Rs. 1,000. Such being the facts, the question referred to us is as follows:—"If by *bond fide* mistake of the parties, or under mistaken action of the Courts, a suit cognizable by a Munsif has been heard and determined by a Subordinate Judge, and the District Judge in appeal has refused to entertain the plea of defect in jurisdiction, is such refusal erroneous; and, if it be, can it be made ground of second appeal in this Court?" I understand this question to raise two distinct points. The first, which I regard as most important, relates to the jurisdiction of the Subordinate Judge. In dealing with this point, it is necessary to refer to Act XVI of 1868, and in particular to ss. 13, 15, and 16. Section 13 says:—"Munsifs are empowered to try all original suits cognizable by the Civil Courts, of which the subject-matter does not exceed in amount or value Rs. 1,000." Section 15 says:—"Subordinate Judges are empowered to try all original suits cognizable by the Civil Courts, of which the subject-matter exceeds in amount or value Rs. 1,000, and (if the District Judge shall have referred them under the Code of Civil Procedure) suits of which the subject-matter is of any less amount or value." These two sections leave no doubt that at the time when Act XVI of 1868 was passed, the Legislature intended that the jurisdiction of the Subordinate Judge should begin where that of the Munsif ceased: in other words, that the Munsif should have jurisdiction to try cases in which the value of the subject-matter did not exceed Rs. 1,000, and that where the subject-matter exceeded that amount in value, the case should be tried by the Subordinate Judge. This conclusion is supported by the terms of s. 16, which says:—"The Local Government may invest any Subordinate Judge with the powers of a Munsif under s. 13, and may define and from time to time vary the local limits within which such powers are to be exercised." I understand from this that [238] unless the Subordinate Judge was invested by the Local Government, under s. 16, with the powers of a Munsif, he would have no jurisdiction in any case in which the subject-matter did not exceed in amount or value Rs. 1,000. Such was the

law in 1868, and I have now to consider how it was affected by Act VI of 1871. The important sections in that Act, for the purposes of this reference, are ss. 19 and 20. Section 19 says:—"The jurisdiction of a District Judge or Subordinate Judge extends, subject to the provisions in the Code of Civil Procedure, s. 6. to *all* original suits cognizable by the Civil Court." Section 20 says:—"The jurisdiction of a Munsif extends to all like suits in which the amount or value of the subject-matter in dispute does not exceed Rs. 1,000." Now it seems to me that in s. 19 the most important word is "*all*" in the phrase "all original suits;" and reading that section with s. 20, it is perfectly clear that the object of the two sections was to create a jurisdiction in a Subordinate Judge concurrent with a Munsif in suits up to Rs. 1,000 in value, but not concurrent in suits of value beyond Rs. 1,000. This was a distinct alteration of the law, and it is important to notice that the rule contained in s. 16 of Act XVI of 1868 has not been reproduced in Act VI of 1871. An important part of the argument of the learned pleader for the appellant related to the effect of the words in s. 19 of the present Act—"subject to the provisions in the Code of Civil Procedure, s. 6." The Code there referred to is the Code of 1859, and we need not consider s. 6 of that Code, because it has been reproduced, almost *verbatim*, in the present Code, in ss. 15 and 25. By cl. (2), s. 3 of the present Code it is provided that when in any Act passed prior to the day on which the Code came into force, reference is made to the "Code of Civil Procedure," such reference shall be read, as far as may be practicable, as applying to the present Code, or the corresponding part thereof. The question then is:—Reading s. 19 of the Bengal Civil Courts Act with ss. 15 and 25 of the present Civil Procedure Code, is there any reason to hold that in suits of less value than Rs. 1,000 the jurisdiction of the Subordinate Judge is ousted, notwithstanding the general terms of s. 19 of the Bengal Civil Courts Act? In other words, does the reference made by s. 19 to s. 6 of Act VIII of 1859, and therefore to ss. 15 and 25 of the present Code, make [239] the rule contained in ss. 15 and 25 a rule of jurisdiction? Now, s. 15 says:—"Every suit shall be instituted in the Court of the lowest grade competent to try it," and the important word here is "*competent*." Section 25 says:—"The High Court or District Court may . . . withdraw any suit whether pending in a Court of First Instance or in a Court of Appeal subordinate to such High Court or District Court, as the case may be, and try the case itself, or transfer it for trial to any other such subordinate Court *competent* to try the same in respect of its nature and the amount or value of its subject-matter." In this section again the word "*competent*" occurs. I am of opinion that "*competent*" means "having jurisdiction"—that is, with reference to the pecuniary value and nature of the suits which the Court has power to try. It seems to me impossible to put any other interpretation upon the word, in either of the two sections which I have quoted. The language of s. 15 seems to me to contemplate that the Court "*competent*"—that is having jurisdiction—to try the suit may be of more than one grade, because the whole object of the section is to provide that the suit should be instituted in the Court "*of the lowest grade*"—a phrase which would not have been employed if there were not a higher Court possessing jurisdiction to try the suit; in other words, if the jurisdiction were possessed by only one Court. Now, as to s. 25. The section undoubtedly enables the High Court or the District Court to transfer a case of less value than Rs. 1,000 from the Court of a Munsif to that of a Subordinate Judge who would be "*competent*"—that is, would have jurisdiction—to try the suit. It is not that the act of transferring a suit confers jurisdiction; but the existence of jurisdiction with reference to the *nature and value* of the suit is a condition precedent to the exercise of the power of transfer. If any

other view were to be taken of the section, it would follow that the High Court or the District Court could transfer a suit of higher value than Rs. 1,000, from the Court of a Subordinate Judge to that of a Munsif. This of course cannot be done, and the reason is that the Munsif's Court is not "*competent*"—that is, has no jurisdiction—to try suits of higher value than Rs. 1,000. From this reasoning it follows that on the one hand s. 15 of the Civil Procedure Code itself contemplates no disturbance of jurisdiction as provided by the Civil Courts Act; and on the other hand, its provisions, both in s. 15 and s. 25, proceed upon the implied ground that, whilst the Munsif's Court has no jurisdiction in suits of higher value than Rs. 1,000, "the jurisdiction of a District Judge extends.....to all *original suits* cognizable by the Civil Courts." These are the words of s. 19 of the Civil Courts Act itself, but the section says that the rule as to jurisdiction therein contained is subject to the provisions of the Civil Procedure Code, and on this ground it is contended by the learned pleader for the appellant that ss. 15 and 25 of the Code must be considered as part and parcel of Act VI of 1871, and therefore form a rule of jurisdiction, and that the effect is to limit the jurisdiction of the Subordinate Judge to suits of which the subject-matter exceeds Rs. 1,000 in value. But, in my opinion, this contention has no force. I have already explained that the two sections of the Civil Procedure Code cannot be understood to disturb the rule as to jurisdiction contained in the Civil Courts Act, so that the circumstance that they are referred to in the latter Act falls far short of substantiating the argument for the appellant. Any other view of the matter would go to show that Act VI of 1871 made absolutely no alteration in the law as it was contained in Act XVI of 1868. This indeed is what the learned Pandit has contended for, but I have already said enough to show that it is impossible, after comparing the two statutes, which are *in pari materia*, to arrive at any such conclusion. My own view is that s. 19 of Act VI of 1871 refers to the Civil Procedure Code merely as a matter of convenience. Section 15 of the Civil Procedure Code is a rule of procedure, not of jurisdiction; and whilst it lays down that a suit shall be instituted in the Court of the lowest grade, it does not oust the jurisdiction of any Court of a higher grade. In order to fortify his argument the learned Pandit called our attention to s. 57, cl. (a) of the Civil Procedure Code, which lays down that the plaint shall be returned to be presented to the proper Court, "if a suit has been instituted in a Court whose grade is lower or higher than that of the Court *competent* to try it, where such Court exists, or where no option as to the selection of a Court is allowed by law." The word "*competent*" occurs in this section also, and I interpret it in the same manner as in [241] ss. 15 and 25. The provision is no doubt imperative, but it is merely a matter of procedure, and does not affect the question of jurisdiction. It simply repeats in another form the rule contained in s. 15 of the Code. The learned Pandit, however, contends that the language of the clause goes to show that there is only one Court "*competent*"—that is, which has jurisdiction—to try the suit. The contention, though plausible, has no real force, because, in the first place, the section is not referred to in s. 19 of the Civil Courts Act; in the second place, it cannot be read irrespective of s. 15 of the Civil Procedure Code, and bearing this in mind, there can be no doubt that the clause is only a rule of procedure and does not affect the question of jurisdiction.

This conclusion is the same as that of the learned Judges who tried the cases in the Calcutta High Court which have been cited by my learned brother BRODHURST, and I entirely agree with the opinions which those learned Judges expressed. My answer to the reference upon the first point, therefore, is that the Subordinate Judge had jurisdiction to try the case, although the subject-matter of it may be less than Rs. 1,000 in value.

I wish to refer for a moment to another part of the argument of the learned Pandit. He referred to s. 6 of Act XI of 1865 (the Mufassal Small Cause Courts Act), and asked us whether a Subordinate Judge could dispose of a suit which was cognizable in Courts of Small Causes. Now, the section describes the nature of suits which are cognizable by such Courts, and then there is a most important section which goes far to furnish an answer to the question put by the learned Pandit. Section 12, which is imperative, says:—"Whenever a Court of Small Causes is constituted under this Act, no suit cognizable by such Court shall be heard or determined in any other Court having jurisdiction within the local limits of the jurisdiction of such Court of Small Causes." We are not directly concerned with the effect of this section. I have quoted it in order to show that the analogy upon which the argument of the learned Pandit proceeds has no weight in connection with the matter now before us. The language of the section is different to that of s. 15 of the Civil Procedure Code, and I should be disposed to say that whilst the latter section is meant [242] to be imperative upon the parties, the terms of the former section would go to show that the rule therein contained is imperative upon the Courts and affects their jurisdiction. Indeed, reading s. 12 of the Small Cause Courts Act with s. 26 of the Civil Courts Act itself, it seems to me that the ordinary Civil Courts do not possess the jurisdiction of a Court of Small Causes unless they are especially invested with such jurisdiction by the Local Government. Section 11 of the Civil Procedure Code is the general section conferring jurisdiction upon the ordinary Civil Courts, and the jurisdiction so conferred is subject to the last part of the section, and in the case of the Small Cause Courts the limitation upon the general rule is contained in s. 12 of Act XI of 1865. It is true that under s. 25 of the Civil Procedure Code a suit may be transferred from a Court of Small Causes to one of the ordinary Civil Courts, provided that the latter Court is "*competent to try the same in respect of its nature and the amount or value of its subject-matter*;" but this can be done not because the mere act of transferring would confer jurisdiction, but because the language of the statute in the last paragraph of the section expressly provides that "the Court trying any suit withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes." But for this express provision of the law I should have been disposed to hold that because s. 12 of Act XI of 1865 ousts the jurisdiction of the ordinary Civil Courts in certain cases, no such case could be transferred under s. 25 of the Civil Procedure Code from a Small Cause Court to an ordinary Civil Court. These observations satisfy me that there is no real analogy between s. 12 of the Small Cause Courts Act and s. 15 of the Civil Procedure Code, and it does not follow that if the one is a matter of jurisdiction, the other should be a matter of jurisdiction also.

The second point is:—Assuming that the Subordinate Judge had no jurisdiction to try the present suit, could the plea of want of jurisdiction be taken for the first time in first appeal, or in second appeal?

What I have already said upon the first point disposes of the second. The trial by a Subordinate Judge of a suit of which the subject-matter is less than Rs. 1,000 in value, is not an assumption by him of a jurisdiction which he does not possess, but is, at the most, [243] an irregularity of procedure on his part. I would not willingly say anything which encouraged people to think that they were at liberty to choose whether they would enforce their remedies in the Munsif's or in the Subordinate Judge's Court. But at the same time I must say that the institution of a suit in a Court of higher grade than the Court which is competent to try it, is not a question either as to the jurisdiction or

affecting the merits of the case. It is a question of the kind provided for by s. 578 of the Civil Procedure Code, and the irregularity is not one which affects "the merits of the case or the jurisdiction of the Court," within the meaning of that section. It only remains for me to add that if the irregularity did affect the jurisdiction of the Court, the plea could, I think, be entertained for the first time at any stage, provided that there were on the record sufficient material to substantiate it.

Duthoit, J.—The questions raised by this reference have been argued in the following order:—

(a) Has a Subordinate Judge, or has he not, jurisdiction to hear and determine a "Munsif's case" not referred to him for trial by a superior Court?

(b) If (a) be answered in the negative, then is a District Judge or is he not, bound to entertain in first appeal the plea of defect of jurisdiction?

(c) Supposing (b) to be answered in the affirmative, and (a) in the negative, then, if a District Judge refuses to entertain the plea of want of jurisdiction, is his refusal, or is it not, a valid ground of second appeal to this Court?

As regards the first of the questions thus stated, it has been contended on the one hand, that jurisdiction to hear a "Munsif's case" is given to a Subordinate Judge by the terms of s. 19 of the Bengal Civil Courts Act (VI of 1871); that jurisdiction can be ousted only by express provision of law, which in this case does not exist; that in the analogous case of Mufassal Small Cause Court jurisdiction, this principle has been recognized (s. 12, Act XI of 1865); that in the case of the Presidency Small Cause Courts not only has the principle been recognized as regards suits, the value of the subject-matter of which does not exceed Rs. 1,000, but in Small Cause Court suits of greater value the High Courts [244] have concurrent jurisdiction (*cf.* s. 12 of the Letters Patent, Calcutta High Court, and Act XV of 1882); and that the intention of the Legislature appears to have been to allow to District and Subordinate Judges a concurrent jurisdiction with Munsifs in "Munsif's cases," and to District and Subordinate Judges a concurrent jurisdiction in Subordinate Judge's cases, but at the same time to protect defendants from being needlessly harassed, by providing District and Subordinate Judges (by s. 15 of the Civil Procedure Code) with the means of exercising a discretion as to what suits, cognizable by an inferior Court, they should, and what they should not, accept for trial in their own Courts.

On the other hand, it is contended that the jurisdiction conferred by s. 19 of Act VI of 1871 is not conferred absolutely, but is made subject to the restrictions imposed on it by the Code of Civil Procedure; that the terms of s. 57 (a) of Act XIV of 1882 constitute an express provision of the law, ousting (except under the provision of s. 25) the jurisdiction of Subordinate Judges in "Munsif's cases," wherever a Munsif's jurisdiction exists; that the case of the Presidency Small Cause Courts is not truly analogous, because (s. 638, Act XIV of 1882) s. 57 of the Code of Civil Procedure does not apply to High Courts; and that the intention of the Legislature was, while preventing Subordinate Judges from throwing open their Courts to suitors who might prefer to use them to using those of Munsifs, to allow at the same time to the superior Courts, for reasons which they might think satisfactory, power to refer for trial any cause to a Court of higher grade than that primarily competent to try it.

Neither of these arguments appears to me to be correct as a whole. The truth appears to me to lie between them. Taking it together (*cf.* s. 3, Act XIV of 1882), I read the law thus:—

The jurisdiction of a District or Subordinate Judge extends to all original suits cognizable by the Civil Court. The jurisdiction of a Munsif extends to

all like suits in which the amount or value of the subject-matter does not exceed Rs. 1,000 (ss. 19 and 20, Act VI of 1871). Every suit shall be instituted in the Court of lowest grade competent to try it (s. 15, Act XIV of 1882). If a suit has been instituted in a Court whose grade is higher than that of the Court competent to try it, the plaint shall, where such Court exists, [245] be returned to be presented to the proper Court (s. 57, Act XIV of 1882). The High Court or District Court may withdraw any suit, and try the suit itself, or transfer it for trial to any subordinate Court competent to try the same in respect of its nature and the amount or value of its subject-matter (s. 25, Act XIV of 1882).

High Courts, in the exercise of their original jurisdiction, are not subject to the provisions of s. 57 of the Code of Civil Procedure, but District and Subordinate Judges are bound by them; and I fail, with reference to those provisions of the law, to understand how a Subordinate Judge, in whose Court a suit cognizable by a Munsif (where a Munsif's Court exists) has been filed, can have any option as to returning the plaint, as soon as the fact that the suit is a "Munsif's case" has been ascertained. There is a marked distinction between the terms of s. 53 of the Code of Civil Procedure and those of s. 57. The words "at or before the first hearing" are absent from s. 57, and instead of "may be" rejected, etc., we have in s. 57, as in s. 54, the words "shall be." I can only understand those words as an instruction which the Court is bound to follow. And if this be so, they are a restraint upon jurisdiction, and it is no more open to a Subordinate Judge to proceed with the hearing of a suit which he has ascertained to be a "Munsif's case" (there being a Munsif with jurisdiction to try it), than he would be if the plaint were written upon paper insufficiently stamped, and the plaintiff, within a time fixed by the Court, failed to supply the deficiency; or if it was ascertained that the cause of action did not arise, etc., within the limits of his local jurisdiction. In the case of the insufficiently stamped plaint, the Subordinate Judge would be bound to reject it; in the other two cases, he would, as it seems to me, be bound to return it. I am unable therefore to agree with the view taken by the learned Chief Justice, that the effect of the concurrent jurisdiction of Subordinate Judges and Munsifs is to allow to a Subordinate Judge discretion as to accepting or not accepting for trial by himself suits cognizable by the inferior tribunal. And I find it impossible to believe that it can have been the intention of the Legislature to allow such a discretion. The institution fee and the pleader's fees are the same, whether the suit be heard and determined in a [246] Munsif's or in a Subordinate Judge's Court, and the difference between the process fees payable in the one Court and in the other is so trivial that a plaintiff would not be deterred, by a refusal of the Court to allow as costs on this account more than the fees payable in the Court of lower grade, from bringing his suit in the superior Court. No one who is conversant with the administration of civil justice in the interior of this part of India would find it difficult to imagine the case of a Subordinate Judge readily admitting into his own Court, if he were allowed to do so, *munsifi* litigation. It is obvious that such an event would materially detract from the usefulness of the Munsif, and it seems to me that it was to prevent the possibility of such a state of things that s. 57 (a) of Act XIV of 1882 was enacted.

When, however, I reach the point of the effect of the neglect by a Subordinate Judge to return the plaint in a "Munsif's case," I am practically of the same opinion as the learned Chief Justice.

A Subordinate Judge who failed to reject or to return the plaint in the cases set out above would, I consider, be guilty of misconduct, and, on failure to furnish satisfactory explanation, would be liable to censure and to departmental punishment. But then the analogy between the three

analogous cases which I have noticed above would, I think, cease, and each of the three cases would be governed by distinct provisions of the law. The suit for the institution of which the proper fees had not been paid would have to be dismissed in the terms of s. 10, and, if decreed, would probably have to be disposed of in appeal in the terms of s. 12 of the Court Fees Act, 1870. The suit in which the cause of action did not arise within the local limits of the jurisdiction of the Subordinate Judge would have to be dismissed, and, if decreed, would have to be dismissed in appeal, with reference to the terms of s. 578 of the Code of Civil Procedure and to those of s. 18 of Act VI of 1871. But the decree in a suit cognizable by a Munsif would not, in my judgment, be liable to be reversed in appeal for want of jurisdiction in the Subordinate Judge: for the jurisdiction was there, though it ought not to have been exercised. And this view of the matter is, I think, consistent with the received canon of construction, that unless the Legislature uses negative words, or words showing an intention to treat the observance of a rule of procedure [247] as essential, the rule will ordinarily be treated as a direction only. "Where," writes Sir P. B. Maxwell (*Maxwell on the Interpretation of Statutes*, 2nd Edition, p. 459), "the prescriptions of a statute relate to the performance of a public duty, and to affect with invalidity acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, without promoting the essential aims of the Legislature, they seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal indeed, but it does not affect the validity of the act done in disregard of them." In this instance the plaint was originally filed in the Court of the Munsif, but it was returned by the Munsif to be presented in the Court of the Subordinate Judge. To send the plaintiff back at this stage of the proceedings to the Munsif's Court would surely be most inequitable.

My answer then to the question put to the Full Bench must be that the refusal of the District Judge to entertain the plea of defect in jurisdiction, in the circumstances stated, is not, in my opinion, erroneous, but correct.

NOTES.

[As regards the jurisdiction of Civil Courts, see also (1899) 23 Mad., 367; (1886) 8 All., 438; (1890) 14 Mad., 183; (1892) 15 Mad., 241; (1898) 18 A.W.N., 241; (1906) 8 Bom. L. R., 516. The objection to jurisdiction may be raised at any stage:—(1887) 12 Bom., 155; (1897) 23 Bom., 22.]

[7 All 247]

The 12th December, 1884.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE
OLDFIELD, MR. JUSTICE BRODHURST, MR. JUSTICE
MAHMOOD AND MR. JUSTICE DUTHOIT.

Sheoraj Rai... ..Plaintiff

versus

Kashi Nath and others.Defendants.*

*Civil Procedure Code, ss. 13, 45—Res judicata—Matter directly and
substantially in issue—Meaning of "suit" in s. 13.*

S sued K for four bonds alleging that the same had been satisfied. K had formerly sued S on two of these bonds. S had alleged in defence of that suit that those two bonds, as also the other two, had been satisfied. It was decided in that suit that not one of the bonds had been satisfied.

Held, by PETHERAM, C J., and OLDFIELD, BRODHURST, and DUTHOIT, JJ., that the only issue in the former suit which had to be decided being whether the bonds on which that suit was brought had been satisfied or not, the second suit was, under s. 13 of the Civil Procedure Code, *res judicata* only in respect of those bonds, and not in respect of the other two bonds.

The Court which tried the former suit had not jurisdiction to try the subsequent suit.

[248] *Per* MAHMOOD J.—This being so, if the word "suit" in s. 13 were taken literally, it might, with some plausibility, be contended, that there was no *res judicata* in respect of any of the bonds. The word "suit," however, must be understood to mean such a matter as might have formed the subject of a separate suit independently of the special provisions of the Civil Procedure Code, such as s. 45, which enables the plaintiff to unite several causes of action in one and the same suit.

Adopting this interpretation, it was clear that the two bonds which were the subject of the former suit could not be allowed to form the subject of litigation again.

As to the other two bonds, which were not the subject-matter of the former suit, they did not, in the former suit, constitute a "matter directly and substantially in issue," within the meaning of s. 13, and even if they were "directly and substantially in issue," the decision in the former suit would not support the plea of *res judicata* because the Court which tried that suit was not a Court of jurisdiction competent to try the subsequent suit in which the plea was raised.

THE plaintiff in this case sued the defendants for the delivery of four bonds, two dated the 7th Pus Badi 1285 fash, and the other two dated, respectively, the 12th Pus Badi and the 3rd Chait Badi 1285 fash. He claimed on the ground that the bonds had been paid. It appeared that the defendants had formerly sued the plaintiff on the two bonds dated the 7th Pus Badi 1285 fash. The plaintiff had set up as a defence to that suit that he had paid those bonds as well as the other two bonds, dated, respectively, the 12th Pus Badi and the 3rd Chait Badi 1285 fash. The Court by which that suit was heard (Munsif) fixed as a point for decision "whether the bonds in suit and other bonds have been satisfied or not." On this point it decided that the plaintiff had not paid the defendants anything in respect of the bonds, and it gave the

* Second Appeal No. 167 of 1884, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 15th December 1883, affirming a decree of Rai Raghub Nath Sahai, Subordinate Judge of Gorakhpur, dated the 21st March 1883.

defendants a decree. This decree was affirmed by the Subordinate Judge on appeal.

The defendants set up as a defence to the present suit, *inter alia*, that the question whether the bonds had been paid was *res judicata*. Both the lower Courts allowed this defence.

In second appeal the plaintiff contended in his memorandum of appeal that, inasmuch as the value of the subject-matter of the present suit exceeded the pecuniary limits of the jurisdiction of the Court which decided the former suit, nothing which that Court decided could operate in the present suit as *res judicata*. The Divisional Bench (MAHMOOD and DUTHOIT, JJ.) hearing the appeal [249] referred the case to the Full Bench, the ORDER OF REFERENCE being as follows:—

"The suit from which this appeal has arisen was instituted in the Court of the Subordinate Judge, with the object of recovering four bonds executed at different times by the plaintiff in favour of the defendants. The suit was valued at Rs. 2,025, and the allegation upon which the suit was based was, that the plaintiff had already liquidated the debts to which the bonds related.

"It appears that on a former occasion the defendants had sued the plaintiff on two of the bonds now in question, and had obtained a decree on the 11th March 1882, from the Court of the Munsif, who, with reference to the valuation of that suit, had jurisdiction to decide that case. In that case the plaintiff had set forth in defence the same allegations as those on which he has now come into Court, and the issue raised in that case was identical with the one raised in this suit. The issue was in that case decided against the plaintiff by the Munsif, and the judgment was upheld in appeal by the Subordinate Judge on the 27th July 1882.

"The Subordinate Judge, whilst holding that the present suit was barred by reason of the judgments in the former litigation, entered into the merits of the case, and dismissed the suit. On appeal, the learned District Judge upheld the decree, and declined to enter into the merits, holding that the suit was barred by s. 13 of the Civil Procedure Code, and for this view he has relied upon the ruling of this Court in *Pahlwan Singh v. Risal Singh*, I. L. R., 4 All., 55, and the ruling of the Calcutta High Court in *Run Bahadoor Singh v. Lucho Kooer*, I. L. R., 6 Cal., 406.

"The plaintiff has preferred this second appeal, and Mr. Conlan, who has appeared on his behalf, contends that the former suit having been disposed of by the Munsif, the finding in that case could not operate as *res judicata*, so as to bar the present suit, the valuation of which exceeds the jurisdiction of the Munsif. In support of his contention, the learned counsel cites the recent Privy Council ruling in the case of *Misir Raghobardial v. Sheo Baksh Singh*, I. L. R., 9 Cal., 439; L. R., 9 Ind. Ap., 197.

"The point raised in this case is, no doubt, of considerable importance and involves much difficulty. The ruling of this Court [250] in the case of *Pahlwan Singh* does not appear to have much application to this case, because the Court which had decided the former suit was competent to try the subsequent suit wherein the plea of *res judicata* was raised. In the present case the Court which decided the former suit was the Court of the Munsif, who, by reason of the pecuniary limits of his jurisdiction, would not have been competent to entertain the present suit. The ruling of the Calcutta High Court, cited by the learned District Judge, is, however, applicable, and supports the view of the law taken by him. But the rule laid down in that case militates against the ruling of the Privy Council cited by Mr. Conlan. In that case their Lordships, in interpreting s. 13 of the Civil Procedure Code (Act X of 1877), held that the words "Court of competent jurisdiction" included the meaning

that the first Court must not have been precluded by the pecuniary limit of its jurisdiction from deciding the question raised in the subsequent suit wherein *res judicata* was pleaded as a bar, and that before the plea could hold good the two Courts must possess jurisdiction concurrent as regards the pecuniary limit as well as the subject-matter.

"In considering the question it is important to notice that the body of s. 13 of the Civil Procedure Code of 1877 has re-appeared in a modified form in the present Code, and the change of diction is very considerable. As the section stands, it would seem that no adjudication can form the basis of the plea of *res judicata*, unless the Court which decided the former suit would be competent to decide the suit in which the plea is raised. In the present case, out of the four bonds to which the suit relates, two have already been the subject of adjudication by the Court of the Munsif; but that Court would not be competent to try the present suit. The question then is, whether the present suit, at least so far as it relates to the two bonds, is not subject to the rule of *res judicata*? The language of s. 13 of the present Code is so general that it seems doubtful whether it is not applicable to the present case. We feel, however, some difficulty in adopting such a view. The present suit, as a whole, is undoubtedly beyond the pecuniary limits of the Munsif's Court, but it is so because the plaintiff, availing himself of the provisions of s. 45 of the Civil Procedure Code, has joined several causes of action, and has thus included [251] in the suit the two bonds already adjudicated upon in the former suit in the Munsif's Court.

"In view of these considerations we refer the following questions to the Full Bench:—

"Is the present suit wholly or partially governed by the rule of *res judicata*, by reason of the former adjudication between the parties?"

Mr. T. Conlan and Munshi Sukh Ram, for the Appellant.

Mr. C. Dillon and Munshi Kashi Prasad, for the Respondents.

Mr. T. Conlan.—The decision of the Munsif in respect of the bonds on which the suit in his Court was brought cannot affect the bonds in respect of which there was no claim in his Court. [MAHMOOD, J.—Do you not contend that, even in respect of the bonds that were sued on in the Munsif's Court, there is no *res judicata*, inasmuch as the Munsif could not have tried the present suit in respect of all the bonds?] No; I do not. I confine my argument to the bonds which were not sued on in the Munsif's Court.

Munshi Kashi Prasad.—There was an appeal from the Munsif's decree; the Subordinate Judge affirmed his decision. Even if the Munsif was not competent to try the present suit, the Appellate Court was. Therefore there exists everything which goes under s. 13 of the Civil Procedure Code to make a matter *res judicata*. [DUTHOIT, J.—The matter as to the bonds not in suit was not "directly" in issue.] The issue framed by the Munsif shows that that matter was "directly" in issue.

The following judgments were delivered by the FULL BENCH:—

• Petheram, C. J.—We are all agreed that the District Judge is wrong in holding that there is *res judicata* as regards the whole of the suit. The difficulty has arisen from a misconception as to what was in issue in the former suit and what was alleged in evidence in that suit. The only issue in that issue was, whether the two bonds sued on had been satisfied. To prove this the defendant adduced evidence showing that all the bonds had been satisfied. The Munsif found that the defendant had not paid anything. But the only question which the Munsif had to decide was, whether the [252] two bonds sued on in his Court had been paid. The answer to the reference should

therefore be that the suit, as regards those bonds, is "*res judicata*," but not as regards the other bonds.

Oldfield and Brodhurst, JJ., concurred.

Mahmood, J.—The point raised by the argument of the learned counsel for the appellant is simple, and I am anxious to explain that I should not have been a party to the reference had I not thought that his contention before the Divisional Bench was that the plea of *res judicata* was not applicable in respect of any of the bonds. The question now seems to be confined to the bond which were not the subject of the former suit, and in determining the question I only wish to add a few words to what the learned Chief Justice has already said. The rule of *res judicata* is regulated in this country by the language of s. 13 of the Civil Procedure Code. The body of that section is thus worded:—"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit, or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court." There can be no doubt that all the bonds are subject of dispute in the present suit, and it is obvious that the Munsif who disposed of the former suit is not "a Court of jurisdiction competent to try such subsequent suit, or the suit in which such issue has been subsequently raised," within the meaning of the section. It seems to me, therefore, that if the word "*suit*" were taken literally, it might with some plausibility be contended that there is no *res judicata* in respect of any of the bonds. In my opinion the word "*suit*," as it occurs in s. 13, must be understood to mean such a matter as might have formed the subject of a separate suit independently of the special provisions of the Civil Procedure Code, such as s. 15, which enables the plaintiff to unite several causes of action in one and the same suit. Adopting this interpretation, it is clear that the two bonds which were the subject of the former suit cannot be allowed to form the subject of litigation again, and the circumstance [283] that the plaintiff has joined them in the present litigation will not enable him to obviate the plea of *res judicata*.

As to the rest of the case, that is the other two bonds which were not the subject-matter of the former suit in the Munsif's Court, the answer is clear. I hold that those bonds did not in that suit constitute a "matter directly and substantially in issue," within the meaning of s. 13 of the Code, although they were discussed as a matter of evidence; and that even if they were "directly and substantially in issue," I should say that the finding of the Munsif would not support the plea of *res judicata*, because the Munsif was not a Court of jurisdiction competent to try the present suit in which the plea has been raised.

I am, therefore, of opinion that the present suit, so far as it relates to the two bonds which formed the subject of adjudication in the former suit, is barred by the rule of *res judicata*, and the rest of it is not so barred.

Duthoit, J., concurred in holding that the suit was *res judicata* only in respect of the bonds on which the former suit was brought.

NOTES.

[See also (1904) 28 Bom. , 338 at 339; (1886) 8 All., 324.]

[7 All. 253]

The 13th December, 1884.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE,
MR. JUSTICE OLDFIELD, MR. JUSTICE BRODHURST,
MR. JUSTICE MAHMOOD, AND
MR. JUSTICE DUTHOIT.

Tota Ram.....Decree-holder

versus

Khuh Chand.....Purchaser.*

Execution of decree—Sale in execution—Order disallowing objections to sale—Order confirming sale—Appeal—Civil Procedure Code, ss. 311, 312, 313, 314, 588 (16).

Per PETHERAM, C.J., and OLDFIELD, BRODHURST, and DUTHOIT, JJ.—An order passed under the first clause of s. 312 † of the Civil Procedure Code, after an objection made under the provisions of s. 311 has been disallowed, is appealable under art. (16) of s. 588.

Per MAHMOOD, J.—An application made under s. 311 can be disposed of only under s. 312, and if the Court rejects the objection to the sale the order must be regarded as an order “refusing to set aside a sale of immoveable property” under the first paragraph of s. 312, and therefore appealable as falling under the purview of art. (16) of s. 588.

Lalman v. Rassu Lal, Weekly Notes, 1882, p. 117, and *Ratan Kuar v. Lalta Prasad*, Weekly Notes, 1883, p. 178, dissented from by MAHMOOD, J.

THIS was a reference to the Full Bench by MAHMOOD and DUTHOIT, JJ. It arose out of the following facts. A decree-holder, [254] in the execution of whose decree certain immoveable property had been sold, applied, on the 3rd October 1883, to have the sale set aside. The main ground of this application was that one Khuh Chand, having purchased the property in question from the judgment-debtor, had proposed to the decree-holder, on the day the execution-sale took place, to pay the amount of the decree, if he would remit Rs. 50; that the decree-holder consented to this arrangement, and upon this intending purchasers believed that a sale would not take place; that Khuh Chand left the decree-holder on the pretence of bringing the money; but instead of doing so, went to the place of sale and purchased the property himself for a very inadequate price. The Court executing the decree (Munsif of Etawah), by an order dated the 18th December 1883, rejected the application, and, by a subsequent order, dated the following day, 19th December, confirmed the sale.

The decree-holder appealed to the High Court from the order of the Munsif, dated the 18th December 1883, rejecting his application to set aside the sale, making the judgment-debtor and Khuh Chand, the purchaser at the sale, respondents to the appeal. The appeal came for hearing before MAHMOOD and DUTHOIT, JJ.

*First Appeal No. 26 of 1884, from an order of Pandit Kashi Narain, Munsif of Etawah, dated the 18th December 1883.

†[Sec. 612:—If no such application as is mentioned in the last preceding section be made, or if such application be made and the objection be disallowed, the Court shall pass an order confirming the sale as regards the parties to the suit and the purchaser.

If such application be made, and if the objection be allowed, the Court shall pass an order setting aside the sale.

No suit to set aside, on the ground of such irregularity, an order passed under this section shall be brought by the party against whom such order has been made.]

On behalf of the respondent Khub Chand a preliminary objection was taken, that the order of the 18th December 1883, was not appealable, being the order by which the decree-holder's objections to the sale were disallowed, and not the order confirming the sale. The learned Judges, with reference to this objection, referred the following question to the Full Bench:—"Is or is not an order, passed under the first clause of s. 312 of the Code of Civil Procedure, disallowing an objection made under the provisions of s. 311 of the Code of Civil Procedure, appealable under art. (16) of s. 588 of the Code."

Babu Barada Prasad for the Respondent Khub Chand.—The order disallowing objections to a sale is not made appealable by the Code. [The Court amended the question referred in manner following:—"Is or is not an order, passed under the first clause of s. 312 of the Civil Procedure Code, after an objection made under the provisions of s. 311 of the Code of Civil Procedure has been disallowed, appealable under art. (16) of s. 588 of the Code?"]

[255] Lala Lalta Prasad, for the Appellant.

The following judgments were delivered by the FULL BENCH:—

Petheram, C.J.—My answer to the question referred to us as amended is in the affirmative.

Oldfield, Brodhurst and Duthoit, JJ., concurred.

Mahmood, J.—I am of the same opinion as the learned Chief Justice; but as one of the Judges who referred the matter to the Full Bench, I wish to explain the reasons which led to the reference. S. 311 of the Civil Procedure Code provides for cases in which either "the decree-holder, or any person whose immoveable property has been sold" in execution of decree, may apply to the Court, raising objections to the sale, and praying that it may be set aside. S. 312 confers the power upon the Court either to reject the application, in which case the sale is confirmed, or to allow the objections, and to set aside the sale. Then comes s. 313, which provides for cases in which the purchaser is also entitled to pray for setting aside the sale, and the same section empowers the Court to grant or reject the application. S. 314 says that "no sale of immoveable property in execution of a decree shall become absolute until it has been confirmed by the Court."

Now, reading these sections together, it would seem that the most convenient course for the Court would be to dispose of all objections to the sale in one and the same proceeding, and to confirm the sale by the same order, if all the objections have been rejected. But the usual practice of the Courts in the Mufassal is to take up the objections, whether they are raised by the decree-holder, the judgment-debtor, or the auction-purchaser, and to dispose of them separately, and afterwards to pass an order confirming the sale, if the objections have already been disallowed. There are two rulings of this Court—*Lalman v. Rassu Lal*, Weekly Notes, 1882, p. 117,—and *Ratan Kuar v. Lalta Prasad*, Weekly Notes, 1883, p. 178,—in which it has been held that an order disallowing objections to a sale was not an order under the first paragraph of s. 312, so as to make it appealable under cl. (16) of s. 588, Civil Procedure Code, and that the only order appealable was that which confirmed the sale, within the meaning of s. 312 of the Code. The accuracy of these two rulings was doubted by me [256] in the unreported case of *Baldeo Singh v. Azim-un-nisasa Bibi*, First Appeal from Order No. 1 of 1884, which was disposed of on the 10th June last, but the exigencies of that case did not require my passing a dissentient order.

In the present case the question arose because the appeal has been preferred, not from an order confirming the sale under s. 312, but from an order disallowing objections to the sale; so that if the two rulings of this Court to which I

have referred were to be adopted, the appeal would not lie under cl (16) of s 588 of the Code. This was the reason why the question was referred to the Full Bench.

With due respect to the two rulings of this Court to which I have referred, I am unable to agree in the rule therein laid down. I am of opinion that an application made under s 311 can be disposed of only under s 312, and if the Court rejects the objection to the sale, the order must be regarded as an order "refusing to set aside a sale of immovable property" under the first paragraph of s 312, and therefore appealable as falling under the purview of cl (16) of s 588 of the Civil Procedure Code.

NOTES

[See also (1888) 10 All , 506 at 510]

[7 All 256]

CIVIL REVISIONAL

The 16th December, 1884

PRESENT

MR JUSTICE OLDFIELD AND MR JUSTICE MAHMOOD

Ganga Prasad .Plaintiff

versus

Chandrawati and another . Defendants *

*Assignment of rent of land—Suit by assignee against tenant—Jurisdiction—
Civil and Revenue Courts— Act XII of 1851 (N W P Rent Act), s 93 (d)*

'A suit by the person, to whom a landholder has assigned rents payable to him by tenants, for the recovery of the money, so assigned, is a suit cognizable in the Civil Courts and not in the Revenue.

THIS was an application to the High Court for the exercise of its powers of revision under s 622 of the Civil Procedure Code. It appeared that the proprietors of an eight anna share in a village called Puchar were indebted to the plaintiff in this suit in the sum of Rs 500. By an instrument, dated the 8th Aug 1881, executed by the debtors, they assigned to the plaintiff Rs 109, the aggregate yearly amount of rent payable to them by certain tenants [257] (the rents payable by the tenants being specified), and agreed that he should satisfy the debt by collecting the rents specified for ten harvests. This instrument was signed by the tenants whose rents were assigned, and they agreed therein to pay their rents to the plaintiff, and, if instead of doing so, they paid them to the zamindars, that they should be liable to pay them a second time. The plaintiff brought the present suit against two of the tenants to recover the amount of rent payable by them respectively in respect of certain harvests. The total amount which he sought to recover was Rs 33. The suit was instituted in a Civil Court. The Court of First Instance gave the plaintiff a decree for Rs 33. On appeal by the defendants the Appellate Court set aside the decree and dismissed the suit, holding that the suit was not cognizable in

* Application No 237 of 1884, for revision, under s 622 of the Civil Procedure Code of an order of G R C Williams, Esq, Deputy Commissioner of Jhansi, dated the 24th June 1884.

the Civil Courts, being one to recover rent, and therefore cognizable exclusively in the Revenue Courts. It observed as follows :—" The fact of the tenants having been parties to the instrument by which the debtors assigned their rents to their creditor, on which the plaintiff apparently relies, treating them as common sureties, cannot, in my opinion, affect the nature of the assignment. I therefore rule that the suit ought to have been instituted under cl. (a), s 93 of Act XII of 1881."

The plaintiff applied to the High Court for revision, contending that the Appellate Court, was wrong in holding that the suit was not cognizable in the Civil Courts.

Babu Jogindro Nath Chaudhri, for the Plaintiff.

The Defendants did not appear.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment :—

Oldfield, J.—The suit is cognizable in the Civil Courts, being for a sum of money, namely rents, assigned to the plaintiff. The decree of the Appellate Court is set aside, and it is directed to dispose of the appeal on the merits.

Application allowed.

NOTES

[This was followed in (1887) 9 All 240]

[258] FULL BENCH.

The 20th December, 1884.

PRESENT:

SIR W. COMER PETHERAM, KT, CHIEF JUSTICE, MR. JUSTICE OLDFIELD,
MR. JUSTICE BRODHURST, MR. JUSTICE MAHMOOD
AND MR. JUSTICE DUTHOIT.

Sheoratan Kuar and others.....Defendants

versus

Mahipal Kuar Plaintiff *

Pre-emption—Simple mortgage—" Transfer "—Wajib-ul-arz—Mortgage—Charge—Act IV of 1882 (Transfer of Property Act), ss. 58, 100.

The *wajib-ul-arz* of a village gave a right of pre-emption to co sharers on a transfer (*intikah*) by sale or mortgage (*rahn*) by a co-sharer of " rights and interests " (*hakkkiyat*).

Per PETHERAM, C.J., that, as a simple mortgage, as defined in s. 58 of the Transfer of Property Act, 1882, by giving a right to sell, transfers an interest in the property mortgaged, a simple mortgage of his share by a co-sharer created a right of pre-emption under the terms of the *wajib-ul-arz*.

Per MAHMOOD, J.—The circumstance that possession had not been transferred to the mortgagee was one which had no bearing on the question whether a right of pre-emption arose under the terms of the *wajib-ul-arz* in the case of a simple mortgage.

* Second Appeal No. 1308 of 1883, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 5th July 1883, reversing a decree of Rai Raghunath Sahai, Suoordinate Judge of Gorakhpur, dated the 24th July 1882.

The word "*intikal*," as used in Hindustani, has the broadest meaning in connection with "alienation," "conveyance," "assignment," or "transfer" of rights in immoveable property.

The word "*hakkiyat*" means rights and interests, in the legal sense of the phrase. The word "*rahn*" is a generic word indicating all that is included in the English word "mortgage," and is not limited to usufructuary mortgages, but includes simple mortgages also.

When general words are used in a document, they must be understood in a general sense, unless they are accompanied by any expression limiting or restricting their ordinary meaning, or unless such limitation or restriction arises from necessary implication.

The words "*intikal*," "*hakkiyat*," and "*rahn*" in the *wajib-ul-arz* could be understood only in the most general use.

"Mortgage," as understood in Indian Law, includes simple mortgage as well as usufructuary, and one is as much a 'transfer of an interest in specific immoveable property' as the other.

A simple mortgage is a "transfer", being the transfer of the right of sale.

Held, therefore, by MAHMOOD, J., that a right of pre-emption accrued under the terms of the *wajib-ul-arz* in the case of a simple mortgage by a co-sharer of his share to a "stranger."

Per BRODHURST, J., that one of the entries in a statement showing the transfers which had taken place in the village at or about the time the *wajib-ul-arz* was [259] framed, which statement was connected with the *wajib-ul-arz*, related to a simple mortgage, from which it appeared that it was the intention that the co-sharers should have the right of pre-emption in all cases of mortgage, whether usufructuary or otherwise, and therefore a right of pre-emption accrued under the terms of the *wajib-ul-arz* in the case of a simple mortgage.

Per DUTHOIT, J., that a pre-emptive right was raised by the terms of the *wajib-ul-arz* only upon the occurrence of a transfer of a share in the property of the mahal, and a simple mortgage was not a transfer of property.

OLDFIELD, J.—The word "transfer" used in the *wajib-ul-arz* was not intended to refer to a simple mortgage, but to mortgages where possession of the property passes to the mortgagee.

The obligors of a bond for the payment of money covenanted as follows:—"To secure this money, we have mortgaged a five gandas share out of a ten gandas share in each of the villages, &c. So long as the principal amount with interest is not paid, the hypothecated share will not be sold or mortgaged to any one."

Held (PETHERAM, C.J., dissenting) that the bond created a simple mortgage.

Per PETHERAM, C.J.—That the bond gave the obligee a charge only on the property.

THIS was a reference to the Full Bench. The facts which gave rise to it were as follow:—On the 5th August 1881, the proprietors of 5 gandas shares in certain villages executed a bond for Rs. 1,597 in favour of Sheodihal Kuar and certain other persons, Mahajans, the terms of which, so far as they are material, were to the following effect:—"Now the total sum due to the aforesaid Mahajans is Rs. 1,597: we promise and agree to pay this sum, principal, together with interest at 2 per cent. per mensem, on the 3rd May 1882: we shall pay in full the principal together with interest at the aforesaid rate: to secure this money we have mortgaged (*rahn*) and hypothecated (*must agra*) a 5 gandas share out of a 10 gandas share in each of the mauzas Barigaon and Málhipur, with this condition, that so long as the principal amount with interest is not paid to the aforesaid bankers, the hypothecated share shall not be sold or mortgaged to any one, and if we do so, such act shall be invalid: we have therefore executed this hypothecation-bond that it may be of use when needed."

In June 1882, Mahipal Kuar, who was a co-sharer in the same *thok* in which the share to which this bond related was situated, brought this suit against the proprietors of the share and the obligees of the bond. He alleged, *inter alia*, that the transaction, which appeared from the bond to be a mortgage, was really a sale, [260] and the persons in whose favour the bond was executed,

who were not co-sharers in the village, were in possession; and he claimed possession of the share, by right of pre-emption, and prayed that possession might be awarded to him either as a vendee or a mortgagee, according to the nature of the transaction. The right of pre-emption claimed was based on the *wajib-ul-arz* of the village. The clause in that document relating to the right of pre-emption is set out in the order of reference. The defendants, obligees of the bond, set up as a defence to the suit, *inter alia*, that possession of the share had not been transferred to them, the transaction not being a sale or usufructuary mortgage, but being, as evidenced by the instrument, a simple mortgage, and that a transfer by simple mortgage did not give rise to a right of pre-emption under the terms of the *wajib-ul-arz*. The Court of First Instance (Subordinate Judge) dismissed the suit, holding, with reference to the terms of the instrument, that it created a simple mortgage, and that a transfer of that nature was not a transfer of the share, within the meaning of the *wajib-ul-arz*. On appeal the District Judge held that the terms of the *wajib-ul-arz* covered a transfer by simple mortgage; and, after remanding the case for the trial of certain issues, eventually gave the plaintiff a decree. The defendants appealed to the High Court, again raising the question whether, under the terms of the *wajib-ul-arz*, the plaintiff had a right of pre-emption in respect of the transaction evidenced by the instrument of the 5th August 1881. The Divisional Bench before which the appeal came for hearing (STRAIGHT, Offg. C.J., and MAHMOOD, J.) referred the case to the Full Bench, the order of reference, which was dated the 7th May 1884, being as follows:—

"This appeal has arisen from a suit for enforcement of pre-emption in respect of the rights conveyed under the deed of Sawan Sudi 10th, 1288 fasli (5th August 1881). The deed is not very clearly worded, but both the lower Courts have rightly held that the contract therein contained constitutes hypothecation or simple mortgage, and that under the deed the defendants, mortgagees, have not been placed in possession. The Lower Appellate Court has also found on the evidence that at the time of the execution of the deed, the plaintiff was recorded co-sharer in the same *thok* as the mortgagors, and had therefore, under the terms [261] of the *wajib-ul-arz*, a preferential right of pre-emption as against the mortgagees. These findings, which cannot be questioned in second appeal, furnish a complete answer to the third ground of appeal which impugns the finding of the lower Court as to the preferential right of the plaintiff.

"But, as his main argument in support of the appeal, the learned Pandit, who has appeared on behalf of the appellants, insists that, under the terms of the *wajib-ul-arz*, which governs the property in suit, mere hypothecation, unaccompanied with possession, does not give rise to a claim for pre-emption at all; and he contends that the Court of First Instance, which dismissed the suit, laid down a sound proposition of law in holding that 'transfer of possession is an essential element of the right of pre-emption, and without such transfer the plaintiff pre-emptor has no right to sue, no transfer of possession having yet taken place.'

"This contention renders it necessary to examine closely the terms of the *wajib-ul-arz*, which relate to pre-emption. Section 5 of that document may be thus literally translated:—'According to the proportion of the land or share in possession, every sharer has the power of transferring property by means of sale and mortgage. But it is a condition that, at the time of transfer, whosoever may be desirous of transferring property, then first his nearest sharer will be entitled, and in case of his refusal, the transfer will be made in favour of other sharers in that *thok*, and in case of their refusal, in favour of sharers in the other *thok*, and when all these refuse or decline to give the proper

price, then the transfer may be made in favour of others, and then no sharer will have the right of pre-emption.'

"Now the argument on behalf of the appellants proceeds upon the assumption that the word 'mortgage' (*rahn*) must be understood to mean only 'mortgage with possession' (*rahn bil kabza*), and that the word 'transfer' (*intikal*) must be understood in the limited sense of such an alienation as by its very nature conveys the right of possession to the transferee. In support of this contention the learned Pandit has brought to our notice the interpretation placed upon this very clause of the *wajib-ul-arz* by a Division Bench of this Court (OLDFIELD and BRODHURST, JJ.) in the case [262] of *Achhaibar v. Sheoratan Kuar and others* (S. A. No. 1260 of 1883, decided on 4th May 1883), in which the learned Judges observed that 'the terms of the *wajib-ul-arz* do not give a right of pre-emption when property is merely hypothecated as security for a debt, and there is no transfer of possession of the land.'

"Having considered the point so raised, we have some difficulty in accepting the interpretation so adopted, and as the terms of the *wajib-ul-arz* in this case regarding the right of pre-emption are probably similar to the wording of the pre-emption clause of the *wajib-ul-arz* of many other villages in these Provinces, we think that the question is sufficiently important to be decided by the whole Court."

"We refer the following question to the Full Bench :—

"With reference to the terms of the *wajib-ul-arz* in this case, does the right of pre-emption arise by simple mortgage or hypothecation in which there is no transfer of possession of the land."

Pandit *Ajudhi Nath* and *Kashi Prasad*, for the Appellants.

The Senior Government Pleader (*Lala Juala Prasad*) and *Bishambar Nath*, for the Respondent.

The Full Bench delivered the following judgments :—

Duthoit, J.—A pre-emptive right is raised by the terms of the *wajib-ul-arz* in this case only upon the occurrence of a transfer of a share in the property of the mahal; and a simple mortgage, or mere hypothecation, is not, in my judgment, a transfer of property.

A transaction between borrower and lender by which, as in the case before us, the only covenant by the borrower, as regards the land, is that he will not sell or mortgage it elsewhere until the loan is repaid, is, in this part of India, commonly styled a "simple mortgage," and is so described in Mr. Macpherson's work on *The Law of Mortgage in Bengal and the North-Western Provinces*, ed. 1868, p. 10. By such a transaction the land is pledged as collateral security only. Its effect is to create a charge upon—not to transfer—the property. The latter effect can only result from such a transaction when the mortgagee has put his bond in suit, has obtained a decree upon it, and has executed his decree by bringing [263] the property to sale; and when that event occurs, the pre-empting co-sharer has his remedy. The transfer of the property may thus be long delayed, especially in the case of a loan conditioned for a term; and it is conceivable that meanwhile the co-sharers might remain in ignorance of the mortgage transaction. Certainly their communal relations would be in no way affected by it. The reason of the existence of a pre-emption clause in the administration-paper of a village is the avoidance of the unpleasantness which is likely to result from the intrusion of a stranger into the commune; and I fail to see how a mere hypothecation can give rise to such unpleasantness.

My answer to this reference must be in the negative.

Brodhurst, J.—With reference to the definition of simple mortgage, as given in Mr. Macpherson's work on Mortgages, and in s. 58 of the Transfer

of Property Act, the deed of Sawan Sudhi 10th, 1288 fasli (5th August 1881), which was considered by the parties to the suit to be a deed of hypothecation or simple mortgage, was, I think, rightly held by the lower Courts and by the referring Bench of this Court to be a deed of that description.

Along with the *wajib-ul-arz*, prepared 22 years ago, is a statement showing the transfers that had, at or about that time, taken place in the village in question, and that statement is, together with the *wajib-ul-arz*, referred to in the settlement officer's order of the 15th August 1862. One of the entries in the statement seems clearly to relate to a simple mortgage, and from these connected documents, which I now have had translated, I am satisfied that it was the intention that the co-sharers should have the right of pre-emption in all cases of mortgage, whether usufructuary or otherwise, and my answer to the reference is therefore in the affirmative.

Oldfield, J.—Referring to the bond with reference to which the right of pre-emption is claimed, I find that it declares that a sum of Rs. 1,597 has been borrowed and is due to the obligee, and the obligors bind themselves to pay this sum with interest on a certain date, and they covenant as follows:—“To secure this money, we have mortgaged a 5 gandas share out of a 10 gandas share in each of the villages Barigaon and Malhipur. So long as the principal amount with interest is not paid to the aforesaid bank- [264]ers the hypothecated share will not be sold or mortgaged to any one, and if we do so, such act will be invalid; we have executed this hypothecation-bond that it may be of use when needed.”

This instrument is drawn up in a not uncommon form, and is of a character which I believe has always been recognized by our Courts as creating a simple mortgage.

The Transfer of Property Act has now defined a mortgage to be “the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability;” and a simple mortgagee is defined to be—“Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds applied, so far as may be necessary, in payment of the mortgage-money, &c.

The right of causing the mortgaged property to be sold is to be exercised by recourse to the Civil Court, as is indicated by ss. 85 to 90 of the Act, except in the cases mentioned in s. 69.

It appears to me that the instrument comes within this definition of a simple mortgage. It transfers, as I think, an interest in immoveable property for the purpose of securing payment of money lent, which the borrower binds himself personally to repay; and there is impliedly a power given to cause the property to be sold to satisfy the debt, and the fact that the right of sale must be exercised through the Civil Court makes no difference; the terms of pledge and mortgage used necessarily imply a right of sale over the property, for the obvious intention of pledging the property as security for the debt is that the debt should be realized by its sale, and the instrument would be meaningless and the intention of the parties would be defeated on any other construction of it.

The case of *Shib Lal v. Ganga Prasad*, I. L. R., 6 All., 551, may be referred to show that the Full Bench of this Court has held an instrument

[265] of a similar character to operate to create a simple mortgage within the meaning of the Transfer of Property Act. I hold, therefore, that the bond creates a simple mortgage; but I am nevertheless unable to hold that the plaintiff has a right of pre-emption in respect of it under the *wajib-ul-arz*. That document gives a right of pre-emption in respect of transfers by mortgage, but we have to see what was intended by such transfers, and I think the word used, which is translated "transfer," was not intended to refer to a simple mortgage, but to mortgages where possession of the property passes to the mortgagee. The object was to exclude strangers from coming in and meddling with the estate, and this does not happen in a case of simple mortgage.

When the property is ultimately sold under the order of the Civil Court, a right of pre-emption will arise, and the object of the shareholders can be obtained.

It seems, therefore, probable that the parties to the *wajib-ul-arz* had in view cases of mortgage where possession of the property was transferred to the mortgagee, and I believe our Court has in many other cases placed this construction on similar terms in the *wajib-ul-arz*. The answer to the reference should be in the negative.

Petheram, C. J.—The question which has been referred to the Full Bench does not, in my opinion, arise in this case, and before the answer can be given, the question must, I think, be amended. The question which does arise in the case is, whether, having regard to the nature of the security created by the bond dated 10th Sudi Sawan 1288, and the terms of the *wajib-ul-arz*, any right of pre-emption arose in the borrower's co-sharers upon his executing the bond. The answer to this question depends on whether the security created by the bond was a mortgage or a transfer within the meaning of the *wajib-ul-arz*. In my opinion it was neither the one nor the other.

By s. 58 of the Transfer of Property Act of 1882, a mortgage is defined to be a transfer of an interest in property for the purpose of a security, and a simple mortgage, which is the lowest form of security which can be defined as a mortgage, is defined to be where the borrower binds himself to pay the loan, and gives the [266] lender a power to sell the property and pay himself in the event of the loan not being repaid when it becomes due. This transaction clearly includes the transfer of an interest in the property, as it transfers the right to sell it from the borrower to the lender.

A reference to s. 100 of the same Act shows that, according to the law of this country, immoveable property may be made the subject of a security by a transaction which may not be a mortgage, i.e., by a transaction which does not transfer to the lender any interest in the land itself. The question then comes to this.—Does the bond in question, either expressly or impliedly, give the lender himself any right to cause the property to be sold; or, in other words, to sell it himself, as, if it does not, it transfers no interest in the property, and is not a mortgage but a charge. I am unable to see that any such right is created or given by the bond; it is evident that no express right is created, and therefore it only remains to inquire whether one arises by implication from the nature of the transaction. I think that it does not. The strongest words in favour of such an implication are "mortgaged" and "hypothecated," and they must be read together with the other words by which the borrower agrees not to sell or mortgage the property to any other person until the bond is paid off. The meaning of this appears to me to be that the land is to remain in the hands of the borrower, subject to a charge upon it in favour of the lender, and, if this is the correct view, certainly no power to sell by the lender can be implied from such a state of things. It follows then that, in my opinion, the transaction in question amounted to a charge only, and not to a mortgage or transfer, and that the question as amended must be answered in the negative.

It may be well to add that, in my view of the law, a simple mortgage, within the definition of the Transfer of Property Act, 1882, s. 58, would create a right of pre-emption under the terms of the *wajib-ul-arz*, because by giving the right to sell, it would transfer an interest in the property; but, as I have before said, I do not think that question arises in the present case.

Mahmood, J.—The question referred to us relates to the interpretation of the 5th clause of the *wajib-ul-arz*, a document which was executed in the Hindustani language by the co-sharers of the village at the time of the settlement of revenue. The clause relates [267] to the exercise of the right of pre-emption, and, in interpreting the words of the clause, it seems to me necessary to bear in mind the nature of the right for which the clause provides.

Sitting as a Judge of this Court, I have on more than one occasion expressed the view, that the rule of pre-emption owes its origin in India to the influence of Muhammadan Jurisprudence, which for centuries governed the administration of justice in this country. Though originally a mere rule of law administered by the Courts, pre-emption has been adopted as a custom by village communities in various parts of India. They have in some respects altered the incidents of that right, but such alteration has almost invariably been in the direction of strengthening the right, removing its limitations, and extending it far beyond the original contemplation of the rule of Muhammadan Law. That law limits the exercise of the right of pre-emption strictly to cases of sale, whereby the ownership of property passes from one person to another; but in adopting the right, the village communities in India, prompted most probably by that feeling of exclusiveness and immiscibility of character which the Hindu system of caste and joint family has engendered in the Indian mind, have extended the rule of pre-emption to mortgages of all kinds and even to *thika* leases, as is exemplified by some of the cases to be found in the reports. Bearing these matters in mind, it seems to me that the case now before us is only another illustration of the tendency to which I have referred. For here pre-emption is claimed, under the terms of the *wajib-ul-arz*, in respect of a transaction which, being only a simple mortgage, falls far short of sale, and does not involve the transfer of possession of the property to which it relates. It is true that in his plaint the plaintiff alleged that under the mortgage possession had been made over to the mortgagee, and the question has been decided against him by both the lower Courts. But the transfer of possession is by no means a condition precedent to the exercise of the right of pre-emption, even under the strict rule of Muhammadan Law,—a rule which, as I have already said, has been adopted by village communities by removing many of its restrictions. I am therefore of opinion that the circumstance that possession has not been transferred to the mortgagees is a circumstance which in itself has no bearing upon the decision [268] of the question now before us. So long as the *wajib-ul-arz* provides the right of pre-emption in cases of all kinds of mortgage, the Courts must give effect to the terms of that document regardless of the question of possession.

This brings me to the consideration of the main question now before us. What is the exact meaning of the clause of the *wajib-ul-arz*? Does it give a right of pre-emption in respect of simple mortgages? The clause runs as follows:—“According to the proportion of the land or share in possession, every sharer has the power of transferring rights and interests by means of sale and mortgage. But it is a condition that at the time of transfer whosoever may be desirous of transferring rights and interests, then first his nearest sharer will be entitled, and in case of his refusal, the transfer will be made in favour of other sharers in that *thok*, and in case of their refusal in favour of sharers

in the other *thok*, and when all these refuse or decline to give the proper price, then the transfer may be made in favour of others, and then no sharer will have the right of pre-emption." * * * In deciding this point it seems to me necessary to determine the exact meaning to be attached to three important words occurring in the clause of the *wajib-ul-arz*, viz., "*intikal*" (انتقال), "*hakkiyat*" (حقیقت), and "*rahn*" (رهن), and in determining their meaning, it seems to me that we are not called upon to enter into a philological discussion as to the origin and primary meaning of these words. The object of interpretation of documents of this nature is to ascertain the exact intention which the parties thereto had in using those words; and bearing this in mind, we are concerned only with the meaning of these words as they are used in the language of Hindustan. Now [269] as to the word "*intikal*" (انتقال) the learned Pandit who has argued the case on behalf of the appellants insists that the word necessarily implies the passing of possession by virtue of an alienation; because, as he contends, the word is derived from the Arabic root "*nakl*" (نقل), which means change of place. I do not dispute the philology, but if the primary meaning of the root were to be the guide of interpretation, it seems to me that the word as used in this country would become meaningless in the majority of documents wherein it occurs; because, even according to the argument for the appellants, a usufructuary mortgage amounts to an "*intikal*" (transfer) of immoveable property. Now if the primary meaning of the word is accepted as the guide of interpretation, I have only to say that, when the owner of immoveable property executes a usufructuary mortgage, the property does not move, in the literal sense of the word "*nakl*," from one place to another, and that it does not therefore change places in the sense in which the learned Pandit interprets the word "*intikal*." It is not contended that the word is used in the *wajib-ul-arz* in any sense peculiar to the locality where the document was executed; and I therefore take it that it is to be interpreted in the sense in which it is usually employed by the people of Hindustan. And taking this view of the matter, I have no hesitation in saying that the word "*intikal*," as used in Hindustani, has the broadest meaning in connection with "*alienation*" "*conveyance*," "*assignment*," or "*transfer*" of rights in immoveable property. I will not undertake to say which of these English words is the nearest equivalent, but I can say that, whichever of these words has the widest possible meaning, that word is the true equivalent of the Hindustani word "*intikal*;" at least I am not acquainted with any word which has a broader meaning in the sense of transfer of interest in immoveable property.

Now as to the word "*hakkiyat*," the word is derived from the Arabic root "*haq*" (حق) the primary meaning of which is "truth." But it is not by that primary meaning of the word that I would interpret the *wajib-ul-arz*, for the word "*haq*," as it is used in Hindustani, means "right," and "*hakkiyat*"

* The original of the clause was as follows :—

بقدر قبضہ زمین یا حصہ ہر ایک حصہ دار کو اختیار انتقال حقیقت از روے بیع و رهن حاصل ہی الا بر وقت انتقال کے یہ شرط ہی کہ جس کسی کو انتقال کونا حقیقت کا منظور ہو تو مول حصہ دار قریبی اسکا مستحق ہوگا در صورت انکار اس کے دیگر حصہ داران تھو کے ساتھ و بحالت انکار اس کے دوسرے تھو کے حصہ دار کے ہاتھ انتقال کریگا — اور جب سب کوئی انکار کرے یا قیمت واجبہ ندے تو دوسرے کے ہاتھ انتقال ہو سکتا ہی پھر کسی حصہ دار کو استحقاقی شفع نہ ہوگا *

means that which is the subject of right, namely, rights and interests, in the legal sense of the phrase. Then the word "*rahn*" (رهن) which is another Arabic word. [270] But we are not concerned with the meaning which it has among Arabians or under the Muhammadan Law. The only question we are concerned with is, what is the meaning of the word in the Hindustani language in which the clause of the *wajib-ul-arz* has been framed? It is to me as clear as the meaning of any word of my own language, that the word "*rahn*" is a generic word indicating all that is included in the English word "mortgage," as I understand the expression. The word is certainly not limited to usufructuary mortgages, but includes simple mortgages also—the former being in Hindustani "*rahn bil kabza*," and the latter "*rahn bila kabza*" in other words, if the nature of the mortgage has to be specified, the expression "*with possession*" or "*without possession*" has to be employed to qualify the general expression "*rahn*" or mortgage.

Now I take it as a rule of construction that when general words are employed, they must be so understood, unless they are accompanied by any expression limiting and restraining their ordinary meaning, or unless such limitation or restriction arises from necessary implication. I have already said that neither the word "*intiqal*" nor the word "*rahn*" can be understood in this document in any sense other than the most general; whilst the word "*hakkiyat*" has an equally general signification. Such being the view which I take of the meaning of these words, it becomes necessary for me to consider their effect with reference to the law of India. And upon this part of the case I have only to say a few words, because the codified provisions of s. 58 of the Transfer of Property Act (IV of 1882) have explained the law as it has always been in this country. I need not read that section; but I will only say that "mortgage," as understood in the Indian law, includes hypothecation or simple mortgage without possession, as well as usufructuary mortgage, which carries with it the right of possession, and that the one is as much "transfer of an interest in specific immoveable property" as the other, and that the purpose of both forms of mortgage is to secure the payment of money advanced as a loan to the person executing the mortgage. In my judgment in the case of *Gopal Pandey v. Parsotam Das*, I. L. R., 5 All., 121, to which the learned pleader for the respondent referred in the course of his argument, [271] I dwelt at some length upon the conception which I have of the form of transfer known in India as hypothecation or simple mortgage without possession. I need not repeat what I then said, but I may briefly state the conclusions at which I then arrived, and to which I have ever since adhered. In this case we are not concerned with what is called an "English mortgage" in India. We have only to see whether the transaction now before us, which is one of the Indian simple mortgage, is in any jurisprudential sense distinguishable from usufructuary mortgage, so as to place the latter under the category of "transfer" of an interest in immoveable property, and to exclude the former from such denomination. I am anxious to address myself to this question, because an important part of the argument of the learned pleader for the appellants proceeded on the ground that, under the transaction which we are now considering, nothing was actually "*transferred*." Now, according to my conception of legal rights, ownership is simply the aggregate sum of certain rights which constitute its component elements. Among those are the rights of possession and enjoyment of produce and the right of sale; in other words, a full owner of immoveable property has the power to alienate the right of possession and enjoyment of produce, as well as the power of transferring to another person the right of sale. It seems to me then that, when the owner of property borrows money or incurs any other pecuniary

obligation, and, as security for the due performance of his engagement, gives a right in immoveable property as security, he may convey to his creditor such one or more elements of ownership as would secure the fulfilment of the pecuniary obligation. When he conveys the right of possession and enjoyment of produce, it is a usufructuary mortgage; when he, whilst remaining in possession, transfers the right of sale, the transaction amounts to a simple mortgage in India. In both cases the transaction involves the transfer of someone or more of the component elements of ownership; in both cases the transaction amounts to a transfer, called mortgage, because in both cases the object of the transaction is to secure the discharge of a pecuniary liability by transferring an interest in immoveable property. The purpose of the transaction in both cases is absolutely identical, though the *modus operandi* for securing that purpose is different. [272] In the case of a usufructuary mortgage, the mortgagee obtains possession and realizes profits towards payment of the mortgage debt; in the case of a simple mortgage his right consists of achieving the same result by bringing the property to sale by such procedure as the law of the land provides. In some cases, such as those described in s. 69 of the Transfer of Property Act the mortgagee may sell the property by private sale; in other cases (and this is the rule of simple mortgages in India) his only way of selling the property is to go to the Court to obtain an order for sale. I am of opinion that this distinction between the two forms of mortgage to which I have referred does not place them under different categories, for my conceptions of jurisprudence convince me that both must be classed under the *genus* of *jura in re aliena*, or estates carved out of the full ownership of property, the object, namely, security of immoveable property for the performance of a pecuniary obligation, being in both cases identical. For those reasons I hold that a simple mortgage, such as the one now before us, falls within the contemplation of the clause of the *wajib-ul-arz* which we are now considering, and that the right of pre-emption accrued under that clause to the plaintiff in this case when the simple mortgage, of which he complains, was executed by one of his co-sharers in favour of a "stranger," in the sense in which that word is understood under the law of pre-emption.

I wish to say a few words more on a minor point which was suggested in the course of the argument. It was said that a simple mortgage in this country can never result in sale without the intervention of the Court; that when such a mortgage is enforced there must be a decree of Court; that such decree would be executed by auction-sale; and that at such auction-sale a co-sharer like the plaintiff could enforce a right of pre-emption under s. 310 of the Civil Procedure Code. This may be so, but it does not seem to me to have the least effect upon the determination of the question now before us. Provisions somewhat similar to those of s. 310 of the Civil Procedure Code are to be found also in s. 188 of the Land Revenue Act (XIX of 1873), but these statutory provisions confer pre-emptive rights wholly independent of the terms of the *wajib-ul-arz*, and I should say that they apply equally to cases in which the village community has entered into no such compact regard-[273] ing pre-emption as in the present case. In the present case we are not concerned with the statutory pre-emptive rights of a bidder at an auction-sale either in execution of a decree or for arrears of Government revenue. We are concerned only with the rights of a co-sharer under the specific terms of the *wajib-ul-arz*, which imposes restrictions on the transfer of interests in the lands of the village. Moreover, we are not called upon to decide whether the policy of the rule of pre-emption in the form in which it is here claimed and provided by the *wajib-ul-arz* is in itself wise. The *wajib-ul-arz* is admittedly binding upon all co-sharers—certainly upon the parties to the present suit—and if that

document provides pre-emption in respect of simple mortgages, as I hold that it does, we are bound to give effect to its terms.

My answer to this reference is in the affirmative.

NOTES.

I. As regards the right of pre-emption, this was followed in (1885) 7 All., 343; see also (1891) 11 A.W.N., 185; (1908) 4 A.L.J. 814.

II. As regards the meaning of 'mortgage', see also (1890) 13 All., 28; (1888) 13 Bom., 90; (1889) 14 Bom., 377; (1895) 20 Bom., 408; (1898) 12 C.P.L.R., 26.

III. As regards the history of pre-emption in India, see also (1885) 7 All., 775; (1889) 12 All., 234.]

[7 Bom 273]
APPELLATE CIVIL.

The 22nd December, 1884.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Nainsukh Rai.....Plaintiff
versus
Umadai.....Defendant.*

*Arbitration—Setting aside award—Corruption or misconduct of arbitrator—
Revocation of submission to arbitration—Civil Procedure Code, s. 508.*

An award cannot be set aside by the Court on the mere surmise that the arbitrator has been partial.

After the parties to a suit have agreed to refer to arbitration, and the order of reference has been made by the Court under s. 508 of the Civil Procedure Code, neither of them can arbitrarily and on no sufficient ground withdraw from the agreement.

Pestonjee Nussurwanjee v. Manockjee & Co., 12 Moo. I. A., 130, followed.

THE plaintiff in this suit claimed to recover Rs. 720, principal and interest, from the estate of Ghasiram, deceased, in the possession of the defendant, his widow. In support of his claim the plaintiff produced his account-books, containing what was alleged to be an acknowledgment by the defendant of the debt. The Court of First Instance dismissed the suit. The plaintiff appealed, and at this stage of the case the parties, by an application to the Lower [274] Appellate Court (Subordinate Judge), dated the 12th July 1883, agreed to a reference of the case to the arbitration of one Fakir Chand, and to abide by any decision which he might make. The Court, on the same day, directed that "orders should issue to the arbitrator, and he should be requested to submit his award by the 31st July 1883." On the same day a formal proceeding was drawn up by the Court, addressed to the arbitrator, informing him that he had been nominated as arbitrator in the case, and requesting him to submit his award by the 31st July 1883. On the 16th July 1883, before this proceeding had issued to the arbitrator, the defendant (respondent) prayed that the agreement to refer to arbitration might be declared null and void, and the case decided on the merits by the Court, as the arbitrator was a connection of the plaintiff,—a fact which the defendant was not aware of when she consented to refer the case to his arbitration, and which the plaintiff had concealed

* Second Appeal No. 1754 of 1883, from a decree of Maulvi Muhammad Maksud Ali Khan, Subordinate Judge of Saharanpur, dated the 11th September 1883, affirming a decree of Muhammad Said Khan, Munsif of Muzaffarnagar, dated the 8th May 1883.

from her. This petition the Court ordered to be filed. The case then went before the arbitrator, who, on the 21st August 1883, made an award in the plaintiff's favour. On the 28th August 1883, the defendant preferred objections to the award to the effect (a) "that the award was inadmissible, as the defendant had, before the records were sent to the arbitrator, declined to abide by his award"; (b) "that the award was also inadmissible because the arbitrator had exceeded his powers"; and (c) "that the arbitrator had been partial to the plaintiff, and had made an award against facts, as he was a relative of the plaintiff." The Lower Appellate Court framed the following issues on these objections, viz.: (i) "what is the effect of the respondent's revocation of her consent to the reference to arbitration before the award was made; (ii) whether or not the corruption or misconduct of the arbitrator is proved; (iii) did the arbitrator exceed his powers in determining the case?"

On the 1st and 2nd issues the Court decided as follows:—"As to the first point, the respondent's denial, after giving an agreement in writing, is insufficient. The only complaint which can now be made is whether or not the award has been made improperly owing to the corruption of the arbitrator; but this ground, given in the first issue, is not reasonable. (2) The plaintiff's relationship with the arbitrator is not denied. The reasons given by him for his award are as follow:—That the defendant's signature corresponds with that on the account-book; that the defendant's account-books were not produced, though called for; and that the defendant's husband's accounts were entered in the plaintiff's account-book. But he failed to determine and investigate the two important points whether the defendant's husband actually carried on dealings with the plaintiff, and that he, and subsequently the defendant, having stated the accounts, admitted the balance or not. When the arbitrator did not pay attention to these matters, the Court therefore suspects his impartiality, as it was not a case in which the arbitrator should have given a decree in a summary manner. The defendant and the plaintiff's gomashtha, who up to this time very zealously conducted the case on behalf of the appellant, are on bad terms. The defendant is a childless widow possessed of property, and men like the plaintiff do not look upon her person and property without any reason. It is not strange if the present opportunity may have been afforded, through the plaintiff's karinda, by stating a person (inclined to favour) as a very trustworthy person, getting an agreement to refer to arbitration executed in his favour, and causing the arbitrator to give a judgment in accordance with the plaintiff's wishes. The arbitrator did not take the evidence of even one witness, nor did he make an equitable award. I am therefore of opinion that the award was not impartially made and should be set aside." The Court accordingly set aside the award, and proceeded to decide the appeal itself. It dismissed the appeal and affirmed the decree of the first Court.

In second appeal the plaintiff contended that the award had been improperly set aside, there being no evidence to prove corruption or misconduct on the part of the arbitrator, and the award having been impugned only on the ground that it was partial and opposed to the merits of the case; that the arbitrator had not exceeded his authority; and that an award should not be set aside on the ground that the arbitrator had not determined the matters referred to him, but in such a case the procedure prescribed by s. 520 of the Civil Procedure Code should be followed.

For the respondent it was contended that the reference to arbitration had been revoked by her before the award was given, and therefore the award was invalid.

[276] Mr. G. T. Spankie and Pandit Ajudhia Nath, for the Appellant.

Pandit Sundar Lal, for the Respondent.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

Oldfield, J. —The Subordinate Judge has rejected the award on the mere surmise that the arbitrator was partial, the grounds being that his decision is summary, and he failed to take evidence. An award can only be set aside for corruption or misconduct. But there are no sufficient reasons for assuming corruption or misconduct; and in the absence of any evidence on these points the award cannot be set aside. The defendant, after having agreed to refer to arbitration, and after the order of reference had been made by the Court under s. 508, could not arbitrarily and on no sufficient ground withdraw from her agreement (*Pestonjee Nussurwanjee v. Manockjee & Co.*, 12 Moo. I. A., 130). The objection therefore on the defendant's part, that the reference had been revoked, fails. The decree is set aside, and the case will go back to the Subordinate Judge to determine the other objection taken to the award, and if it fails, to decree in accordance with the award: costs to follow the result.

Appeal allowed.

NOTES.

[This was followed in (1887) 10 All., 8. In (1886) 9 All., 253, there was positive proof of misconduct in that the arbitrator refused to receive evidence.]

[7 All. 276]

CIVIL REVISIONAL.

The 22nd December, 1884.

PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Raghunath Das.....Petitioner

versus

Raj Kumar..... Opposite Party.*

Civil Procedure Code, ss. 206, 622—Order amending decree—

High Court's powers of revision.

Per OLDFIELD, J.—When an original decree is amended under s. 206 of the Civil Procedure Code, it as amended is the decree in the suit; and an appeal therefore lies from it under the provisions of s. 540, when the validity of the amendment can be questioned. The matter of amending a decree under s. 206 does not by itself constitute a “case,” within the meaning of s. 622 of the Civil Procedure Code, but forms part of the proceedings in the suit in which the decree is made.

Held, therefore, *per* OLDFIELD, J., that, where an original decree, which was appealable, was amended by the Court of First Instance, under s. 206 of the Civil [277] Procedure Code, the High Court had no power to revise such amendment under s. 622 of the Code.

Per MAHMOOD, J.—An order passed under s. 206 amending a decree is a separate adjudication, and is not merely a part of the original decree, and cannot alter its date, and

* Application No. 216 of 1884, for revision under s. 622 of the Civil Procedure Code of an order of Maulvi Muhammad Abdul Qayum, Subordinate Judge of Bareilly, dated the 6th May 1884.

such an order is not appealable under s. 538 of the Code. Such an order, therefore, can be revised by the High Court, under s. 622.

IN this case a decree in a suit to enforce a right of pre-emption was passed by the Subordinate Judge of Bareilly on the 24th March 1884, and the order contained in that decree as to costs directed that the pleader's fees should be calculated with reference to the value of the claim as set forth in the plaint. On the 18th April 1884, the defendant applied to the Court to amend its decree in regard to costs, on the ground that the pleader's fees should be calculated with reference to the actual value of the property to which the suit related. On the 6th May 1884, the Court passed an order as follows:—"In pre-emption cases fees should be calculated upon the actual value of the property, and not upon any other value. In preparing this decree, the value of the property was not regarded, and fees were computed on the amount of the claim. The decree should be corrected, and it is therefore ordered that the original decree be amended, and after the copy thereof has been amended, it may be returned to the applicant."

The defendant applied for revision of this order to the High Court. It was contended that the pleader's fees had been wrongly computed with reference to the actual value of the property, and that the amendment of the decree by the lower Court was not an amendment of the kind authorized by s. 206 of the Civil Procedure Code.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), for the Petitioner.

Munshi Sukh Ram, for the Opposite Party.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgments:—

Oldfield, J.—We have no power of revision, under s. 622 of the Civil Procedure Code, in a case in which an appeal lies to the High Court. We are asked here to revise an order made under s. 206 for amending a decree. Now the decree as amended is the decree in the suit, and therefore an appeal lies from it under the [278] provisions of s. 540, when the validity of the amendment can be questioned. An appeal, therefore, in the language of s. 622 lies in this case to the High Court, and s. 622 has no application.

It cannot be said that the matter of amending a decree under s. 206 by itself constitutes a "case" within the meaning of s. 622; it seems to me to form part of the proceedings in the suit in which the decree is made, and those proceedings together form a case in which an appeal lies.

I would therefore dismiss this application with costs.

Mahmood, J.—I regret that I am unable to agree with my brother OLDFIELD upon the questions of law which this case involves. The facts which it is necessary to mention are that, on the 24th March 1884, the Subordinate Judge of Bareilly passed a decree in a suit for pre-emption, and subsequently, on the 18th April 1884, the respondent applied to the Court to amend its decree, on the ground that it was defective in not awarding costs in the manner required by the law in this part of the country. The Subordinate Judge took up the case under s. 206 of the Civil Procedure Code, and professing to act under the authority given by the last paragraph of that section, passed an order on the 6th May 1884, which is the subject of the present application on the Revisional Side.

The power which the Court possesses of amending its decree was first created, at all events in the present extensive form, by the Civil Procedure Code of 1877, and it remained unaltered by the Code of 1882. But for this

provision the Court of First Instance could not, after passing its decree, interfere *suo motu* with the order contained therein in regard to costs, mesne profits, or any other matter connected with the suit. I have therefore no doubt that from the moment when the decree was passed, the Court became *functus officio*. Now it is necessary to examine carefully the terms of s. 206, which are as follows:—"The decree must agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, as stated in the register, and shall specify clearly the relief granted or other determination of the suit." The second paragraph imperatively requires the Court to frame its decree so as to [279] "state the amount of costs incurred in the suit, and by what parties and in what proportions such costs are to be paid." In the case before us, the words of the last paragraph are specially important:—"If the decree is found to be at variance with the judgment, or if any clerical or arithmetical error be found in the decree, the Court shall, of its own motion, or on that of any of the parties, amend the decree so as to bring it into conformity with the judgment, or to correct such error: provided that reasonable notice has been given to the parties or their pleaders of the proposed amendment." Now in this paragraph there are three important points. The first is, that the powers referred to may be exercised by the Court of its own motion; secondly, they may also be exercised by the Court at the instance of either party; thirdly, they cannot be exercised unless reasonable notice has been given to the parties. I understand the section to mean that when the Court or the parties to a suit consider that the decree is at variance with the judgment, the Court can only amend the decree after issuing such notice as may enable either party to prefer objections. The section would not have imperatively required the issuing of notice, if this proceeding under the section were not in the nature of an adjudication, separate from the decree sought to be amended.

A considerable part of the argument addressed to us by the learned pleader for the opposite party (respondent) related to the question whether s. 206 of the Code should not be regarded as merely ministerial, and whether a decree amended under the section must not be taken for the purposes of appeal, etc., as dating from the time when the amendment was made. I am of opinion that the contention has no force. In the first place it is specifically provided by the immediately preceding s. 205, that a decree shall date from the day on which the judgment was pronounced, and after it is duly signed it becomes, and must be regarded as a decree of that date. There is nothing in s. 206 to modify this imperative rule. Further, in s. 2 of the Code, a "decree" is defined as "the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit or appeal." Now I lay particular stress [280] upon the last words which I have just read; and it appears to me that there is no force in the contention raised on behalf of the opposite party that the decree of the 24th March 1884, did not decide the case, so as to make the Court *functus officio*. Once a judgment is pronounced and the decree prepared and signed within the meaning of s. 205 of the Civil Procedure Code, it becomes a final decree, which might form the subject either of an appeal or a review of judgment. It could not be interfered with, altered or amended by the Court which passed the decree, if the last paragraph of s. 206 did not confer the special power of amendment to be exercised only after hearing the parties. I am therefore of opinion that the order passed under s. 206 was a separate adjudication, and not merely a part of the original decree, and could not alter its date. Then we have been referred to the case of *Gaya Prasad v. Sikri Prasad*, I. L. R., 4 All., 23, in which it was held that "an

application to amend a decree which is found to be at variance with the judgment, in accordance with the provisions of s. 206 of the Civil Procedure Code, is an application of the kind mentioned in No. 178 of sch. ii of Act XV of 1877, and, as such, subject to the limitation of three years." And at the hearing it was said that this ruling made it impossible for the Court to amend its decree after three years. I do not agree with this. The Limitation Act relates to the action of parties, but not to the action of the Court. If the Court should be of opinion that by reason of any clerical or arithmetical error, its decree does not carry the judgment into complete effect, it may take up the decree and amend it even after three years or more. Under the provisions of the law as to revision, a decree cannot be revised if an appeal from it is possible. By s. 206, as I understand it, the Court has power to amend its decree, even if an appeal would lie therefrom, to this Court or to their Lordships of the Privy Council, and the time for the appeal had expired.

If we were to hold that this order of the 6th May 1884 was not a separate adjudication, we should be deciding in effect that after several years had passed, and after the time provided for an appeal had long come to an end, the Court might take up its decree and so amend it as to seriously affect the rights of the parties whom it [281] concerned. Now we know that the only grounds recognized in s. 206 as justifying the Court in amending the decree are variance of the decree with the judgment, or clerical or arithmetical errors. But what happened in the present case was that the original decree, conformably with Rule 59 of the collected Rules of the High Court, awarded costs computed on the value of the amount claimed. The rule is as follows:—"The words, 'the amount or value of the claim' in Rules 55, 56, and 58, mean the value as set forth in the plaint, application, or memorandum of appeal, and where Court-fees are payable *ad valorem*, according to which such Court-fees are paid." The effect of this is that the costs in a suit like the present must be calculated in the same manner as court-fees upon a valuation of the claim. In the present case, therefore, the decree ordered costs in the manner prescribed, and that order has been interfered with, not on account of a clerical or arithmetical error, but because the Court believed that it was competent to pass an order which is inconsistent with the Rules which this Court has framed.

I am, therefore, satisfied that the order passed under s. 206 is a separate adjudication; that it is not appealable under s. 588; and that a Court which goes beyond what is warranted by the last paragraph of s. 206 may practically be altering the nature of the decree. If such a course were allowed, any Judge, who (as sometimes happens) took an erroneous view of his own judgment, might say: "I meant so and so by my judgment upon this point and upon that", and thus might make alterations going far beyond merely clerical or arithmetical corrections. The present petitioner could not appeal against the decree of the 24th March 1884, for it would be contrary to his interest to do so. His only grievance is the order of 6th May 1884, which wrongly amended the decree, and his only way to remove that grievance is by revision. The power of revision under s. 622 of the Civil Procedure Code belongs to the High Court only, and it was intended to be exercised in correction only of such errors as were not open to appeal, and within certain specified limits. Then it is argued that an order amending a decree under s. 206 of the Civil Procedure Code, whether such order is right or wrong, is not a "*case*" within the meaning of s. 622 of the Code, and is therefore not subject to revision. [282] What I have already said fully meets this contention, and I may add that as a matter of practice the case of *Gaya Prasad*, to which I have already referred, shows that a Division Bench of this Court has taken cognizance of such orders in revision,

although it dismissed the application upon grounds which do not apply to this case. Here the order as to costs complained of by the petitioner is admittedly erroneous and could be rectified only by revision. The order as to costs, as it stood originally in the decree of 24th March 1884, was correct, and the order of amendment passed on the 6th May 1884, was not justified by the provisions of s. 206 of the Civil Procedure Code, and was therefore *ultra vires*. I would set aside that order, and allow the application with costs to the petitioner.

NOTES.

[See the notes to 7 All., 876, where the decision of the Full Bench in this case is reported.]

[7 All. 282]

APPELLATE CIVIL.

The 15th January, 1885.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Nanda Rai and another.....Decree-holders

versus

Raghunandan Singh.....Judgment-debtor.*

Execution of decree—Application by two of three joint decree-holders for part execution of joint decree—Limitation—Act XV of 1877 (Limitation Act), sch.

ii, No. 179—Acquiescence by judgment-debtor in part execution.

A decree for money was passed in 1871, in favour of two persons jointly. In 1883, the decree-holders applied for execution thereof. By previous applications for execution made in 1873, 1877, and 1880, the decree-holders had sought to recover two-thirds of the amount of the decree.

Held, that inasmuch as the previous executions of the decree by some sharers for their shares, whether strictly allowable or not, were allowed, and no objections at the time were taken to them, they were good for the purpose of keeping the decree alive, and that the judgment-debtor could not now take exception to them as not being applications to enforce the decree within the meaning of the Limitation Act. *Mungul Pershad Dichit v. Grija Kant Lahiri*, I. L. R., 8 Cal., 51 : L. R., 8 Ind. Ap., 123, followed.

THE decree of which execution was sought in this case, which was for money, and dated the 19th July 1871, was passed in favour of Gopal Rai and Jeo Rai jointly. They sold it to three persons, named Sheodat Rai, Umar Rai, and Jageshar Rai. On the 29th November 1873, these three persons applied for its execution. On the 5th February 1874, the rights and interests of Sheodat Rai and Umar Rai in the decree were put up for sale in execution of a [283] decree against them, and were purchased by Nanda Rai and Karta Rai, the appellants in this case. On the 2nd January 1883, they made the application for execution of the decree out of which this appeal arose. In this they asked to recover two-thirds of the amount of the decree, as the representatives of Sheodat Rai and Umar Rai. The judgment-debtor objected that execution was

* Second Appeal No. 64 of 1884, from an order of H. D. Willock, Esq., District Judge of Azamgarh, dated the 1st March 1884, affirming an order of Moultvi Amin-ud-din, Munsif of Muhammadabad Gohna, dated the 22nd December 1883.

barred by limitation. To this it was replied that the decree had been kept alive by applications for execution made by Nanda Rai and Karta Rai in 1875, 1877, and 1880. By those applications the decree-holders had sought to recover two-thirds of the amount of the decree.

The Court of First Instance (Munsif of Muhammadabad) refused the application. It held on the authority of *The Collector of Shahjahanpur v. Sukhan Singh*, I. L. R., 4 All., 72, that, inasmuch as the previous applications were for the partial execution of a decree which was passed jointly against more persons than one, and which could only be legally executed as a whole for the benefit of all the decree-holders, they were not in accordance with law, and therefore were insufficient to keep the decree alive in terms of No. 179, sch. ii of the Limitation Act. On appeal, the District Judge affirmed the Munsif's order.

The decree-holders appealed to the High Court, contending that the previous applications had not been objected to by the judgment-debtor, and had been allowed, and therefore they could not now be impugned as being not in accordance with law.

Munshi Kashi Prasad, for the Appellants.

Babū Jogindro Nath Chaudhri, for the Respondent.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

Oldfield, J.—Whether or not the previous executions of the decree by some sharers for their shares were strictly allowable, they were allowed, and no objections at the time were taken to them, and they must be held to be good for the purpose of keeping the decree alive. The judgment-debtor cannot now take exception to them as not being applications to enforce the decree within the meaning of the Limitation Act. The principle of the decision of the Privy Council [284] in *Mungul Prasad Ditch v. Grija Kant Lahiri*, I. L. R., 8 Cal., 51; L. R., 8 Ind. Ap., 123, governs this case. The judgment-debtor cannot now object to the execution of the decree by the appellants for their shares. The orders of the Courts below are set aside, and the case remanded to the first Court for disposal. Costs to follow the result.

Appeal allowed.

NOTES.

[See also (1894) 16 All., 390.]

[7 All. 284]

The 15th January, 1885.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE DUTHOIT.

Pragi Lal.....Plaintiff

versus

Maxwell and others.....Defendants.*

Set-off—Civil Procedure Code, s. 111—“Ascertained” sum—Act XV of 1877 (Limitation Act), s. 22, sch. ii, Nos. 52, 53, 63.

A suit was brought by P against the Elgin Mills Company for recovery of the price of wood supplied under two contracts, each of which contained a clause by which the plaintiff

* Second Appeal No. 1880 of 1883 from a decree of A. Sells, Esq., District Judge of Cawnpore, dated the 23rd July 1883 reversing a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Cawnpore, dated the 3rd April 1883.

contracted to indemnify the defendants for loss arising by reason of failure on his part to supply the wood as contracted for. No wood was supplied after the 11th November 1879. The suit was brought on the 10th October 1882. In January 1883, the partners of the Elgin Mills Company were, on their own application, brought upon the record as defendants. The defendants claimed a set-off as damages for loss incurred by the plaintiff's failure to supply all the wood contracted for, such loss having arisen on the 25th October 1879, and subsequently

Held, that art. 53*, and not art. 52†, sch. ii of the Limitation Act was applicable to the plaintiff's claim, the intention of the parties having been that the price of wood was not claimable as of right on the date of its being supplied, but rather when the contract was completed by the whole wood being supplied, or when the contract came to an end.

Held, that although, taking the word "ascertained" to mean "liquidated," the claim of the defendants for damages would not come within the meaning of a set-off under s. 111 of the Civil Procedure Code, that section was one regulating procedure, and was not intended to take away any right of set-off, whether legal or equitable, which parties would have had independently of its provisions; that the right of set-off would be found to exist not only in cases of mutual debts and credits, but also where the cross-demands arose out of one and the same transaction, or were so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit, and that as, in the present case, the claim sprang out of the same contract which the plaintiff sought to enforce, and could readily be determined in the same suit, it was equitable that it should be so determined. *Gauri Sahai v. Ram Sahai*, N.-W. P. H. C. Rep., 1875, p. 157; *Kistnasamy Pillay v. The Municipal Commissioner of Madras*, 4 Mad. H. C. Rep., 120, and *Kishor Chand Champa Lal v. Madhoyji Visram*, I. L. R., 4 Bom., 407, followed.

[285] *Held*, that the law of limitation applicable to the set-off was art. 83, sch. ii of the Limitation Act; that limitation would run from the time when the plaintiff was actually damaged, and should be reckoned to the date of the institution of the suit, and not to that of claiming the set-off, which was after the defendant's names were brought on the record; and that the set-off was therefore in time. *Walker v. Clements*, 15 Q. B., 1046, referred to.

Per OLDFIELD, J.—That the excess of the set-off in favour of the defendants over and above the claim of the plaintiff might properly be decreed to them, and that the set-off should be allowed, if at all, to its full extent, and not merely to the extent of defeating the claim.

Per DUTHOIT, J.—That although the set-off might properly be admitted as an equitable protection to the defendants against being cast in the plaintiff's suit, the defendants could not, failing the provisions of s. 111 of the Civil Procedure Code, be allowed to recover a sum of money from the plaintiff, they having paid no Court-fees on that account.

* [Art. 53 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
For the price of goods sold and delivered to be paid for after the expiry of a fixed period of credit.	Three years.	When the period of credit expires.]

† Art. 52 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
For the price of goods sold and delivered, where no fixed period of credit is agreed upon.	Three years.	The date of the delivery of the goods.]

Held, that s. 22* of the Limitation Act refers to cases where a new defendant is substituted or added, and that when the partners of the Elgin Mills Company were brought on the record as defendants in January 1883, there was no institution or addition of new defendants, the defendants having been comprised in the designation of Elgin Mills Company and at most what was done was to correct a misdescription.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of OLDFIELD, J.

Mr. T. Conlan and the Junior Government Pleader (Babu Dwarka Nath Banarji), for the Appellant.

Mr. C. H. Hill for the Respondents.

Oldfield, J.—This is a suit by the plaintiff against the partners of the Elgin Mills Company, for recovery of the price of wood supplied under two contracts dated the 22nd October 1878 and 27th July 1879. A certain amount of firewood was to be supplied by certain dates, and each contract contained a clause by which the plaintiff contracted to indemnify the defendants for loss arising by reason of failure on his part to supply the wood as contracted for.

It is admitted that the plaintiff did not supply all the wood contracted for, and as a matter of fact the defendants did not keep him to the strict terms of the contracts, but received wood after the dates specified in the contracts had expired and it appears that the plaintiff received payment for what he supplied from time to time, [286] and on the 11th November 1879, he presented a bill to the respondents for Rs. 1,367-10-9 alleged due to him on that date, and was met by a counter-claim on the defendants' part for a sum due for damages in consequence of his failing to supply wood. After that date no further wood was supplied, and it is admitted that the plaintiff failed to supply all the wood contracted for.

The present suit has been brought on the 10th October 1882, to recover the above sum of Rs. 1,367-10-9 with interest.

There is no dispute that the above sum was due for wood supplied, but the defendants, who are proprietors of the firm, pleaded that they were made defendants after the period of limitation had expired for bringing this suit, that some of the items composing the claim are barred by limitation, and they claimed a set-off as damages for loss incurred by the plaintiff's failure to supply all the wood contracted for.

The Lower Appellate Court, modifying the decree of the first Court, has held that the plaintiff's claim is not barred by limitation, but that the set-off was properly claimable by the defendants, and in consequence it dismissed the suit. The plaintiff has appealed, and there are cross-objections on the part of the defendants. The plaintiff's appeal is directed against the order allowing the set-off, and it is contended that the claim for damages is not one which can be set-off under s. 111 of the Civil Procedure Code, it not being an ascertained sum of money legally recoverable.

Effect of substituting or adding new plaintiff or defendant.

Proviso where original plaintiff dies.

Proviso where original defendant dies.

* [Sec. 22 :—When, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.

Provided that, when a plaintiff dies, and the suit is continued by his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted by the deceased plaintiff :

Provided also, that, when a defendant dies, and the suit is continued against his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted against the deceased defendant.]

Taking the term "ascertained" to mean liquidated, that is, in a claim for damages to mean a case where a certain sum has been agreed upon as the just amount of damages sustained, the claim will not come within the meaning of a set-off under s. 111; but it has been held by this Court in *Gauri Sahai v. Ram Sahai*, N.-W. P. H. C. Rep., 1875, p. 157, following a ruling of the Madras High Court in *Kistnasamy Pillay v. The Municipal Commissioner of Madras*, 4 Mad. H. C. Rep., 120, and by the Bombay High Court in *Kishor Chand Champa Lal v. Madhowji*, I. L. R., 4 Bom., 407, that this provision in the Code is one regulating procedure, and not intended to take away any right of set-off, whether legal or equitable, which parties would have had independently of its provisions, and that the right of set-off will be found to exist not only in cases [287] of mutual debts and credits, but also where the cross-demands arise out of one and the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover, and the defendant be driven to a cross-suit. And so, in the case before us, the claim springs out of the same contract which the plaintiff seeks to enforce, and can be readily determined in this suit, and it is equitable that it should be so determined.

There is another objection that the claim by way of set-off is barred by limitation, but this has no force. The loss which arises from the defendants being obliged to purchase coal in place of the wood not supplied was incurred on the 25th October 1879, and subsequently. The law of limitation applicable is art. 83, and limitation will run from the time when the plaintiff was actually damaged, and will be reckoned to the date of the institution of the plaintiff's suit, and not to that of claiming the set-off, which was the 14th January 1883, after the defendants' names were brought on the record,—see *Walker v. Clements*, 15 Q. B., 1046,—and the set off is in consequence within time. The other plea that the defendants waived their right to damages is not made good.

The appeal of the plaintiff therefore fails. The first objection on the part of defendants is to the effect that, inasmuch as they were not made defendants till January 1883, the suit is barred by s. 22, Limitation Act. It appears that the plaintiff made the Elgin Mills Company defendant, and upon the application of the defendants, who are the partners in the firm, they were brought on the record as defendants. Section 22 refers to cases where a new defendant is substituted or added. In the case before us there has been no substitution or addition of new defendants; the defendants were comprised in the designation of the Elgin Mills Company, and at most what was done was to correct a misdescription, for which the plaintiff cannot be blamed, seeing that the defendants trade under the designation of Elgin Mills Company, and he was not in a position to know who the partners were.

The next objection is, that all items of the claim for wood supplied prior to three years antecedent to the date of institution of [288] suit are barred by art. 52, Limitation Act, the limitation running from the date of delivery of the goods.

It appears to me, however, that the intention of the parties was that the price of the wood was not claimable as of right on the date of its being supplied, but rather when the contract was completed, by the whole wood being supplied, or when the contract came to an end. I would apply art. 53, and hold that no portion of the plaintiff's claim is barred by limitation. The objection on the defendants' part, however, that the Court below should have decreed in their favour the excess of their set-off over and above the claim allowed to the plaintiff is valid, for if it is right to allow a set-off at all in this

suit, it seems reasonable that it should be allowed to its full extent, and not to admit it to the extent of merely defeating the present claim. It should be either allowed in full or not allowed at all, and I would so far modify the decree, and give a decree in favour of the defendants against the plaintiff for Rs. 1,808-5-6. There is no dispute in appeal before us either as to the amount of the plaintiff's claim or that of the defendants for damages.

The appeal of the plaintiff is dismissed. Each party to bear their own costs in both Courts.

Duthoit, J.—I am agreed with my learned brother upon all the points raised in this appeal and objection, except as regards the defendants' objection that their claim to recover the difference between the amount of the set-off and the sum found to be due to the plaintiff should have been decreed. I am not prepared to admit the validity of this claim. It is, I think, clear that, not being *liquida causa*, the set-off could not be claimed under the provisions of s. 111 of the Code of Civil Procedure; and this being so, though I am prepared to allow that the set-off may be admitted as an equitable protection to the defendants against being cast in the plaintiff's suit, I do not see how, failing the provisions of s. 111 of the Civil Procedure Code, the defendants, who have paid no Court-fees on this account, can be allowed to recover a sum of money from the plaintiff. I would affirm the decree of the Lower Appellate Court, and dismiss the appeal and the defendants' objection, both without costs.

NOTES.

I. As regards set off, see also (1892) 15 All., 9; (1908) P. R. 85.

II. As regards limitation upon addition of parties, see also (1899) 19 A. W. N. 143; (1901) 6 C. W. N., 218; (1907) P. R. 149; (1897) 21 Bom., 580.]

[289] *The 23rd January, 1885.*

PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Bakhshi Nand Kishore.....Judgment-debtor
versus

Malak Chand and another.....Decree-holders.*

Execution of decree—Sale of immoveable property in execution before thirty days from date of fixing up proclamation—Material irregularity in publishing or conducting sale—Civil Procedure Code, ss. 290, 311.

An infringement of the rule contained in section 290 of the Civil Procedure Code is an irregularity vitiating a sale in execution of decree, and is something more than a material irregularity in publishing a sale to which section 311 refers.

THIS was an appeal from an order of the Munsif of (Haveli) Aligarh confirming the sale in execution of a decree of certain immoveable property. It appeared that the property had been put up for sale before the expiration of thirty days, calculated from the date on which the copy of the proclamation was fixed up in the court-house of the Munsif. The judgment-debtor applied to the Munsif under s. 311 of the Civil Procedure Code to set aside the sale, on the ground that the requirements of s. 290 had not been complied with, and that this

* First Appeal No. 68 of 1884, from an order of Mir Akbar Husain, Munsif of (Haveli) Aligarh, dated the 20th May 1884.

constituted "a material irregularity in publishing or conducting the sale," within the meaning of s. 311. The Munsif disallowed the objection and confirmed the sale. The judgment-debtor appealed to the High Court.

The Junior Government Pleader (Babu Dwarka Nath Banarji) for the Appellant.

Babu Oprokash Chandar, for the Respondents.

The Court (OLDFIELD and MAHMOOD, JJ.), delivered the following judgment:—

Oldfield, J.—The infringement of the rule in s. 290 of the Civil Procedure Code vitiates the sale. It is an illegality vitiating the sale and is something more than a material irregularity in publishing and conducting a sale to which s. 311 refers. The sale is set aside, and the appeal decreed with costs.

Appeal allowed.

NOTES.

[When the sale is held before the thirty days, it has been treated not as an illegality but as an irregularity;—(1894) 21 Cal. 66; (1904) 31 Cal. 385; (1890) 14 Mad., 227; (1906) 29 All., 196; (1889) 11 All., 333; (1889) 12 All., 440; (1889) 12 All., 510; *contra* (1887) 9 All., 511; (1886) 14 Cal., 1. See also (1894) 5 M. L. J., 70.]

[290] FULL BENCH:

The 17th January, 1885.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE OLDFIELD, MR. JUSTICE BRODHURST, MR. JUSTICE MAHMOOD, AND MR. JUSTICE DUTHOIT.

In the matter of Durga Charan, Pleader, and s. 12 of Act XVIII of 1879.

Act XVIII of 1879 (The Legal Practitioners' Act), s. 12—Conviction of Pleader of criminal offence—Case reported to the High Court—Argument allowed to show that conviction was illegal.

A District Judge reported to the High Court for orders the case of a pleader who had been convicted of cheating under s. 417 of the Penal Code, and who, in the opinion of the District Judge, was unfit to be allowed to practice.

Upon the hearing of the case, counsel was permitted to go behind the conviction in order to show that the acts of the pleader did not amount at law to the offence of cheating.

THIS was the case of a pleader, who had been convicted of cheating, under s. 417 of the Indian Penal Code, which was reported to the High Court for orders, under Act XVIII of 1879. The District Judge making the report was of opinion that the pleader was unfit to be allowed to practice.

It appeared that the pleader had been convicted of cheating by a Magistrate, and sentenced to pay a fine of Rs. 200. On appeal to the Court of Session, the conviction and sentence were affirmed, and an application for revision, which came before one of the Judges of the High Court, was rejected.

The District Judge's report of the case came before OLDFIELD and MAHMOOD, JJ., who, being of opinion that it was desirable that the case should be disposed of by the Full Bench, referred it accordingly to the Full Bench.

Mr. T. Conlan, for the Accused.

Mr. *T. Conlan*.—If I am permitted to go behind the conviction, I can show that Babu Durga Charan committed no offence at law.

[PETHERAM, C.J.—I think you are "entitled to go behind it in order to show that.]

Mr. *Conlan* then contended that the acts of Babu Durga Charan did not amount at law to the offence of cheating.

[291] At the conclusion of the argument, their Lordships delivered the following Opinion :—

Petheram, C.J., and Oldfield, Brodhurst, Mahmood, and Duthoit, JJ.—We do not consider that Durga Charan, pleader, should be either suspended or dismissed under s. 12 of Act XVIII of 1879, and the Judge may be informed accordingly.

NOTES.

[The propriety of the conviction cannot be questioned in the proceedings under the Legal Practitioner's Act :—(1889) 22 All., 43 at 54 ; (1895) 18 All., 174.]

[7 All. 291]

APPELLATE CIVIL.

The 15th January, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT, CHIEF JUSTICE, AND
MR. JUSTICE BRODHURST.

Lachmi Narain and another.....Defendants

versus

Manog Dat.....Plaintiff.*

Pre-emption—Wajib-ul-arz—" Transfer "—" Sale."

On the 1st September 1881, *L* and *R* entered into an agreement (which was duly registered) with *B*, that in consideration of their bringing a suit for recovery of a twelve-annas share in a village which *B* claimed by right of inheritance against *G*, they should receive a moiety of the share. *L* and *R* found funds for the prosecution of two suits in respect of the share, which on the 5th April 1882, were compromised, *B* getting one anna and three pies out of the twelve annas originally claimed by her. In that compromise, *B* stated as follows :— " I make over one anna to *L* and *R* my partners, in lieu of the prosecution of the two cases. I, the plaintiff, shall remain in possession of the remaining three pies." Meanwhile, on the 3rd September 1881, *G* had sold three annas out of the twelve annas share to *M*. On the 3rd April 1883, *M* brought a suit against *L* and *R*, claiming the right of pre-emption in respect of the one anna which they had acquired from *B*, on the allegation that the transfer of the share had taken place on the 5th April 1882. This claim was based on the *wajib-ul-arz* of the village, which gave a right of pre-emption to the co-sharers of any sharer wishing to "transfer" his share.

Held, that the compromise of the 5th April 1882, was only a re-adjustment of the amount of the interest in the share between *B* and *L* and *R*; that the real transfer to *L* and *R* was given effect to on the 1st September 1881; and that, this having been prior to the acquisition

* Second Appeal No. 31 of 1884, from a decree of *Ru Raghunath Sahai*, Subordinate Judge of Gorakhpur, dated the 27th August 1883, reversing a decree of *Sayyid Muhammad Mir Badshah*, Munsif of Bansi, dated the 14th June 1883.

by *M* of any right in the village, he was not a co-sharer at the time of the transfer; and that he had consequently no right as against *L* and *R* by way of claim for pre-emption.

THE plaintiff in this suit claimed to enforce the right of pre-emption in respect of a one-anna share of a village under the following circumstances. On the 1st September 1881, Bhagwanta, the daughter of Reoti Ram, who claimed as heir to her father a [292] twelve-annas share in this village, together with her three sons, executed in favour of Lachmi Narain and Ramraj Lal, the defendants in this suit, an instrument in which, after stating that Bhagwanta was entitled to the share by right of inheritance to her father, that one Gajadhar had wrongfully taken possession of the share, that it was not possible to recover possession of the share without a suit, and that they had not the money to bring a suit, they agreed as follows:—

“Therefore we, while in the full possession of our senses and health, and without coercion on the part of anybody, have willingly agreed to make Lachmi Narain and Ramraj Lal our partners (*sharik*) to the extent of one-half in the twelve-annas share in the said village, and do hereby authorize them to institute a suit themselves against the said wrong-doer for the recovery of the said share, at their own cost, and to obtain a decree in respect thereof. After a decree is obtained in respect of the said share, whatever out of the said share is decreed by the Court itself, or by virtue of a compromise, or in any other way, shall be divided into halves, one-half to go to the said partners (*sharik-daran*), and the other to us. All the expense of recovering the said share, from the beginning up to the High Court, shall be borne by the said partners. We shall effect mutation of names in respect of the names of the said partners. We hereby further declare that we shall not, expressly or by implication, compromise with the said wrong-doer without the consent of the said partners. If we break any of the conditions herein contained, the said Lalas are at liberty to have recourse to law to obtain possession of the said share.”

This instrument was duly registered. On the 3rd September 1881, Gajadhar sold three annas out of the twelve-annas share to Manog Dat, plaintiff in this suit. On the 5th April 1882, a suit having been instituted in the name of Bhagwanta against Gajadhar and certain other persons for the recovery of the twelve-annas share, that suit was compromised. By that compromise Bhagwanta obtained one anna and three pies of the twelve-annas share. In it, after stating that she was to take one anna and three pies of that share, she stated as follows:—

[293] “I make over one anna to Lachmi Narain and Ramraj Lal, my partners (*sharikdaran*), in lieu of the prosecution of the two cases. I, the plaintiff, shall remain in possession and enjoyment of the remaining three pies. As to the one anna which I have transferred to my partners (*sharikdaran*), I declare that if I or my heirs raise any objection thereto, the said partners shall be competent to recover the costs incurred by them in prosecuting the said cases from me and my heirs.”

The second “case” referred to in this compromise was a suit brought by certain persons against Gajadhar, Bhagwanta, and others, in respect of the twelve-annas share. This suit and Bhagwanta’s suit were compromised on the same day.

On the 3rd April 1883, Manog Dat instituted the present suit against Lachmi Narain and Ramraj Lal, claiming the right of pre-emption, in respect of the one anna which they had acquired from Bhagwanta, on the allegation that the transfer of the share to the defendants had taken place on the 5th April 1882. The suit was based on the *wajib-ul-arz* of the village. That document

contained a clause in respect of the right of pre-emption, which was to this effect:—

“Every sharer has the power of transferring his share (*hissa*). But when he wishes to transfer, he must sell or mortgage the share, at a proper price, to his nearest sharer; in case of his refusal, the sale or mortgage may be made in favour of a sharer of the village; if he refuses, or does not give a proper price, then the sharer wishing to transfer may do so to whomsoever he likes.”

The defence of Lachmi Narain and Ramraj Lal was that they became the owners of the one-anna share, in respect of which the right of pre-emption was claimed, on the 1st September 1881, and not the 5th April 1882, and therefore the plaintiff, who only became a co-sharer in the village on the 3rd September 1881, had no right of pre-emption in respect of the transfer. The Court of First Instance (Munsif of Bansi) allowed this defence and dismissed the suit. It observed:—“I am of opinion that the defendants acquired a right of ownership in respect of the one anna on the 1st September 1881, the date on which the deed of partnership (*sharakat nama*) was executed by Bhagwanta in [294] favour of Lachmi Narain and Ramraj Lal. The deed of compromise, dated the 5th April 1882, under which Bhagwanta Kuar assigned the disputed one-anna share to Lachmi Narain and Ram Lal out of the property which she had received under the said deed of compromise, in fact gave effect to the deed of partnership which had been executed on the 1st September 1881.” On appeal by the plaintiff, the Lower Appellate Court (Subordinate Judge of Gorakhpur) held that the ownership of the one-anna share was transferred to the defendants on the 5th April 1882, and therefore the plaintiff, who became a co-sharer in the village previously, had the right of pre-emption.

The defendants appealed to the High Court, contending again that the share in respect of which the right of pre-emption was claimed had been transferred by the “deed of partnership” of the 1st September 1881.

• Mr. G. T. Spankie, Munshi Hanuman Prasad, and Lala Lalta Prasad, for the Appellants.

Munshi Sukh Ram, for the Respondent.

The Court (PETHERAM, C.J., and BRODHURST, J.) delivered the following judgment:—

Petheram, C.J.—The plaintiff sued to enforce a right of pre-emption, and his right in the village was acquired on the 3rd September 1881, by purchase and not by inheritance. He was not an old co-sharer, and, as regards the merits, there is no reason why he should succeed, not being such a co-sharer, unless he can show a preferential claim to the defendants. The question which arises is, whether the defendants had acquired rights in the village before the 3rd September 1881. We are of opinion that they had, for the first interest which they acquired was on the 1st September 1881, when they entered into an agreement with the female defendant that, in consideration of their bringing an action for recovery of her share, they should have a moiety. She thus by that agreement transferred, on the 1st September 1881, one-half of what she was to get to them. The present defendants found funds for the two suits, which eventually were compromised, the Musammat getting a less share than she supposed. Then followed a re-adjustment of the amount of the interest in that share between her and the defendants, [295] and they got a larger share of her interest than had originally been contemplated, but in reality a less share in the village. It cannot, however, be said that their right was not created till then. The real

transfer was given effect to on 1st September 1881, and the plaintiff has no right as against the defendants by way of claim for pre-emption.

The Munsif's judgment is correct and will be restored, this appeal being decreed with costs.

Appeal allowed

[7 All. 296]

The 23rd January, 1885.

PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE BRODHURST.

Karim Bakhsh. Judgment-Debtor

versus

Misri Lal and others. Decree-holders.*

Insolvent judgment-debtor—Civil Procedure Code, s. 351 (a)—Accidental false statements in application.

Before rejecting an application by a judgment debtor for a declaration of insolvency with reference to the provisions of s. 351 (a) of the Civil Procedure Code, it is necessary that the Court should be satisfied that the applicant has wilfully made false statements: unintentional inaccuracies are not sufficient grounds for rejection.

THIS was an appeal from an order of the District Judge of Ghazipur rejecting an application under s. 344 of the Civil Procedure Code to be declared an insolvent. The application was rejected on the ground that the judgment-debtor had omitted to set forth in the application certain assets valued at Rs. 44,090-7-9, which were shown in his account-books, and therefore the statements contained in the application were not substantially true; and on the ground that he had fraudulently concealed a portion of such assets. The judgment-debtor stated in explanation of such omissions that the account-books were in the possession of his creditors. The District Judge was of opinion that this explanation was not satisfactory, because the account-books were in the court-house during the proceedings, and because in any case the judgment-debtor was not justified in filing accounts without making a serious effort to analyze his own accounts, or at least to explain why he did not do so.

[296] It also appeared from the account-books that a portion of these assets consisted of a sum of Rs. 2,702-11-3, which was in the hands of the judgment-debtor. He alleged that he had paid this sum to creditors, and called witnesses to prove the payments.

*First Appeal No. 102 of 1884, from an order of J.L. Denniston, Esq., Officiating District Judge of Ghazipur, dated the 17th June 1884.

† [Sec. 351 (a):—If the Court is satisfied—

(a) that the statements in the application are substantially true; the Court may declare him to be an insolvent, and may also, if it thinks fit, make an order appointing a receiver of his property, or if it does not appoint such receiver, may discharge the insolvent.

If the Court is not so satisfied, it shall make an order rejecting the application.]

The District Judge decided "upon the facts and explanations and evidence" as follows:—

"The application must in any case be rejected under the terms of s. 351, clause (a). It is not indeed to be asserted that the omissions in the statements in the application are in all cases fraudulent omissions. The fact that the accounts were accessible to the creditors supplied a certain antidote to their defects; and annoying and injurious to the creditors as the debtor's proceedings may have been, they do not in all cases come under the condemnation conveyed by s. 351 (b), or by any clause except s. 351 (a). Under that clause the debtor's statements, as a whole, are condemned, and the application is rejected.

"But further, the Court considers that the debtor has wilfully concealed a sum of Rs. 2,702-11-3 or some similar balance in his hands. As to his account of the transfer of this large sum without note or acknowledgment to the creditors, the Court holds his statement and that of his witnesses to be false. No such sum can be believed to have been paid in so reckless a manner. As to this sum, the petition is rejected under s. 351 (b)."

The judgment-debtor appealed on the ground, among others, that inasmuch as his account-books were not in his possession when his application was presented, it could not be said he had wilfully omitted to set forth the assets in question.

Munshi Kashi Prasad, for the Appellant.

Lala Lalta Prasad, for the Respondents.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment:—

Oldfield, J.—This application has been rejected with reference to the provisions of s. 351 (a) of the Civil Procedure Code, that the statements in the application were not substantially true.* Before, however, rejecting his application, it is necessary that the Court should be satisfied that the applicant has wilfully made false [297] statements: unintentional inaccuracies are not sufficient for rejection.

His explanation as to the omission of assets which were easily discoverable from the account-books, which were not in his possession when he made his application, may be accepted, and we cannot say that there is any sufficient proof of his concealment of the sum of Rs. 2,702 to which the Judge refers.

On a consideration of the evidence we find no sufficient reason why the applicant should not be declared an insolvent; and an order for appointing a receiver should be made.

The order of the Judge is set aside, and the case will go back, in order that the Judge may appoint a receiver of his property under s. 351. Costs will be paid out of the estate.

Appeal allowed.

NOTES.

[See also (1900) P.R., 43 ; (1904) 7 O.C., 158.]

[7 All. 297]
FULL BENCH.

The 6th December, 1884.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE
OLDFIELD, MR. JUSTICE BRODHURST, MR. JUSTICE
MAHMOOD, AND MR. JUSTICE DUTHOIT.

Mazhar Ali and others.....Plaintiffs

versus

Budh Singh and another.....Defendants.*

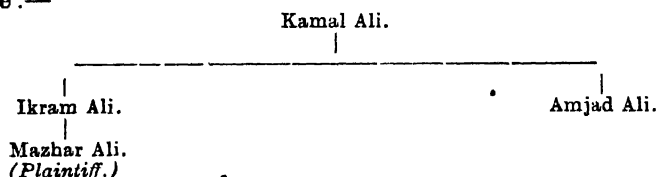
*Missing person—Act I of 1872 (Evidence Act), s. 108—Muhammadan Law—
Act VI of 1871 (Bengal Civil Courts Act), s. 24.*

The rule contained in s. 108† of the Evidence Act governs the case of a Muhammadan who has been missing for more than seven years, when the question of his death arises in cases to which, under the provisions of s. 24 of Act VI of 1871 (Bengal Civil Courts Act), the Muhammadan Law is applicable.

Per MAHMOOD, J.—The rule of the Muhammadan Law that a missing person is to be regarded as alive till the lapse of ninety years from the date of his birth is, according to the most authoritative texts of the Muhammadan Law itself, a rule of evidence, and not of "succession, inheritance, marriage, or caste, or any religious usage or institution," within the meaning of s. 24 of Act VI of 1871.

THIS was a reference to the Full Bench by OLDFIELD and MAHMOOD, JJ. The facts of the case and the points of law referred are fully stated in the order of reference which was as follows :—

[298] MAHMOOD, J.—The following genealogical table indicates the mutual relationship of the persons to whom reference is necessary in stating the facts of this case :—



The property, for half of which the plaintiff is now suing, originally belonged to Kamal Ali, who, on the 20th September 1845, mortgaged it to one Jiwan Mal, and died in 1850, leaving his sons, Ikram Ali and Amjad Ali, as inheritors under the Muhammadan Law.

Ikram Ali died in 1854, leaving his son, Mazhar Ali, the plaintiff, as inheritor, who, on the 13th February 1864, sold the equity of redemption, which he had inherited from his father, to Narain Das, represented in this litigation by the defendants.

* Second Appeal No. 1496 of 1883, from a decree of C. W. P. Watts, Esq., District Judge of Saharanpur, dated the 17th July 1883, reversing a decree of Maulvi Muhammad Maqsd Ali Khan, Subordinate Judge of Saharanpur, dated the 6th March 1883.

Burden of proving that person is alive who has not been heard of for seven years.

† [Sec. 108 :—When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is on the person who affirms it.]

Narain Das, as the owner of a moiety of the mortgaged property, redeemed it in 1864, and obtained possession of the whole mortgaged property.

It is admitted in this case that Amjad Ali left his home in 1858, and has never been heard of since; but the plaintiff, whilst making this statement made another inconsistent statement, that the missing person had died in 1875.

This latter part of the plaintiff's allegation has, however, been found to be unsupported by any evidence. The defendants, however, themselves stated, that in 1858, when Amjad Ali left his home, he was only thirty years old, and it is not disputed that Mazhar Ali, plaintiff No. 1, is the heir of Amjad Ali, under the Muhammadan Law.

Mazhar Ali, plaintiff No. 1, has sold half this right, said to have been inherited by him from his uncle, Amjad Ali, to the other two plaintiffs in this case.

The plaintiffs, alleging that the mortgage under which the defendants hold the property has been redeemed from the usufruct, leaving a surplus of Rs. 336.8-0 as mesne profits for the last three years, came into Court suing for possession of the share [299] left by Amjad Ali, and for recovery of the above-mentioned sum as mesne profits.

The suit was resisted by the defendants on many grounds, only one of which need be noticed here. 'They pleaded that, as ninety years had not elapsed from the date of Amjad Ali's birth, he, although missing ever since 1858, must be presumed to be still alive under the Muhammadan Law, that no devolution of inheritance had therefore taken place in favour of Mazhar Ali, plaintiff No. 1, and therefore the plaintiffs had no *locus standi* to come into Court.

The Court of First Instance, applying the rule contained in s. 108 of the Evidence Act, held that Amjad Ali must be presumed to be dead, and added the opinion that even "if the plaintiff's ancestor is only missing, still the plaintiff is entitled to possession of the property as a trustee, and the defendant has no right to object." Then, after going into the merits of the case, that Court decreed the claim under conditions which need not be specified here.

On appeal by the defendants, the learned District Judge has reversed the decree of the Court of First Instance. Following the ruling of this Court in *Kalee Khan v. Jadee*, N.-W. P. H. C. Rep., 1873, p. 62, he held that, under the Muhammadan Law, the heirs of a missing person are not as such entitled to divide his estate among themselves, either as a trust or otherwise, before his death, natural or legal. The learned Judge then goes on to say:—"By s. 103 of the Evidence Act, the burden of proof was on the plaintiff to prove Amjad Ali's death, and I consider that he has certainly failed to prove it. Section 108 will not apply as the case is one governed by the Muhammadan Law, not by this section of the Evidence Act."

The plaintiffs have preferred this second appeal, and the learned counsel who has appeared on their behalf contends that the rule in regard to presumption as to the death of a missing person, being purely a rule of evidence, is not affected by the Muhammadan Law, and must be governed by s. 108 of the Evidence Act. He also contends that, even if the missing person be treated as alive, the plaintiff, Mazhar Ali, is entitled to the property under [300] the Muhammadan Law, as the heir of the missing person, and that as such he is entitled to recover either from a trespasser, or to redeem it from a mortgagee, whose mortgage has been paid off from the usufruct of the mortgaged property.

This contention, which is resisted by the learned pleader for the respondents, raises questions of considerable importance. The course of rulings of

this Court, and we believe of other High Courts also, as well as of the Sadr Diwani Adalats, has been to apply the rule of Muhammadan Law regarding missing persons to all cases of this nature, and no ruling has been pointed out to us which definitely lays down any rule as to the rights of the heirs of a missing person in respect to recovering possession of his property in the capacity of trustees for such missing person. Section 24 of the Civil Courts Act (VI of 1871), which only re-enacts much older statutory provisions, lays down that in cases of "succession, inheritance, marriage, or caste, or any religious usage or institution, the Muhammadan Law, in cases where the parties are Muhammadans . . . shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished;" whilst cl. (1) of s. 2 of the Evidence Act clearly lays down that "all rules of evidence not contained in any Statute, Act, or Regulation in force in any part of British India" shall be repealed. The rule of Muhammadan Law regarding missing persons is one which necessarily affects questions regarding succession, inheritance, and marriage, for in all these branches of rights the death of a missing person may be the turning point of adjudication. At the hearing our attention was called to the following rulings of this Court, which partially support the contention of one party on the one question, and of the other party on the other:—*Dowlut Khatoon v. Khaja Ali Jan*, N.-W. P. H. C. Rep., 1867, p. 59; *Kalee Khan v. Jadee*, N.-W. P. H. C. Rep., 1873, p. 62; *Parmeshar Rai v. Bisheshar Singh*, I. L. R., 1 All., 53; *Hasan Ali v. Mahrban*, I. L. R., 2 All., 625; and *Girdhari Lal v. Lado Begam*, Weekly Notes, 1882, p. 105. So far as the question of the ninety years' rule as to missing persons is concerned, the effect of these rulings is to support the respondents' case, whilst on the question of the right of legal heirs to claim as trustees, the ruling in *Dowlut Khatoon v. Khaja Ali Jan*, N.-W. P. H. C. Rep., 1867, p. 59, inclines to favour the appellants' [301] contention. On the other hand, a Division Bench of this Court consisting of STUART, C.J., and TURNER, J., in the unreported case of *Nur Muhammad v. Habibunnissa*, distinctly applied the rule contained in s. 108 of the Evidence Act to questions of this nature, holding at the same time that "when a person is missing, the Kazi should make over the property to a trustee, to be retained for the missing person until ninety years have elapsed from the birth of the missing person."

Having examined these various rulings, we are of opinion that they do not definitely settle the questions which have arisen before us, whilst the rulings which preceded the passing of the Evidence Act are of small value, in view of the fact that no such enactment existed before the passing of that Act as specifically repealed all rules of evidence followed by the Courts.

We refer the following questions to the Full Bench:—

(i) Does the rule contained in s. 108 of the Evidence Act govern the case of a Muhammadan who has been missing for more than seven years, when the question of his death arises in cases to which, under the provisions of s. 24 of the Bengal Civil Courts Act (VI of 1871), the Muhammadan Law is applicable?

(ii) When a Muhammadan owner of property is missing, are his immediate heirs entitled, during his absence, to claim possession of his property as trustees on his behalf from trespassers, or to sue for redemption of such property from a mortgagee in possession?

Mr. T. Conlan and Shaik Maula Bakhsh, for the Appellants.

Munshi Kashi Prasad, for the Respondents.

Mr. T. Conlan, for the Appellants.—The rule of the Muhammadan Law is that a person must be presumed to be dead when he has been missing for a period of ninety years, counted from the date of his birth. The question

whether a man is dead or not is a question of evidence, and the presumption of law just stated is a rule of evidence, and not a rule of succession or inheritance, or the other matters referred to in s. 24 of the Civil Courts Act. In order, therefore, to determine, whether or not a man who is missing is dead, the rule contained in s. 108 of the Evidence Act, [302] and not the Muhammadan Law, must be followed. [He was stopped.]

Munshi Kashi Prasad, for the Respondents.—The question merely whether a man is alive or dead may be one of evidence, but the question whether the heirs of a missing person have acquired a right by inheritance to his property is a question of succession, and, when such a question arises between Muhammadans, it must be determined according to the Muhammadan Law, by virtue of s. 24 of the Civil Courts Act.

Mr. T. Conlan, in reply.

The following judgments were delivered by the Full Bench :—

Mahmood, J.—It appears to me that the first question which has been referred to us by the Division Bench cannot be decided without determining whether the rule of Muhammadan Law, that a missing person is to be regarded as alive till the lapse of ninety years from his birth, is a rule of the Muhammadan Law of "succession, inheritance, marriage, or caste, or any religious usage or institution" within the meaning of the Bengal Civil Courts Act (VI of 1871). This, I think, is the first and necessary step in the reasoning which would lead to the answer we are called upon to give to this reference. If the rule forms part of the branches of law which I have mentioned, there can, I think, be no doubt that by the provisions of the Statute we are bound to decide the question according to the strict rules of the Muhammadan Law, whether or not such rules appear to us reasonable and adapted to the exigencies of modern life in this country. On the other hand, if such is not the case, the question must be determined according to the general law of British India. The provisions contained in s. 24 of the Bengal Civil Courts Act constitute one of the most important guarantees given to the people of India by the British rule, and they date as far back as the beginning of the British rule, itself, for they first found legislative enactment in the year 1780, when the first Regulation for the administration of justice was enacted by the Bengal Government; they have been repeatedly confirmed by Acts of Parliament, and have ever since remained in the statute-book of British India. And I think I may safely say that, ever since those provisions were first enacted, the [303] Courts of Justice have been uniformly accustomed to regard the rule of Muhammadan Law as to missing persons as a rule forming an essential part of the Muhammadan Law of inheritance, succession, and marriage. It is not necessary to cite authorities for this proposition, and I have mentioned the circumstance simply to indicate the importance which must be attached to the question we are called upon to determine,—a question which affects the devolution of property owned by the entire Muhammadan population living within the jurisdiction of the Courts of Justice in British India. And because the question is one of so much significance, because by a long course of decision the Muhammadan Law has been held to govern it, and the people are in consequence accustomed to regard it as a rule binding upon the Courts, and because my own views on the subject are at variance from those which have hitherto been adopted in the cases to be found in the reports, I consider it necessary to refer to the original authorities of Muhammadan Law, in order to show, in the first place, that the rule which we are now considering is, accord-

ing to the best recognized and most authoritative texts of the Muhammadan Law itself, neither a rule of inheritance, nor of succession, nor of marriage, and that the Muhammadan jurists themselves have regarded it as a rule belonging to that department of procedure which regulates the ascertainment of facts in judicial tribunals. In the second place, I shall deal with the argument which has been addressed to us regarding the effect which the provisions of the Evidence Act have upon the decision of the question.

Now, first as to the Muhammadan jurisprudence itself. It is a matter of the history of Muhammadan Law that when the Republic founded by the Prophet became an empire under the Khalifas of Baghdad, the exigencies of administration necessitated the establishment of Courts of Justice, for decision of disputes, and it was about that time that the jurists and doctors of the law endeavoured to frame a system of jurisprudence by supporting it with reasons deduced from those logical methods which the Arabian schoolmen had borrowed from the ancient philosophers of Greece. It was in consequence of this that the earliest systematized text books of Muhammadan jurisprudence were written, and by the concurrence of generations of jurists, principles and maxims were formulated and accepted as guides for judicial decision. Among the maxims which were thus established is the maxim, "*Certainty is not overridden by doubt*," (1) which, says the author of the *Ashbah*, the most celebrated treatise on maxims of Muhammadan Law, "has been explained by some doctors to mean that the requisitions of certainty are not removed by doubt." (2) The author goes on to say:—"In this maxim are included various rules, one of which is, that original condition is continuance of what was in the same state as it was." (3) This rule, which I have literally translated, is technically called *istis-hab*, and it is thus dealt with by the same author under the maxim which I have just cited. "The second benefit," says the author, "derived from the maxim relates to *istis-hab*, which means (as in the *Tahrir*) that a thing ascertained exists till there is *probability* of its extinction. There is a difference of opinion whether the rule can be employed as an argument by a claimant. Some hold that it is an absolute argument, while many altogether deny its efficacy. But the three profound doctors, Abu-Zaid, Shamsul-Aimma, and Fakhrul-Islam Bazdawi, hold that the rule may be employed as an argument in defence but not in attack (that is, in resisting a claim but not in seeking a right), and this doctrine has been generally accepted by the lawyers. Another outcome of the maxim is, that a missing person neither inherits nor is he inherited from." (4) Fakhrul-Islam Bazdawi (to whom the author of the *Ashbah* has referred), in his celebrated book entitled the *Principles of Jurisprudence* has treated the rule in the chapter on analogical presumptions in these words:—"But employing *istis-hab-alhal* (continuance of condition) as an argument is correct according to Shafei, and this applies to all matters

(1) اليقين لا يزول بالشك

(2) حقق بعض المحققين أن المراد لا يرتفع حكم اليقين *

(3) يندرج في هذه القاعدة قواعد منها قولهم الأصل بقاء ما كان على ما كان *

(4) الفائدة الثانية في الاستصحاب هو كما في التحرير المعكم ببقاء امر محقق لم

يظن عدمه و اختلفوا في حجته فقبل بحجته مطلقا ونفاة كثير مطلقا و اختلفوا فيقول

الثلة ابو زيد و شمس الائمة و فخر الاسلام انه حجة للدفع لا للاستحقاق وهو المشهور

بند الفقهاء و مما فرع عليه المفقود فانه لا يرث عندنا ولا يورث *

[305] the necessity whereof is established by reason, and then doubt arises as to the discontinuance of those matters. In such cases the rule of *istis-hab* holds good, "so that it may be used against the opposite party. And according to us it cannot be an argument of proof on behalf of a claimant, but an argument in defence; and on this (principle) are grounded the doctrines of our doctors for example, the life of a missing person." (1)

So far as to the rule of *istis-hab*, which, as is abundantly apparent from these texts, is a rule of the Arabian system of reasoning as applied to legal questions. The exact manner in which the rule has been applied to the subject of missing persons is most fully explained in *Birjandi*, whose authority is undoubted among Muhammadans. "A missing person," says the author, "is one whose trace is unknown, which means that his whereabouts, life, or death, be unknown, that is, all news about him be intercepted, and it be unascertainable whether he is dead or alive. Such a person is regarded as alive regarding his own rights, because it is certain that he was alive at one time, and this presumption of continuance (*istis-hab*) will apply till the contrary becomes apparent. His wife cannot marry, because, if she were to marry, it would necessarily imply his being dead, whereas the former marriage, being a certainty, cannot be destroyed by doubt. Nor will his property be distributed among his heirs, nor his contracts set aside, because these would also necessarily imply his being dead. The *Kazi* may appoint a person to take possession of his rights and protect his property, whether the heirs demand this or not, because in this is advantageous protection to him. He is regarded as dead in regard to rights of others, and does not therefore inherit, because to regard him as capable of inheriting would be to hold that proved which cannot be proved. Therefore the *dictum* that a missing person does not inherit has been explained to mean that his share in the property of his ancestor is to be held in suspense, because there is a possibility of his being alive till the expiration of ninety [306] years from the time of his birth. This doctrine has been adopted by Imam Abubakar Muhammad Ibn-ul-Fazl, and has been approved by Sadrul-Shahid as mentioned in the *Khulasa*. Hasan-ibn-i-ziad held that the missing person should be declared defunct after the expiration of one hundred and twenty years from his birth, whilst Abu Yusuf maintained that one hundred years was the period, because in modern times no one lives longer. According to my own view the true doctrine is, that a missing person should be declared defunct when none of his coevals remains alive. This rule has been adopted in the *Zahiriya*. Then it is said that the proper period is when his coevals in all the towns are dead; but the more correct opinion is that when his coevals in his own town are dead. Some learned doctors hold that his property will be held in suspense till, in the opinion of the Imam, he is to be considered dead, and that when such period has elapsed as the *Kazi* thinks is more than the usual age of persons like the missing person, then he will be declared defunct. Others maintain that the proper period is seventy years, Muhammad maintains one hundred and ten years, and Abu Yusuf one hundred and five; but these two sayings are not to be found in celebrated works, as stated in the *Zawl Faraz Sirajiya*. In the *Zakhiya* it is stated that Hanifa estimated the period at eighty years, and in the *Fusul Imadiya* it is said that he hesitated in this matter. In the *Hedaya* it

(1) اما لا احتجاج باستصحاب الحال فصيح عند الشافعي وذلك في كل حكم عرف وجوبه بدليل ثم وقع الشك في زواله كان استصحاب حال البقاء علي ذلك موجبا بصح الاحتجاج به علي الخصم و عندنا هو لا يكون حجة للإيجاب لكنه حجة دافعة علي ذلك دلت مسائلهم كحقيقة المفقود *

is said that the most reasonable doctrine is that the term should not be fixed at any particular estimate, and that the benevolent doctrine is to fix it at ninety years. Upon the expiration of the term, the property of the missing person will be distributed among his heirs, such as are alive at the time, because he must be regarded as having then died, and therefore those who died before do not inherit from him. As to his rights to the property of others, he is to be regarded as dead from the day he has disappeared, because by the rule of *istis-hab* (continuance) his life must be presumed, and the rule is an argument for resisting a claim, though not for enforcing a right. For this reason he cannot inherit another's property(1)." Rules similar to those contained in this [307] text are to be found in the *Hedaya*, Book XIII, which relates to the subject of *mafkoode* or missing persons; but I need not quote much from that celebrated treatise, because the labours of Mr. Hamilton have rendered the book accessible to English readers. I may, however, mention the circumstance, that the author of the *Hedaya* lays it down as the opinion of Imam Malik, one of the great founders of Muhammadan jurisprudence, that "at the expiration of four years the *Kazi* may pronounce a separation, after which the wife is to observe an *iddat* of four months and ten days, such being the *iddat* of

(1) المفقود غائب لم يدر ائره والمواد عنها موصوفة وحديثة وموتة اي انقطع خبره بحيث لم يعلم انه حي او ميت حتى في حق نفسه حكما لاننا علمنا حيوته بيقين فيستصحب ذلك ما لم يظهر خلافه فلا ينكح عرسه اذا وكتحت كان فيه حكم بموته والنكاح ما كان معلوما بيقين فلا يزول بالشك ولا يقسم ماله بين ورثته ولا يقسم اجارته لان في كل منهما حكم بموته ضمناً ويقوم القاضي من يقبض حقه ويحفظ ماله سواء طلب الورثة ذلك او لم يطلبوا لان في ذلك نظره ميت في حق غيره فلا يرث من غيره فان في تورثته من الغير اديات امور لم يكن ثابداً له ثم قد نسر قوله لا يرث المفقود من غيره اي توقف قسطه من مال مورثه لان حيوة المفقود محتملة الى تسعين سنة من زمان ولادته واختاره الامام ابو بكر محمد بن الفضل قال الصدر الشهيد وعليه الفتوى كذا في الخلاصة وكان الحسن بن زياد يقول اذا تم له مائة وعشرون سنة من يوم ولد يحكم بموته وعن ابي يوسف انه مائة سنة لان الظاهر ان احد الا يعيش في زماننا اكثر منه والمذهب عندنا انه اذا لم يبق احد من اقاربه حيا فانه يحكم بموته كذا في الظهيرية ثم قيل المعتبر اقاربه في جميع البلدان والاصح ان يعتبر اقاربه في بلده و قال بعضهم يوقف ماله الى اجتهاد الامام في موته فاذا مضى مدة يقضي لقاضي بان مثله لا يعيش باكثر من مدة المدة حكم بموته وقال بعضهم انها سبعون سنة ومن محمد انها مائة وعشرون سنة وعن ابي يوسف انها مائة وخمس سنين وهاذان الروايتان لم يوجد في الكتاب المشهورة كذا في صوء الفرائض السراخيه وفي الذخيرة ان في قول ابي حنيفة يقدر ثمانين سنة وفي الفصول العمادية ان انا حنيفة توقف في ذلك وفي الهداية الاقيس ان لا يقدر بشئ والارقي ان يقدر بتسعين ويقسم ماله بين ورثة الان يعني ورثة الموجودين في ذلك الوقت الذي تمت المدة فيه كانه مات في ذلك الوقت ومن مات قبل ذلك لم يرث منه وفي مال غيره اي يحكم بموته في كل حق تعلق بغيره من حين فقد لان حياته باستصحاب الحال وهو يصلح حجة لدفع الاستحقاق لا للاستحقاق فلا يستحق ميراث غيره *

widowhood, and she may then [308] marry whoever she pleases; because Omar thus decreed with respect to a person who disappeared from Medina.”(1)

Now, whilst Imam Malik maintains that the short period of four years is sufficient to raise the presumption of death of the missing person, the followers of the school of Imam Abu Hanifa are far from being unanimous as to the exact period necessary for raising the presumption. I can illustrate this best by reading a passage from the *Fathul Kadir*, a most celebrated commentary on the *Hedaya* :—

“Shaikh Imam Abubakr Muhammad Ibn-i-Hamid has adopted the term of ninety years, because that is the probable age in our time. But this reason is not correct unless it be taken that the majority of long lives among people of our time do not exceed that limit. This may be so, but the moderns who have adopted sixty years have based the rule on the ground that that is the probable limit of age. In short, the disagreement has arisen from the difference of opinion as to whether the rule should be adopted according to the majority of long lives or of ordinary lives. In view of this, Shamsul-Aimma has said ‘the most proper course according to legal methods is, that no estimate should be fixed, because it is impossible to fix any estimate by opinion, and this is what the author (of the *Hedaya*) means by saying *the most reasonable (course)*. But we maintain that when none of the missing person’s coevals remains (alive) he will be declared dead, regarding him in the condition of those like him.’ This opinion is with reference to the *Zahirur-Riwayat*. The author (of the *Hedaya*) says that the most benevolent (opinion) for mankind is, that it (the period), should be fixed at ninety years, whilst it would be more benevolent to fix it at sixty years. In my opinion the best is seventy years, because the Prophet said, ‘the ages of my people are between sixty and seventy years,’ and therefore the longest of the two is the most probable.” Some doctors maintain that the question should be [309] delegated to the opinion of the Judge who, when he considers proper, should declare a missing person defunct.”(2)

I must quote one more passage from the *Fatawa-i-Alamgiri*, which explains the rule of Muhammadan Law on the subject in brief terms, and with a precision not to be found in other works. I am all the more anxious to cite this authority because the work, which is a monument of the industry of the Muhammadan lawyers, was prepared under the orders of the Emperor Aurangzeb, and was

(1) قال مالك اذا مضى اربع سنين يفرق بينه وبين امرائه تعتد عدة الرقاة ثم تزوج من شئت لان عمر رضي الله عنه هكذا قضي في الذي استهووا الحسن المدينة وكفى به اماماً *

(2) اختار الشيخ الامام ابوبكر محمد بن حامد انها تسعون سنة لان الغالب في اعمار اهل زماننا وهذا لا يصح الا ان يقال ان الغالب في الاعمار الطوال في اهل زماننا ان لا يزيد على ذلك نعم المتأخرون الذين اختاروا وستين نبوه علي الغالب من الاعمار والحاصل ان الاختلاف ما جاء الامن اختلاف الراي في ان الغالب هذا في المطول او مطلقا فلا اقال شمس الاثمه الاليق بطريق انفق ان لا يقدر بشئ لان نصب المقادير بالراي لا يكون وهذا قول المصنف الاقبس ولكن فقول ان لم يبق احد من اقرانه يحكم بموته اعتباراً بحاله بحال نظيره وهذا رجوع الى ظاهر الرواية قل المصنف الا وفق الي الناس ان يقدر بتسعين والارفق منه التقدير بستين وعندني الاحسن سبعون بقوله عليه الصلواة والسلام اعمار امتي ما بين ستين الى سبعين فكانت المفتى فالبابو قال بعضهم يفوض الى راي القاضى فاي وقت راي المصلحة حكم بموته *

promulgated in India as the great Code of Muhammadan Law regulating the decision of disputes in India. The book possesses high authority, not only in this country, but under the name of *Fatawa-i-Hindi*, it is regarded in other Muhammadan countries, like Turkey, Egypt, and Arabia itself, as an authoritative work of Muhammadan jurisprudence. This great work summarizes the state of Muhammadan Law regarding missing persons in the following terms :—"A missing person is declared dead on the lapse of ninety years, and this is the accepted opinion. And in the *Zahirur Riwayat* the term is to be estimated by the death of his coevals, and therefore when none of them remains alive he is declared dead, and this is to be determined according to the death of his coevals in his town, as is said in the *Kafi*. The preferable (opinion) is that the question should be delegated to the opinion of the Imam, as is said in the *Tabeen*."(1)

[310] Now, reading these texts carefully, there can, I think, be no doubt, *firstly* that the rule of the Muhammadan Law as to missing persons has arisen from a maxim relating to the subject of evidence, and the rule of *istis-hab*, which is the outcome of that maxim, cannot be regarded as a rule of succession, inheritance, or marriage; *secondly*, that among the great doctors of the Muhammadan Law itself there is a great difference of opinion as to the exact manner in which the rule of *istis-hab* is to be applied to missing persons; *thirdly*, that as to the period necessary to elapse before the presumption of death can be applied to missing persons, Muhammadan jurists are themselves are far from being unanimous; *fourthly*, whilst some of the greatest doctors of the law would leave the fixation of period to the discretion of the Judge in each individual case, others consider the preferable course to be that the matter should be determined by the Imam, that is, by the ruling authority, as distinguished from the Kazi or the Judge presiding in a judicial tribunal. These conclusions are amply borne out by the texts which I have quoted, and they convince me that the rule of Muhammadan Law as to missing persons is a rule belonging purely to the domain of legal presumptions falling under the head of the law of evidence; and, I may say, with due deference, that in my opinion the reported cases which have been cited and which tend to support a contrary opinion are not based upon a sound view of the Muhammadan Law. It is true that, in some of the most celebrated treatises of that law, the rule has been discussed as if it were a part of the law of inheritance and succession; but, on the other hand, the Hedaya itself and some other equally authoritative treatises have dealt with the subject in a perfectly separate chapter, obviously because the authors regarded it as too general to be classed under any particular head, applying, as it does, to all the branches of law in which the death of a missing person may happen to be the subject of investigation. I think that in administering a medieval system of law it is supremely important that the Courts of Justice in British India should draw a clear distinction between the rules of substantive law and those which belong purely to the province of procedure, because, whilst under s. 24 of the Civil Courts Act the Courts are bound to administer the former branch of the law according to native laws in cases of succession, [311] inheritance, and marriage, questions which go to the remedy, *ad litem ordinationem*, must be decided according to the general law of British India. The rule as to missing persons appears to my mind to be purely a rule of

(1) حكم بموته بمضى تسعين سنة و عليه القنوى و فى ظاهر الرواية يقدر بموت اقاربه فاذا لم يبق احد من اقاربه حيا حكم بموته و يعتبر موت اقاربه فى اهل بلدة كذا فى الكافي والمختار انه يفوض الى الولى الامام كذا فى التبيين *

evidential presumption, and though before the passing of the Evidence Act there might have been perhaps some justification for the Courts to apply the rule to cases of Muhammadan succession, inheritance, and marriage, the provisions of s. 1 (1), s. 2 of the Evidence Act leave no doubt in my mind that we are now bound, in connection with all questions of evidence, to administer the rules contained in that Act, and it follows that the present case is governed by s. 108 of the Statute.

This view, considering the exigencies of the present case, renders it unnecessary for me to deal with the second question which has been referred to us by the Division Bench. My answer to the first question referred to us must therefore be in the affirmative; and I wish to add that I have dwelt at such length upon the original authorities of Muhammadan Law because they have never been translated into English, and also because if the Muhammadan jurists themselves had regarded the question as belonging to the substantive law of succession, inheritance or marriage, I should have, sitting here as a Muhammadan Judge, felt myself bound by the provisions of the Civil Courts Act to adhere to the view adopted in the cases to be found in the reports.

Duthoit, J.—I have nothing to add, except that it appears to me that the rule of Muhammadan Law as to missing persons is clearly not a rule of succession, inheritance, marriage or caste, or any religious usage or institution. The matter is therefore governed by the ordinary statute law of the country, which on the point before us is contained in s. 108 of the Evidence Act.

Oldfield and Brodhurst, JJ., concurred.

Petheram, C. J.—The question referred to the Full Bench in this case is—“Does the rule contained in s. 108 of the Evidence Act govern the case of a Muhammadan who has been missing for more than seven years, in cases to which, under the provisions of s. 24 of the Civil Courts Act, the Muhammadan Law is applicable?” The answer really depends on the question whether the mode in which the death of the missing person is to be proved, [312] is part of the Muhammadan Law of “succession or inheritance.” By s. 24 of the Civil Courts Act, persons of the Muhammadan and the Hindu religions respectively are given the right of being governed in the matters therein referred to by their own law, but any other questions in which they are concerned are to be dealt with under the general law of the country. Now, questions of succession and inheritance are questions as to the manner in which property shall devolve or shall be distributed upon the death of the owner either with or without a will. I do not think that they are anything more. Then comes s. 108 of the Evidence Act, which provides that “when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.” Now, if a man’s death has been properly proved, his estate will be divided according to the law of the community to which he belongs. But the first thing to be settled is the fact of his death, and only after that has been proved can questions of inheritance arise. The rule of Muhammadan Law in regard to missing persons dates from ancient times and from social conditions to which it may well have been adapted. But to apply it to the totally different conditions of the present day, when the means of communication between distant places have been so extended and improved, and when no man can hide his existence from others in the manner which was formerly possible, and to presume that a man was living ninety years from the date of his birth, though his death was practically certain, would be a piece of gross injustice. It was

to benefit the people of this country by enabling proof to be given of facts which should be known, that s. 108 of the Evidence Act was passed. For these reasons, my answer to the question referred to us is in the affirmative.

NOTES.

[See also (1885) 7 All., 822; (1886) 8 All., 614; (1888) 10 All., 289; (1898) 23 Bcm., 296.]

[313] *The 20th December, 1884.*

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE OLDFIELD,
MR. JUSTICE BRODHURST, MR. JUSTICE MAHMOOD, AND
MR. JUSTICE DUTHOIT.

Kandhiya Lal.....Plaintiff

versus

Chandar and others.....Defendants.*

Bond—Debt—Inheritance—Hindu Law—Right of one of several heirs to sue creditor for share of debt—Contract—Obligation—Act XXVII of 1860—Act IX of 1872 (Contract Act), ss. 42, 45.

Held, by the Full Bench (MAHMOOD, J., dissenting) that when, upon the death of the obligee of a money-bond, the right to realize the money has devolved in specific shares upon his heirs, each of such heirs cannot maintain a separate suit for recovery of his share of the money due on the bond.

THIS was a reference to the Full Bench by MAHMOOD and DUTHOIT, JJ. The facts of the case appear from, and the point of law referred is stated in, the ORDER OF REFERENCE, which was as follows :—

MAHMOOD, J.—This is an application for revision under s. 622 of the Civil Procedure Code, and the argument addressed to us in support of the application raises a question of considerable importance.

The bond of the 19th October 1877, was executed by the principal defendants in favour of one Shambhu Singh, upon whose death a $4\frac{1}{2}$ annas share in the bond devolved by inheritance upon his two nephews, Gudri Singh and Bisnath Singh, who, on the 29th October 1880, sold their rights and interests to the present plaintiff. The object of the suit was to recover from the obligors the amount due on the bond to the extent of the $4\frac{1}{2}$ annas shares purchased by the plaintiff. The learned Judge of the Small Cause Court, without going into the merits of the case, has dismissed the suit on the preliminary ground that the obligation created by the bond, being single, could be enforced only as a whole, and that the plaintiff has not the option of claiming only his portion of the money due on the bond. In support of this view the learned Judge has cited no authorities, but he has at some length stated his reasons, the most important of which is that "an obligor must not be harassed with more than

* Application No. 116 of 1884, for revision under s. 622 of the Civil Procedure Code of an order of Babu Kashi Nath Biswas, Judge of the Court of Small Causes at Benares, dated the 8th February 1884.

one suit under a single obligation." The other reasons mentioned by the learned Judge relate principally to the practical inconvenience which might arise if the contrary view were adopted.

[314] We have not been referred to any specific provisions, either in the Contract Act or in the Civil Procedure Code, which would furnish a satisfactory answer to the question raised in this case; and, in the absence of statutory provisions, the determination of the question must depend upon the general principles of law and equity. The view adopted by the learned Judge of the Small Cause Court seems to proceed upon the ground that the specific shares in the bond which, upon the death of the original obligee, Shambhu Singh, devolved by inheritance on his various heirs, must be regarded as constituting only one joint right which could not be enforced in parts, by separate suits at the instance of each heir, because the obligation correlative to the right continued to be single, notwithstanding the death of the original obligee. This view of the law is directly opposed to the opinion adopted by three learned Judges of the Calcutta Sadr Diwani Adalat in *Mahant Muddusudun Das v. Goverdhan Das*, S. D. A. Rep., 1847, p. 392, in which it was held that if the right to receive a debt secured by bond devolved by inheritance upon more than one person, the heirs might bring separate actions to recover the proportion that each was entitled to. Similarly, in the case of *Shiu Din Misr v. Genda Debi*, S. D. A. Rep.; L. P., vol. viii, p. 829, it was held that, after the dissolution of a partnership, wherein the share of each partner had been ascertained, the sharers could sue separately for their shares of the debts due to the firm. These rulings are old, but we have not been referred to any more recent case in which the point has been directly discussed. The question, which seems to involve mixed considerations of procedure and substantive law, does not appear to us to be free from difficulty as the law stands in India, and, in view of the importance of the point, we refer it to the Full Bench:—

"When, upon the death of the obligee of a money-bond, the right to realize the money has devolved by inheritance in specific shares upon his heirs, can each of such heirs maintain a separate suit for recovery of his share of the money due on the bond?"

Pandit Sundar Lal, for the Plaintiff.

The Senior Government Pleader (Lala Juala Prasad), for the Defendants.

[315] The following judgments were delivered by the Full Bench:—

Oldfield, J.—The answer to this reference seems to me afforded by the terms of Act XXVII of 1860. By that Act "no debtor of any person shall be compelled in any Court to pay his debt to any person claiming to be entitled to the effects of any deceased person, or any part thereof, except on production of a certificate, to be obtained in the manner hereinafter mentioned, or a probate or letters of administration, unless the Court shall be of opinion that payment the debt is withheld from fraudulent or vexatious motives, and not from any reasonable doubt as to the party entitled."

The Act indicates the course to be taken by the heirs, and the debts should be collected by the administrator, and the assets distributed amongst the heirs.

The Court can permit an action to be brought by the heirs under the discretion allowed, but it can only properly do so when the party or parties suing are in a position to sue for the whole debt, for to permit one heir to realize his share would be to alter the nature of the contract, and to subject the debtor to inconveniences and hardships.

I would answer the reference in the negative.

Petheram, C. J., and Brodhurst, J., concurred.

Duthoit, J.—I am of the same opinion as the learned Chief Justice and my learned brothers **OLDFIELD** and **BRODHURST**, but I wish to add a few words by way of explanation as to the way in which I have arrived at the conclusion stated.

There can, I think, be no doubt that when an obligation is contracted between *A* and *B*, then, in default of anything in the nature of the obligation, or of a special covenant to the contrary, the obligation passes to the representatives of the parties. How, then, does the obligation pass? European Jurisprudence would, I believe, say that, if the obligation is indivisible, it cannot be split up among the representatives according to their shares in the inheritance; but, if it be divisible, it can. This was, I take it, the Roman Law on the subject, and it is so stated to have been by Demangeat, who is perhaps the best authority on the point. The French Law, too, is formulated to the same effect in the Civil Code, Book III, Title III, Section V, paras. 1217 to 1221. But [316] it would, in my judgment, lead to much inconvenience if we were to attempt to apply this canon in its entirety to the circumstances of this country, where the law of inheritance among Hindus and Muhammadans is complicated by variations, of which, as governing the particular case, one of the parties to the obligation might well have no knowledge.

Take, for instance, the case of a Hindu creditor on whose death the widow enters into possession and management of the estate, and thus obtains payment of a debt due to her husband. Presently three brothers of the deceased come forward and say,—and the fact is admitted by the widow,—that the creditor was living jointly with them, and that consequently the widow had no share in the debt. Or take again the case of a Muhammadan creditor who leaves a widow and ten sons and daughters. The sons and daughters claim, and are paid, their legal shares of the debt, but afterwards the widow comes forward and claims the entire debt, as due to her alone, on account of her dower, a first charge on the estate.

It was, I take it, to meet such difficulties that Act XXVII of 1860 was enacted, the preamble of which recites that it is expedient to consolidate certain Acts, and to remove all doubts as to the legal title to demand and receive debts payable in respect of the estates of deceased Hindus and Muhammadans. The Act then goes on to provide that no debtor of a deceased person shall be compelled to pay his debt to any person claiming to be entitled to any part of the effects of the deceased, except on the production of a certificate obtained under the Act, and that such certificate shall afford full indemnity to all debtors paying their debts to the person in whose favour the certificate has been granted.

The only cases which were quoted to us as answering this reference in the affirmative were decisions of the Court of Sadr Diwani Adalat of the Lower Provinces in *Mahant Muddusudun Das v. Goverdhun Das*, S. D. A. Rep., 1847 p. 392, and in *Shru Din Mizr v. Genda Debi*, S. D. A. Rep., L. P., vol. vii p. 829. The facts of the latter case are so different from those of the case now before us, that I do not think it can be held to throw light upon the point under discussion; and both the cases are of a date (1847) long prior to [317] the enactment of Act XXVII of 1860. Under that Act the Calcutta High Court has held—*Waselun Huq v. Gowhuroonissa Bibi*, 10 W. R., 105; and *Srimati Amir-un-nissa Barkat v. Srimati Afiatt-un-nissa*, 3 B. L. R., 404,—that certificates to collect fractional parts of debts due to a deceased person cannot be granted to different heirs according to their respective shares in the inheritance. And this I take to be a very necessary rule, for we may not consider the convenience of one party to the obligation alone. We are bound to see that the debtors are not unduly harassed by representatives of a deceased

creditor. If it be objected that unless a certificate be allowed for a share to the party entitled to such a share, it will be impossible for him, in case of difference between himself and his co-parceners, to proceed at all, I would reply, in the words of Mr. Justice MARKBY in *Srimati Amirunnissa Barkat's Case*, 3 B. L. R., 404, "that if a shareholder could not, having established his right to a share, prevail upon his co-shareholders to consent to one certificate being granted, it would be within the competence of the Court, under Act XXVII of 1860, to select one or more of these co-sharers who would consent to act, and appoint him or them as the representatives of the deceased, taking, of course, proper security for the safe custody of the amount of debts that might be realized; and that even if this could not be done, and if there should be any difficulty in appointing one or more of the co-sharers," there would be no difficulty in taking steps to have a receiver appointed under s. 503 of the Code of Civil Procedure.

My answer to the question put to the Full Bench must therefore be in the negative.

Mahmood, J.—I regret that in this case I am unable to agree with the learned Chief Justice and the other members of the Court upon the question which has been referred to the Full Bench. It is due to the respect which I feel for my learned brethren that I should state the grounds upon which my own opinion is based at greater length than I should otherwise have considered necessary. The order of reference sets forth all the essential points of the case except one, namely, that the plaintiff, having fallen out with heirs of the deceased Shambhu Singh, had to bring a regular suit to establish his right to a 4½ annas share in the bond which had [318] been executed in Shambhu Singh's favour. His claim was decreed on the 20th March 1883; and the question which we now have to determine is, whether he is competent to maintain a separate suit for the recovery of his share of the money due on the bond, or whether the obligation which the bond creates can only be enforced as a whole.

It appears to me that the opinions expressed by my learned brothers OLD-FIELD and DUTHOIT proceed, if with all deference I may say so, merely upon the construction which they place upon a particular section of Act XXVII of 1860. The object of that Act is best shown by the preamble, which runs thus:—"Whereas it is expedient to consolidate and amend certain Acts now in force, which provide greater security for persons paying to the representatives of deceased Hindus, Muhammadans, and others not usually designated as British subjects, debts which are payable in respect of the estates of such deceased persons, and which facilitate the collection of such debts by removing all doubts as to the legal title to demand and receive the same; it is enacted as follows." Now, I confess that I am unable to hold that the language here used by the Legislature was designed to interfere in the smallest degree with the native laws which regulate the devolution of debts due to a deceased person. It relates not to substantive law, but to procedure, and aims at giving facilities for the removal of doubts and difficulties in the way of creditors and debtors. This brings me to the second point which I desire to notice. Section 2 of Act XXVII of 1860 is as follows:—"No debtor of any deceased person shall be compelled in any Court to pay his debt to any person claiming to be entitled to the effects of any deceased person, or any part thereof, except on the production of a certificate to be obtained in manner hereinafter mentioned, or of a probate or letters of administration,"—and then come these important words—"unless the Court shall be of opinion that payment of the debt is withheld from fraudulent or vexatious motives, and not from any reasonable doubt as to the party entitled." Now, in the first place, I wish to say, as one of the Judges who have

referred this case to the Full Bench, that the reasons which often make it desirable to apply the imperative part of s. 2 do not exist here. The record shows that [319] in the present case payment of the debt was withheld, not on the ground of reasonable doubt as to the person entitled to receive it, but upon an extremely technical plea; and we have to consider whether such a plea is warranted by the law or not. We are not concerned in Full Bench with the question whether payment was or was not withheld from vexatious motives. That is a question as to the merits of the case, and it is not for us, but for the Divisional Bench, to decide. It was not tried by the Subordinate Judge, and his judgment does not refer to it in any way. I therefore put Act XXVII of 1860 aside altogether in considering the present reference.

The question before us is a complicated and difficult one, involving closely connected considerations of substantive law and of procedure. I propose to deal first with that part of it which relates to the rights of the parties which are created by the substantive law; and secondly, with the procedure to be followed for the enforcement of those rights.

Upon the first point, I have no doubt that the facts as proved and admitted show that the plaintiff represents two of the nephews of Shambhu Singh: in other words, that he can claim all the rights which devolved upon those two nephews in the bond now in dispute. We have to consider whether, according to the Hindu Law, which undoubtedly applies to the case, the rights in the bond inherited by the nephews were joint or several. Under the Hindu Law, as I understand it, where a person dies leaving property, the devolution of rights in that property proceeds, so far as the present question is concerned, in the same manner, whether it consists of land or a bond, or anything else. I have no doubt that in a divided Hindu family the rights which a deceased creditor's heirs inherit are not joint but several, and that just as no one of them could maintain a suit for ejectment from a greater share of a zamindari village land than he himself had separately inherited, so also no single heir could sue for the recovery of more than his own share of the money due upon a bond.

It seems to me that the learned Judge's view proceeds upon the assumption that the specific shares in the bond which devolved by inheritance upon the various heirs of Shambhu Singh must be [320] treated as one joint right which could not be enforced in parts by separate suits at the instance of each heir; because the obligation correlative to the right continued to be single notwithstanding the death of the original obligee. Viewed in this light, the question belongs to the domain of substantive law, and not to that of procedure or adjective law. If the rights possessed by the various heirs of Shambhu Singh are to be regarded as constituting one joint right, it may be taken that it could not be enforced except as a whole. "Where the subject-matter of the contract is entire, as if it be to pay a whole sum to several parties, it is solely joint, and no one can bring a separate action for his share. Nor will the mere fact that the share of each is stated, give a separate right of action, if the intention be to pay only one sum *in solido* So, also, where different sums of money are contributed by several persons, and the amount raised is advanced as one total sum, it has been held the action for repayment should be jointly brought."—(*Story on Contracts*, s. 55). The reason of the rule is based upon fundamental principles of jurisprudence, regulating the nature and incidents of joint rights and joint obligations. The true notion of joint rights and joint obligations is fully applicable only to cases where any one of several persons entitled to a joint right can require performance to himself of the entire obligation correlative to the right, and where any one of the several persons under a joint obligation can be required to render full performance of the entire obligation. "If the

right of the several persons thus entitled, or the duty of the several persons thus obliged is identical, and if the right or duty arises from a simultaneously combined expression of will, such persons are termed *correi*; those thus obliged being *correi debendi*, and those thus entitled being *correi credendi*."—(*Lindley on Jurisprudence*, s. 117 A). When such a full correal relation exists, a joint creditor, by accepting full performance of the obligation, may extinguish it *in toto*, and entirely discharge the debtor. The reason of the rule is, that when money is jointly advanced by several persons, each of them authorises the other by necessary implication to act on his behalf. The question then in the present case is, whether the heirs of Shambhu Singh possessed any such joint right as would entitle each and every one of them to enforce performance to himself of the entire [321] obligation created by the bond which they had inherited. In other words, could the plaintiff, who represents the interests of two of the nephews of the deceased creditor, maintain a suit for the whole amount due on the bond? I am of opinion that he could not, because the rights inherited by the heirs of the creditor cannot be regarded as correal or joint in their nature. "Parties are not said to be joint in law, merely because they are connected together in some obligation, or some interest which is common to them both. They must be so connected as to be in some measure identified. They have not several and respective shares, which, being united, make a whole; but these together constitute one whole, which, whether it be an interest or an obligation, belongs to all. Hence arises an implied authority to act for each other, which is in some cases carried very far. Thus, if several plaintiffs sue for a joint demand, and the defendant pleads in bar an accord and satisfaction with one of the plaintiffs, but without any allegation that the other plaintiffs had authorized the accord and satisfaction, the plea is nevertheless good. For a release of a debt, or of claim to damages, by one of many who hold this debt, or claim jointly, is a full discharge of it"—(*Parsons on Contracts*, vol. I, p. 21). The rule thus stated seems to me to be the test for decision of the point raised in this case. For it seems clear that if the plaintiff is not entitled to sue for the whole amount due on the bond, his only remedy is to sue for his own share. The other sharers in the bond may, as has actually happened in this case, be unwilling to join in the suit, and, if the view of the learned Judge were sound law, the plaintiff, who undoubtedly possesses a right, would be without a remedy.

We have in India an enactment dealing with the law of contracts. It can hardly be called a complete Code, but it may be taken as a kind of summary of the main principles which govern contracts. The only sections of the Contract Act which I need refer to are ss. 42 and 45. The former deals with the devolution of joint liabilities, but not with the devolution of joint rights. The latter does relate to joint rights, and it runs thus:—"When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during [322] their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly." I have read the section at length in order to show that it does not meet the present difficulty, for it deals only with cases in which the deceased himself is a joint obligee. And there is nothing in the Contract Act to show what happens to a *single* right when the owner of it dies, and several persons become entitled to it. It appears to me that, under such circumstances, the only rule which we have to guide us is the rule of justice, equity, and good conscience, and in applying it we must go back to those first principles of jurisprudence which are deeper and wider than any

purely local laws. In connection with the matter before us, those principles have been so well stated by the eminent jurist *Domat*, that I cannot do better than read a passage from his work on *Civil Law*, which exactly expresses my own view:—"The solidity among several creditors hath not this effect, that every one of them may appropriate the whole debt to himself, and deprive the others of their shares; but it consists only in this, that every one of them has a right to demand and receive the whole, and the debtor remains quiet, with respect to them all, by paying the debt to any one of them. This solidity depends on the title which may give it, and on that which may show that what is owing to several persons is due to every one of them in the whole. Thus, when two persons lend a sum of money, or sell a house or land, they may treat in such a manner as that the payment may be made to any one of the two singly; and they will be creditors, each of them for the whole, either of the money lent, or of the price of the sale. But if it were only said that a debtor should owe a sum of money to two creditors, without mentioning anything of the solidity, in that case each creditor could demand no more than his own portion" (Part I, Book III, Title III, Section II, arts. 1, 2).

This explains the meaning of the term "solidity" in connection with obligations of this nature, and shows that there is no solidity unless any one of the creditors is competent to obtain recovery of the whole debt. There is another passage in the same work, which is even more instructive:—"If a thing is due to two [323] or more creditors solidly, that is, in such a manner that every one of them has full and ample right to receive the whole, the payment that is made to one of them will discharge the debtor from all the others." And then the author states the very question now before us:—"If there be no solidity among several creditors for one and the same thing, that is, if each of them has not a right to receive the whole thing, but only his portion of it, such as *co-heirs*, none of them can receive the whole for the others, unless they all consent to it"—(Part I, Book IV, Title I, Section III, arts. 7, 8).

In this case, all the co-heirs do not consent that one should receive payment of the whole for the others, and the plaintiff brought the suit in this form for that very reason. To my mind the authority of *Domat* seems sufficient; but the question is so important that I may refer to the opinion of a still greater jurist, namely *Pothier*, who, in his *Treatise on Obligations*, gives a separate chapter to this subject. The chapter is headed "Of the effect of the indivisibility of obligations *in dando aut in faciendo* with respect to the heirs of the creditor." It begins thus:—

"When the obligation is indivisible, each heir of the creditor being creditor of the whole thing, it follows that each of the heirs may demand the whole thing from the debtor. For instance, if any one has engaged in my favour to grant, or procure me for the use of my estate, a right of passage over his or over any other neighbouring estate, this right being indivisible, each of my heirs may institute a demand for the whole against the debtor. So if any one engages to make me a picture, or to build me a house, each of my heirs may demand of him to make the whole picture, and to build the whole house. But each of my heirs, although creditor of the whole thing, is not creditor *totqliter*; if, upon the demand of the whole by one of my heirs, the debtor, for want of executing his obligation, is condemned in damages, the condemnation in favour of this heir will only extend to that proportion of the damages for which he is heir; for although creditor of the whole, he is nevertheless only creditor as my heir for part; if he has a right to demand the whole thing, it is because the thing cannot be demanded in parts, not being susceptible of them; but the

obligation of this indivisible thing being converted by the non-execution of it into an obligation of damages, which is divisible, my [324] heir in part can claim no greater share of the damages than the part for which he is heir. In this respect, the heirs of the creditor of an indivisible debt differ from the creditors *in solido*, who are called *correi credendi*, each of the latter being creditors not only of the whole thing due, but also *totaliter*; if, upon the demand of the creditor, the debtor does not fulfil his obligation, he must be condemned to the creditor for the whole damages.

"From this principle, that the heir in part of an indivisible debt, though creditor of the whole thing, is not so *totaliter*, it follows also that he cannot make an entire release of the debt which a creditor *in solido* might. Therefore, if the creditor of an indivisible debt has left two heirs, and one of them has made a release to the debtor so far as concerns himself, the debtor will not be liberated as against the other."—*Pothier's Law of Contracts*, (Vol. I, p. 197-8)

The jurisprudential conceptions upon which this passage proceeds appear to me to go to the root of the matter, and to show that although a particular right of the kind we are now considering may originally be single, the death of its owner may split it up, and make it enforceable by each of his heirs to the extent of his share, because they are not *correi credendi*, but hold severally. Lastly, to quote one of the more modern writers on Jurisprudence, I may translate the following observations in *Demolombe's Traité des Contrats*:—"This right which belongs to the creditor *solidaire*, does it belong in the same way to the heir of the creditor *solidaire*? Certainly. Yes, because it relates to an irrevocable mandate, which is not extinguished by death. Let us always observe that if the deceased creditor has left several heirs, each of them can only demand from the debtor the share which falls to him, in consequence of his position as an heir in the credit *solidaire*. It is true the credit *solidaire* itself belongs to the succession. But the succession being divided among the heirs, with regard to their hereditary position, it follows that the credit *solidaire* necessarily undergoes the same division. The obligation *solidaire* is not, for the matter of that, indivisible"—(Vol. III, p. 117).

In other words, notwithstanding the fact that the right is, in the first instance, a "solid" one, the owner's death makes it no longer subject to the rules relating to rights *in solido*.

[325] Applying these principles to the present case, I am of opinion that, upon the death of Shambu Singh, although the obligation created by the bond continued to be single, the right correlative to that obligation was split up into the various shares which were inherited by the heirs of the creditor, and that the interest of each of them being limited to the extent of his share, cannot be regarded as constituting a joint right such as would render a separate action like the present unmaintainable. Such seems to have been the view of the law taken by three learned Judges of the Calcutta Sadr Diwani Adalat in *Muhant Muddusuddan Das v. Goverdhun Das*, S. D. A. Rep., 1847, p. 392, in which it was held that if the right to receive a debt secured by bond devolve by inheritance upon more than one person, the heirs may bring separate actions to recover the proportion that each is entitled to. Similarly, in the case of *Shiu Din Misr v. Genda Debi*, S. D. A. Rep., L. P., vol. vii, p. 829, it was held that after the dissolution of a partnership, wherein the share of each partner had been ascertained, the sharers could sue separately for their shares of the debts due to the firm. These rulings are old, but the point does not appear to have been considered in any recent case, so far as I am aware. The former of these rulings, however, is exactly applicable to the present case, and for the reasons which I have already stated, I agree in the rule therein laid down. It

has been said by my learned brother DUTHOIT, that the latter of the two rulings to which I have referred has no bearing upon the question now under consideration, and whilst interpreting the rules of jurisprudence as understood in Europe in the same manner as I have done, he has expressed the view that those rules would lead to much inconvenience if applied to the peculiar conditions of Indian life. With due deference to his opinion, I regret that I am unable to agree with him in either of these propositions. The case of *Shiu Din Mistr v. Genda Debi*, S. D. A. Rep., L. P., vol. vii, p. 829, to which he refers appears to me to proceed upon the same hypothesis as the other case, for in both cases a single right was held by the learned Judges to have been split up into several rights,—in the one case by reason of the death of the creditor, in the other by the dissolution of partnership. The *ratio decidendi* in both cases purported to proceed upon the same principle, and I have therefore cited them, though I must not be understood to say that the effect [326] of dissolution of partnership is the same as that of the death of a creditor upon rights and obligations arising out of money-bonds. If anything the case of *Shiu Din Mistr*, S. D. A. Rep., L.P., vol. vii, p. 829, goes beyond my view, and it is unnecessary for me to express any opinion upon the rule therein laid down. As to the advisability of applying the rules of jurisprudence to this country, I have long entertained the opinion that jurisprudence, being a science, is and must be applicable to all conditions of life where society has sufficiently advanced to render the introduction of the rules of law necessary for defining rights and deciding disputes; and I cannot help feeling that the complications which the Hindu and the Muhammadan Law of inheritance produce in connection with the devolution of rights are not greater than those produced by the laws of Europe, where the principles of jurisprudence are of course kept in view in administering justice.

So far as the opinion of the learned Judge of the Small Cause Court is concerned with the question of procedure, I wish to observe that the practical inconvenience which he anticipates would apply equally to a case where the owner of immoveable property dies leaving numerous heirs whilst the property is in the possession of a trespasser. It is clear that so long as the original owner was alive, he could claim possession of the whole property only by one suit, and it is equally clear that upon his death each of the heirs could maintain a separate action for his share of the property. Although the case so contemplated would be one arising out of tort and not out of contract, yet so far as the limited question of procedure is concerned, the analogy seems very strong with the point now under consideration. In both cases the right to sue could, under the rules of procedure, be at one time enforced as a whole, in both cases the death of the holder of the right may split up the right and render it enforceable by every one of the heirs by separate actions co-extensive with their shares in the inheritance, and, if the argument of the learned Judge of the Small Cause Court were to be accepted in the case contemplated, no heir could sue the trespasser at all unless he sued not only for his own share, but also for the shares of the other heirs who may be unwilling to join in the suit. There is no provision in our law by which any person can be made a plaintiff against his will. Where the right is strictly [327] joint, there arises, as I have already said, an implied authority by the joint holders of the right to act for each other, and such authority would enable any one or more holders of the joint right to maintain a suit in their own name for enforcing the whole right, and in case any of them refused to join in the suit, the proper course would be to implead them as *pro forma* defendants, and the Court having before it all persons interested in the matter could do justice

between them. But no such implied authority can be understood to exist between the various heirs of a deceased person who dies leaving property which devolves in specific shares upon his heirs, whether such property consists of a money-bond or land. Any one of such heirs therefore cannot sue for more than his share, and the plaintiff was therefore entitled to maintain this suit. The other shareholders in the bond whom the plaintiff impleaded as *pro formâ* defendants might have joined in the suit as plaintiffs under the provisions of s. 26 of the Civil Procedure Code, but that section cannot be understood to render such joinder imperative, and indeed in cases where dissensions exist among the heirs, such joinder is practically impossible. In the present case, therefore, the plaintiff could not sue for more than his share in the bond, and I hold that the learned Judge was wrong in law in throwing out the suit on the preliminary ground.

My answer to the question is therefore in the affirmative

NOTES.

[This was approved in (1901) 25 M&d , 26 at 33. See also (1887) 9 All., 486 ; (1896) 21 Bom., 154 at 158 ; (1907) 6 C.L.J., 383 ; (1894) P.R., 51 ; 70.]

[7 All 327]

APPELLATE CIVIL.

The 7th January, 1885.

PRESENT :

MR. JUSTICE BRODHURST AND MR. JUSTICE DUTHOIT.

Zahur Khan and another.....Judgment-debtors

versus

Bakhtawar and others.....Decree-holders.*

Execution of decree—Decree payable by instalments—Execution of whole decree—Construction of decree—Payments out of Court—Act XV of 1877 (Limitation Act), sch. ii, No. 179 (6)—Civil Procedure Code, s. 258—Limitation.

A decree passed against the defendant in a suit, and dated the 13th March 1877, directed " that the plaintiff should recover the decree-money by instalments, agreeably to the terms of the deed of compromise, and he, in case of default, should recover in a lump sum." The compromise mentioned in the decree pro-[326] vided that the amount in dispute should be paid in ten instalments, from 1284 to 1294 fasli, the first to be paid on the 27th May 1877 (1284 fasli), and the remaining nine instalments on Jaith Puranmashi of each succeeding fasli year. On the 1st September 1883, the decree-holders applied for execution of the decree, alleging that the first four instalments had been paid, but not any of the succeeding instalments, and they claimed to recover, under the terms of the decree, the fifth and all the remaining instalments in a lump sum. The judgment-debtors contended that the application was barred by limitation, as they had not paid a single instalment, and more than three years had elapsed from the date of the first default; and that, even if the first four

* Second Appeal No. 59 of 1884, from an order of H. D. Willock, Esq., District Judge of Azamgarh, dated the 16th February 1884, affirming an order of Babu Madho Lal, Officiating Subordinate Judge of Azamgarh, dated the 17th January 1884.

instalments had been paid, such payments could not be recognised by the Court as they had not been certified.

Held, reversing the decision of the Lower Appellate Court, that if the four annual instalments had not been paid under the decree, the execution of the decree was barred by limitation.

Held, also, that recognition of such instalments was not barred by the terms of s. 258 of the Civil Procedure Code. *Sham Lal v. Kanahia Lal*, I.L.R., 4 All. 316, and *Fakir Chand Bose v. Madan Mohan Ghose*, 4 B. L. R., 180, followed.

THE decree of which execution was sought in this case was in these terms :—
“That a decree be passed against the defendant in favour of the plaintiff for Rs. 3,327-7 0, being the amount sued for, with costs and interest during the pendency of the suit, together with interest at the rate of ten annas per cent. from this day, by establishment and enforcement of lien against the hypothecated property; that the plaintiff should recover the decree-money by instalments, agreeably to the terms of the deed of compromise, and in case of default he should recover in a lump sum.”

The compromise mentioned in this decree provided that the Rs. 3,327-7-0 should be paid in ten instalments, from 1284 to 1294 fasli, the first, Rs. 327-7-0 in amount, to be paid on the 27th May 1877 (1284 fasli), and the remaining nine instalments, Rs. 300 each, to be paid on Jaith Purnamashi of each succeeding fasli year. The decree was dated the 13th March 1877. On the 1st September 1883, the decree-holders applied for execution of the decree. They alleged that the first four instalments had been paid, but not any of the succeeding instalments, and they claimed to recover, under the terms of the decree, the 5th and all the remaining instalments in a lump sum. The judgment-debtors contended that the application was barred by limitation, as they had not paid a single instalment, and more than three years had elapsed from the date of the first default; and that if even the first four instalments [329] had been paid, such payments could not be recognized by the Court, as they had not been certified. The Court of First Instance (Subordinate Judge of Azamgarh) held that it was immaterial whether the decree-holders had or had not received the first four instalments, as the application had been made within three years from Jaith Purnamashi 1288 fasli (12th June 1881), the date the 5th instalment fell due. On appeal by the judgment-debtors, the Lower Appellate Court (District Judge of Azamgarh) affirmed the order of the first Court.

It observed :—“The appeal fails. All the rulings that have been given on the subject of such limitations are in favour of the decree-holders' case. Art. 179, sch. ii, Act XV of 1877, corresponds with art. 167 of the second schedule of Act IX of 1871, and the rulings of the Allahabad Court (*Kanchan Singh v. Sheo Prasad*, I. L. R., 2 All. 291) and of the Calcutta Court (*Nilmadhub Chuckerbutty v. Ramsodoy Ghose*, I. L. R., 9 Cal., 857, are one, that is, to the effect that in such cases it is immaterial whether former instalments were paid or not; that applications made within three years from the date on which any instalment claimed fell due are within time; that the clause in a decree empowering a decree-holder to execute the decree for the whole amount due on the default of any instalment was made solely for his benefit and protection, and did not contract any of the privileges otherwise granted.”

The judgment-debtors appealed to the High Court on the grounds that the period of limitation for the application for execution should be computed from the date of the first default, and that the cases cited by the Lower Appellate Court were not applicable to the present case, because in the present case the payment of the instalments was denied. It was also contended that the disputed payments, even if made, could not be recognized, as they had not been certified.

Pandit *Ajudhig Nath* and *Shah Asad Ali*, for the Appellants. *

Munshi *Hanuman Prasad*, for the Respondents.

The Court (BRODHURST and DUTHOIT, JJ.) delivered the following judgment:—

[330] Duthoit, J.—We do not agree with the Lower Appellate Court that it is immaterial whether four annual instalments had or had not been paid under the decree, for we consider that if they were not paid, the execution of the decree was time-barred. We are unable, however, to accept the contention of the learned pleader for the appellants, that cognizance of payment of such instalments is barred by the terms of s. 258 of the Civil Procedure Code. This contention is opposed to the ruling of a Division Bench of this Court in *Sham Lal v. Kanahia Lal*, I. L. R., 4 All., 316, which followed and approved a Full Bench decision of the Calcutta Court—*Fakir Chand Bose v. Madan Mohan Ghose*, 4 B. L. R., 130.

We reverse the decision of the Lower Appellate Court upon the preliminary point noted above, and remand the case for disposal on the merits, after ascertainment of the fact whether the four instalments were or were not paid under the decree as asserted by the decree-holders and denied by the judgment-debtors. The costs of this appeal will abide the final result

Appeal allowed.

NOTES.

[The C.P.C., 1882, was amended in respect of sec. 258 in 1888, and the clause ran, as amended, 'It shall not be recognised as a payment or adjustment of the decrees'. But in the C.P.C., 1908, these words have been omitted.]

The decisions in (1894) 17 All., 42; (1890) 12 All., 569; (1900) P.L.R., 415, were under the previous state of the law.]

[7 All. 330]

The 7th January, 1885.

PRESENT:

MR. JUSTICE BRODHURST AND MR. JUSTICE DUTHOIT.

Ramlal.....Decree-holder

versus

Radhey Lal and another.....Judgment-debtors.*

*Execution of decree—Powers of Court in executing transmitted decree—
Civil Procedure Code, ss. 228, 229.*

The powers which the foreign Court has, under s. 228† of the Civil Procedure Code, are confined to the execution of the decree, and the Court cannot question the propriety or

* Second Appeal No. 80 of 1884, from an order of A. Sells, Esq., District Judge of Calcutta, dated the 2nd July 1884.

† [Sec. 228.—The Court executing a decree sent to it under this chapter shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its orders in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.]

Powers of Court in executing transmitted decree.

Appeal from orders in executing such decrees.

correctness of the order directing execution, nor can it, with reference to s. 239 * of the Code, stay execution except temporarily.

Held, therefore, where the drawers of a hundi, against whom the indorsee from the payee had obtained a decree on the hundi, objected in the Court to which the decree had been transmitted for execution that execution should not be allowed, because the payee had paid the amount of the hundi to the decree-holder, after the decree had been passed, and such Court refused to entertain the objection, that the order of the Lower Appellate Court directing that the parties should be allowed to produce evidence in regard to the alleged payment, and that, should the Court of First Instance find that the decree-holder had received satisfaction to the full amount of the decree, the judgment-debtors should be absolved from all liability under the decree, could not be maintained.

[331] THE decree of which execution was sought in this case had been obtained under these circumstances. A firm carrying on business at Cawnpore drew three hundis on another firm carrying on business at the same place in favour of one Ajudhia Prasad, the proprietor of a firm styled Phundu Lal, Ganga Prasad. The payee either indorsed the hundis to one Ram Lal, or sent them to him for realisation, it did not appear which, and Ram Lal procured the acceptance of the hundis. Subsequently Ram Lal sued the drawers and acceptors on the hundis in the Court of the Civil Judge of Lucknow, and on the 2nd August 1875, obtained a decree. This decree was transferred for execution to the Subordinate Judge of Cawnpore.

The drawers, judgment-debtors, took the following objection to the execution of the decree:—"That the whole decretal money has been realised by the plaintiff from Ajudhia Prasad (who sold the hundi), after the passing of the decree; the plaintiff is, therefore, not competent to take out execution of the decree." The Subordinate Judge disallowed this objection on the following grounds:—

"The Court, however, observes that the objectors (judgment-debtors) or Suraj Bhan (who accepted the hundis), against whom the decree of the 2nd August 1875 had been obtained, not having paid any portion of the judgment-debt, they (objectors) have no right to take this objection. If there was any dealing between Ram Lal and Ajudhia Prasad, the Court would not hold such payment to have been made in satisfaction of the decree, because Ajudhia Prasad sold the hundis to Ram Lal, or sent them to him as a commission agent to realise their amount, and Suraj Bhan had accepted the hundis in favour of Ram Lal, and for this reason Ram Lal brought the regular suit in his own name, obtained a decree, and took out its execution. If all the statements made by the objectors be true, then Ajudhia Prasad is the original decree-holder and Ram Lal is the second decree-holder. The transaction between them is not tantamount to satisfaction of the judgment-debt. When there is a dispute between Ram Lal and Ajudhia Prasad before the Court, all such questions would be decided. The judgment-debtors can by no means take advantage of the transactions between the said persons, and plead that the decree had been satisfied."

*[Sec. 239:—The Court to which a decree has been sent for execution under this chapter

When Court may stay execution.

shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was made, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by such Court of First Instance or Appellate Court if execution had been issued thereby, or if application for execution had been made thereto;

and in case the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution or discharge of such property or person pending the result of the application for such order.]

[332] The judgment-debtors appealed to the District Judge. On the question whether if the amount of the decree had been paid to the decree-holder by Ajudhia Prasad, the proprietor of the firm of Phundu Lal, Ganga Prasad, execution of the decree should be allowed, the District Judge observed as follows:—

"The appellants affirm that in October 1875 (about two months after the passing of the decree), the respondent adjusted the claim with the firm of Phundu Lal, Ganga Prasad, by debiting that firm with the amount due under the decree, and they contend that, as against themselves, therefore, the respondent now has no claim. It is stated also (but this has not been inquired into) that the firm of Phundu Lal, Ganga Prasad, also show this settlement in their books, and it is further declared that, at the present time, there is no balance (in the accounts between the two firms) to the credit of Phundu Lal, Ganga Prasad, thus showing that the adjustment had been complete. The respondent calls in question the fact of any such adjustment, but at the same time distinctly contends that, even supposing it to have been an actual fact, it could in no way affect his rights against the appellants under the decree. This view I cannot hold to be valid. Decree was given simply on the basis of the hundis, and if any of the intermediate possessors of the hundis, even though not sued jointly with the appellants, chose to pay the respondent the full amount of his decree, even though it had not been passed against themselves, the decree by such payment became virtually satisfied, and it is utterly impossible for me to concur in the view that, if such satisfaction was made, the decree-holder could still recover from the judgment-debtors. If this adjustment has actually taken place between respondent and Phundu Lal, Ganga Prasad, the former can have no further claim upon the appellants. Everything turns upon the *bona fide* character, the reality of the alleged payment of the amount by Phundu Lal, Ganga Prasad, to the respondent, and I think that the lower Court was in error in not allowing the appellants to establish its reality." After disposing of other questions raised in the case, which it is not material for the purposes of this report to notice, the District Judge made the following order:—"The case will now be returned to the lower Court with directions to allow the parties to produce evidence in regard to the alleged payment to respondent by Phundu Lal, Ganga [333] Prasad in October 1875, and should the Court find that satisfaction to the full amount of the decree has been received by the respondent, the appellants should be held absolved from all liability under the decree."

The decree-holder appealed to the High Court, contending that the Courts to which the decree had been sent for execution could not go behind the certificate, and could not entertain the objection of the judgment-debtors.

Pandit *Ajudhia Nath*, for the Appellant.

The *Junior Government Pleader* (*Babu Dwarka Nath Banarji*), for the Respondents.

The Court (BRODHURST and DUTHOIT, JJ.) delivered the following judgment:—

Duthoit, J.—The order of the Lower Appellate Court cannot be maintained. The powers which the foreign Court has, under s. 228 of the Code of Civil Procedure, are confined to the execution of the decree. It cannot question the propriety or correctness of the order directing execution, nor can it (s. 239 of the Code) stay execution except temporarily.

We reverse the order of the Lower Appellate Court and restore the order of the Court of First Instance.

Appeal allowed.

[7 All 333]

The 6th January, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND
MR. JUSTICE MAHMOOD.

Chhab Nath.....Plaintiff

versus

Kamta Prasad and another.....Defendants.*

Bond—Interest—Covenant for rate of interest after due date of bond.

In a deed of mortgage, dated in July, 1870, the mortgagors covenanted, among other things, as follows :—“ That, having repaid the principal amount in the course of three years, we shall take back this bond, and we shall continue to pay annually interest on the said amount at the rate of Re. 1-2 per cent. per mensem; that, should we in any year fail to pay the amount of interest, it shall, at the close of the year, be consolidated with the principal amount, and we shall pay compound interest at Re. 1-2 per cent. per mensem.....that, in the event of non-payment of the principal and interest on the expiration of the appointed time,” the mortgagee “shall be at liberty to recover from us the whole amount due to him with interest by means of a law suit.”

[334] *Held* that the terms of the bond amounted to a covenant to pay interest at the stipulated rate after the period of three years, so long as the principal remained due; that, the bond containing an express covenant for the payment of interest at that rate, the interest was not affected by the considerations of the reasonableness or otherwise of the rate; and that the mortgage was therefore entitled to interest up to the date of the decree at the rate of Re. 1-2 per mensem.

Baldeo Panday v. Gokal Rai, I. L. R., 1 All., 603, referred to.

THE plaintiff in this suit claimed to recover Rs. 15,000, principal and interest, due on a mortgage-bond dated the 28th July 1870. The defendants were Kamta Prasad, one of the original mortgagors, and the heirs of Bhagwan Din, the other mortgagor, deceased. The material portion of this bond was as follows :—

“ We, Kamta Prasad and Bhagwan Din, do declare that, having received Rs. 4,645-5-6 of the current coin (half of which is Rs. 2,322-10-9), from the said Mahajan (Chhab Nath), and brought the money to our own use, we covenant and agree that having repaid the principal amount in the course of three years, we shall take back this bond, and we shall continue to pay annually interest on the said amount at the rate of one rupee and two annas per cent. per mensem; that should we in any year fail to pay the amount of interest, it shall, at the close of the year, be consolidated with the principal amount, and we shall pay compound interest at one rupee and two annas per cent. per mensem; that for the satisfaction of the said Mahajan we have, in lieu of the said amount, hypothecated our respective zamindari rights as detailed below, and until the repayment of the principal amount and interest due to the said Mahajan, we shall not transfer them to any other person by sale or mortgage, &c.; that whatever amount we pay as interest shall be entered on the back of the bond, and we shall not set up payments except on the basis of indorsements on the bond, and if we do so, the claim shall be

* First Appeal No. 22 of 1884, from a decree of Maulvi Farid-ud-din, Subordinate Judge of Cawnpore, dated the 25th September 1883.

deemed false; that, in the event of non-payment of the principal and interest on the expiration of the appointed time, the said Mahajan shall be at liberty to recover from us the whole amount due to him with interest by means of a law suit."

The mortgagors failed to pay interest as agreed. The interest claimed by the plaintiff, which amounted to Rs. 10,354-10-6, was made up of compound interest for three years from the date of the [335] bond to the due date, and of simple interest from the latter date to the date of suit, at the rate of Re. 1-2-0 per cent. per mensem.

The defendants set up as a defence to the suit, amongst other things, that the plaintiff had improperly charged compound interest, and that the plaintiff should be allowed interest from the due date of the bond at the rate of eight annas per cent. per mensem only.

The lower Court (Subordinate Judge of Cawnpore) held on the issues framed on this defence, the fourth and fifth, that the plaintiff was entitled to compound interest as claimed, but that he was not entitled to interest after the due date of the bond at the rate of Re. 1-2-0 per cent., but at the rate of eight annas only. It observed as follows:—

"As to the fourth and the fifth issues," the Court is of opinion that according to the conditions laid down in the deed sued upon, the plaintiff is entitled to get interest on the principal as well as interest on the interest up to the due date; for compound interest was stipulated, and the deed sued upon contains a provision for the payment thereof. But after the expiry of the date, he shall, of course, get interest on the principal only, and that, too, at the rate of 8 annas per cent. The plaintiff much delayed the institution of the suit, to let a large amount of interest accumulate. The deed in suit was executed on the 28th July 1870, and the term fixed for the repayment of the debt was three years, which expired on the 28th July 1873. But the suit was instituted on the 8th September 1882, or after nine years, one month and 11 days, and the result is that the interest has come to Rs. 10,354-10-6, while the principal is only Rs. 4,645-5-6. The Court does not think it just to allow interest after the due date at the stipulated rate."

The plaintiff appealed to the High Court, and it was contended on his behalf that he was entitled to interest up to the date of the decree at the stipulated rate of Re. 1-2-0 per cent. per mensem, and that the lower Court was not competent to reduce the rate of interest payable after the due date. In support of this contention, the case of *Baldeo Panday v. Gokal Rai*, I.L.R., 1 All. 603, was referred to.

M. C. H. Hill and *Shah Asad Ali*, for the Appellant.

[336] *Munshi Hanuman Prasad* and *Lala Jokhu Lal*, for the Respondents.

The Court (PETHERAM, C. J., and MAHMOOD, J.) delivered the following judgments:—

Petheram C.J.—I think that this appeal must be allowed. As I understand the matter, the principal and interest are claimed at Rs. 15,000 by calculating compound interest for a period of three years, and simple interest at Rs. 13-8 per cent. from the end of that period to the date of the institution of the suit. The terms of the bond are rather more wide than I at first supposed, and they appear to me to amount to a covenant to pay interest at the stipulated rate after the period of three years, so long as the principal remained due. The terms of the bond seem to bring it within the case cited by *Mr. Hill*; and, if so, we are bound to follow the decision in that case. But our own view is the same. If the bond contains an express covenant for the

payment of interest at this rate, then the interest will not be affected by the considerations of the reasonableness or otherwise of the rate, because the amount was agreed upon by the parties. It is also well within what would have been due to the plaintiff, if he had taken the account strictly on the terms specified in the bond. The appeal must be decreed, and the decree will be for the amount claimed in the plaint with costs.

Mahmood, J.—I am of the same opinion.

Appeal allowed.

NOTES.

[See also (1887) 9 All., 690 ; (1889) 11 All., 416.]

[7 All. 336]

FULL BENCH.

The 10th January, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE OLDFIELD,
MR. JUSTICE BRODHURST, MR. JUSTICE MAHMOOD, AND
MR. JUSTICE DUTHOIT.

Magni Ram and another.....Defendants

versus

Jiwa Lal and others.....Plaintiffs.*

High Court's powers of revision—Civil Procedure Code, s. 622.

In a suit to enforce the right of pre-emption in respect of a usufructuary mortgage of immoveable property, the plaintiffs alleged that the consideration-money was less than that stated in the mortgage-deed. The Court of First Instance gave the [337] plaintiffs a decree for possession of the property, on payment of an amount less than that mentioned in the deed; and this decree was affirmed on appeal. The mortgagees appealed to the High Court on the following grounds :—“(i) Because it was for the respondents to prove that any portion of the consideration was not paid. (ii) Because the lower Court has not considered the evidence of the appellants. (iii) Because the finding of the lower Court is based on conjecture.”

Held, on the question whether, such grounds not being grounds on which a second appeal is allowed by Chapter 42 of the Civil Procedure Code, the appeal should not proceed rather under Chapter 46, s. 622 of that Code, that the appeal could not proceed under s. 622 of the Civil Procedure Code, in consequence of the decision of the Privy Council in *Amir Hassan Khan v. Sheo Bakhsh Singh*, I. L. R., 11 Cal., 6, that only questions relating to the jurisdiction of the Court could be entertained under that section.

THIS was a reference to the Full Bench arising out of the following facts. The plaintiffs in the case sued to enforce the right of pre-emption in respect of a usufructuary mortgage of certain immoveable property. They alleged that the consideration-money was less than that stated in the mortgage-deed.

* Second Appeal No. 1738 of 1884, from a decree of H. G. Pears, Esq., Offg. District Judge of Mainpuri, dated the 5th September 1884, affirming a decree of Maulvi Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 11th July 1884.

The Court of First Instance gave the plaintiffs a decree for the possession of the property, on payment of an amount less than that mentioned in the mortgage-deed. On appeal by the mortgagees the Appellate Court affirmed this decree. The mortgagees preferred a second appeal to the High Court. The grounds of appeal were as follow:—

“(i) Because it was for the respondents to prove that any portion of the consideration was not paid.

Because (ii) the lower Court has not considered the evidence of the appellants.

(iii) Because the finding of the lower Court is based on conjecture.”

The appeal was admitted under s. 551 of the Civil Procedure Code. The appeal came on for hearing before PETHERAM, C.J., and DUTHOIT, J. The learned Chief Justice being of opinion that the grounds of appeal were not grounds on which a second appeal is allowed by s. 584 of the Civil Procedure Code, and that therefore the appeal would not lie, and that the appellants should consequently seek their remedy under s. 622, the Bench referred the following question to the Full Bench:—

[338] “Should this appeal proceed under Ch. 42, or under Ch. 46, s. 622?”

Pandit *Ajudhia Nath*, for the Appellants.

The following opinion was delivered by the Full Bench:—

Petheram, C.J., and **Oldfield, Brodhurst, Mahmood and Duthoit, JJ.**—This appeal cannot proceed under s. 622 of the Civil Procedure Code, because the Privy Council has decided in *Amir Hassan Khan v. Sheo Bakhsh Singh*, I. L. R., 11 Cal., 6, that only questions relating to the jurisdiction of the Court can be entertained under that section. The appeal will be laid before a Division Bench for orders under s. 551.

NOTES.

[See the Notes to 11 Cal., 6 in the ‘Law Reports Reprints’

* This was followed in (1885) 7 All., 661; (1886) 8 All., 111; (1886) 8 All., 519; (1885) 7 All., 345; (1900) 20 A. W. N., 214; (1903) 25 All., 509; (1894) 17 Mad., 410; (1886) 18 Cal., 225; (1896) 1 C. W. N., 617.]

[7 All. 338]

APPELLATE CIVIL.

The 12th January, 1885.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND
MR. JUSTICE BRODHURST.

Kauleshar Panday.....Plaintiff

versus

Girdhari Singh and another.....Defendants.*

Jurisdiction—Civil and Revenue Courts—Declaration that land is plaintiff's sir and defendant a lessee—Landholder and tenant.

A zamindar claimed a declaration that certain land was his sir, and that the defendants were in possession thereof as his lessees. The defendants resisted the claim on the ground that they were tenants of the land at fixed rates, and not lessees of it as the plaintiff's sir.

* First Appeal No. 52 of 1884, from a decree of W. Barry, Esq., District Judge of Jaunpur, dated the 11th January 1884.

Held that the suit raised the question whether the land was *sir*, in respect of which no occupancy-rights could be created except by contract, and whether the defendants were the plaintiff's lessees, and that this was a question purely of contract, and one which was cognizable in the Civil Courts.

THE plaintiff in this suit, a zamindar, claimed a declaration that certain land was his *sir*, "that the defendants were in possession thereof as cultivators under a lease granted by the plaintiff, and that they should continue in possession of the land by payment of the rent entered in the lease." The defence to the suit was that the defendants were tenants at fixed rates of the land, and not lessees of it, as the plaintiff's *sir*, and that as the relation of landlord and tenant admittedly existed between the parties, and the object of the suit was the determination of the nature of the tenancy, the suit was exclusively cognizable in the Revenue Courts.

[339] The judgment of the lower Court (District Judge of Jaunpur) was in these terms:—

"The issue is, whether the suit is cognizable by the Civil Court? I find that the two defendants, Banslochan Singh and Girdhari Singh, are own brothers. The plaintiff asserts that this land is his *sir*, and that he has let it to Banslochan under a lease, and taken a *kabuliyat* from him. Banslochan Singh is in prison, and he does not defend the suit. But his brother, Girdhari Singh, replies that the holding is hereditary, and not the *sir* of plaintiff; that he knows nothing of the alleged lease; and that the suit is not cognizable by the Civil Court.

"The plaintiff admits that both the defendants are in possession; the relation of landlord and tenant is thus established; so the dispute resolves itself into a dispute about the nature of the defendants' holding; plaintiff asserts the land is his *sir*, and that defendants hold under a lease, and, of the defendants, Girdhari ignores the lease, and asserts that his family has held the land for generations. It is thus clearly a case for a Revenue Court. The suit is dismissed with costs."

The plaintiff appealed to the High Court, contending that the suit had been properly instituted in the Civil Court.

Munshi Hanuman Prasad, for the Appellant.

Babu Jogindro Nath Chaudhri, for the Respondents.

The Court (PETHERAM, C.J., and BRODHURST, J.) delivered the following judgment:—

Petheram, C.J.—We think that the appeal must be allowed. The suit raises the question whether the land to which the suit relates is *sir*-land. This is land in respect of which no occupancy rights can be created except by contract. The plaintiff contends that he granted a lease of the land to the defendants. The question is, whether the land is *sir*-land, and the defendants are the plaintiff's lessees. The question whether the defendants are the plaintiff's lessees is a question purely of contract, and is one which is cognizable in the Civil Courts.

Appeal allowed.

[340] *The 14th January, 1885.*

PRESENT

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE,
AND MR. JUSTICE BRODHURST.

Phulchand and others.....Defendants

versus

Miller.....Plaintiff.*

Statute 11 and 12 Vic., c. 21, s. 24—Insolvent—Voluntary transfer.

On the 12th March 1881, a firm, the partners of which were subsequently, within two months from that date, adjudicated insolvents under 11 and 12 Vic., c. 21, suspended payment. On the night of the previous day, the 11th March, one of the creditors of the firm, the impending bankruptcy of the firm having become known, urged the latter to make over a part of their stock-in-trade as security for the debt, and to this the insolvents consented. The only pressure which appeared to have been exercised was that, on the 11th March, security was demanded from the insolvents.

Held that there having been no pressure which could not be resisted, and no legal proceedings having existed against the insolvents, or which they could have feared, the transaction was a voluntary transfer, and therefore void under s. 24 of 11 and 12 Vic., c. 21.

THE suit out of which this appeal arose was brought by the plaintiff as the official assignee of the estate of a firm trading at Calcutta and Cawnpore. This firm, which carried on business at Cawnpore under the style of Paramsukh-Sheolal, was adjudicated insolvent on the 26th March 1881. The defendants in the suit were Gansham Das and Keshab Deo, the proprietors of the firm of Gansham Das-Keshab Deo, Hardat, their gomashtha, and Phulchand, the proprietor of the firm of Phulchand-Makhan Lal. It appeared that on the 11th March 1881, it became known in Cawnpore that the firm of Paramsukh-Sheolal was insolvent. On the night of that day, about 11 P.M., the firm of Paramsukh-Sheolal agreed to deliver a portion of their stock-in-trade to the agent of the firm of Phulchand-Makhan Lal, in part-payment of a debt due by the former firm to the latter. Carts were laden with piece-goods, and were about to leave the premises of Paramsukh-Sheolal, when the gomashtha of the firm of Gansham Das-Keshab Deo asked for some of the stock also as security for a hundi held by them, and accepted by the firm of Paramsukh-Sheolal, and in respect of which it was uncertain whether it had been honoured. It was accordingly agreed that the firm of Gansham Das-Keshab Deo should retain the goods, making them over to the firm of Phulchand-Makhan Lal, in the event of the hundi having been honoured. On the following day, [341] the 12th March 1881, the firm of Paramsukh-Sheolal stopped payment. Two or three days later the goods were delivered to the firm of Phulchand-Makhan Lal, the hundi having been honoured.

The plaintiff in this suit claimed to recover from the defendants the goods in question, or their value, and damages for their wrongful detention. The Court of First Instance (Subordinate Judge of Cawnpore), for reasons which it is not material for the purposes of this report to state, dismissed the suit. The plaintiff appealed to the District Judge, who held that the plaintiff was entitled to recover the goods, as the transfer of them was void under s. 24, c. 21, 11 and 12 Vic. The District Judge observed as follows:—

* Second Appeal No. 1477 of 1883, from a decree of A. Sells, Esq., District Judge of Cawnpore, dated the 31st July 1883, modifying a decree of Mauli Fairid-ud-din, Subordinate Judge of Cawnpore, dated the 31st March 1883.

"Of course the delivery was the result of pressure, but virtually it must still be regarded as being an absolutely voluntary delivery. Now this delivery was certainly made within two months before the bankrupts on petition under c. 21, 11 and 12 Vic., were adjudicated insolvents (26th March 1881). Accordingly, if made by the bankrupts, when 'in insolvent circumstances,' it becomes void, as against the insolvent's assignee, under s. 24 of that statute. Now I imagine that to meet the condition indicated by the term, 'in insolvent circumstances,' it is not necessary that a firm should actually have stopped payment and suspended business, but that it is simply required that they should be unable to meet the demands made upon them, and this must unquestionably have been the position of the bankrupts at the time this delivery was made, for it is said to have occurred about 10 or 11 P.M., on the last night of the existence of the business. It took place on the night of the 11th March, and the firm suspended payment on the 12th. It was not a delivery made in the ordinary course of business, but a delivery in part payment to one creditor in preference to the general body; and further, as an actual transfer it dated even after the firm had suspended business. When the goods were handed over to Gansham Das, it was not an out-and-out transfer; they were simply given as security, and the actual delivery to Phulchand-Makhan Lal did not take place till some days after. * I am of opinion therefore that the transfer was unquestionably void, and within the meaning of s. 24 of the Insolvency Act even fraudulent."

[342] The District Judge in the event gave the plaintiff a decree against the firm of Phulchand-Makhan Lal for Rs. 1,198, the value of the goods, and dismissed the suit as against the other defendants.

The defendants against whom the suit was decreed appealed to the High Court.

Munshi Sukh Ram, for the Appellants.

The Junior Government Pleader (Babu Dwarka Nath Banarji) and Mr. E. C. F. Greenway, for the Respondent.

The Court (PETHERAM, C.J., and BRODHURST, J.) delivered the following Judgment:—

Petheram, C.J.—We think that this appeal must be dismissed. The question is, whether a transaction between certain insolvents, or persons who shortly afterwards were adjudicated insolvents, and one of their creditors, is void. The answer to this question depends on what are the proper inferences to be drawn from the facts. The facts are, that on the 12th March the insolvents suspended payment. On the night of the previous day, the 11th March, the creditor, the impending bankruptcy of the insolvents having become known, urged the latter to make over a part of their stock-in-trade as security for the debt, and to this the insolvents consented. Now, was this a voluntary transfer? because if it were, it is void under s. 24 of 11 and 12 Vic., c. 21. All that appears is, that on the 11th March security was demanded from the insolvents. There was no pressure which could not be resisted. There were no legal proceedings against the insolvents existing, nor could they have feared any, as they must have known that on the following day they would stop payment. Under these circumstances, we are of opinion that the transfer was a voluntary one.

Appeal dismissed.

NOTES.

[See also (1889) 9 A. W. N., 24.]

[7 All. 342]

The 14th January, 1885.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND
MR. JUSTICE BRODHURST.

Bandhu Naik.....Plaintiff

versus

Lakhi Kuar and another.....Defendants.*

*“ Transfer of suit—Civil Procedure Code, s. 25—Court to which
suit is transferred deciding suit on evidence taken by Court
from which suit is transferred.*

Where the trial of a suit was commenced by a Subordinate Judge, and then transferred by the District Judge to his own file under s. 25 of the Civil Procedure [343] Code, and the latter did not re-take the evidence, but dealt with the case as it came to him from the Subordinate Judge, and dismissed the suit, —*held* that the District Judge had not “tried” the case within the meaning of s. 25 of the Code.

THE plaintiff in this case claimed Rs. 30, the price of a bullock sold and delivered to one Raja Ram, represented in the suit by the defendants. The trial of the suit was commenced by the Subordinate Judge of Azamgarh, and after he had taken evidence, the District Judge of Azamgarh transferred the suit to his own file, under s. 25 of the Civil Procedure Code. The District Judge did not re-take the evidence, but dealt with the case as it came to him from the Subordinate Judge. He found that the sale of the bullock was not proved, and dismissed the suit. The plaintiff appealed to the High Court.

Munshi Kashi Prasad, for the Appellant.

Munshi Sukh Ram, for the Respondents.

The Court (PETHERAM, C.J., and BRODHURST, J.) delivered the following judgment:—

Petheram, C. J.—We think that the appeal must be allowed, and the suit tried again. The question is, whether it has been tried. The trial was commenced by the Subordinate Judge, and the suit was then transferred by the District Judge to his own file under s. 25 of the Civil Procedure Code. By that section the District Judge had power to transfer and try it. But inasmuch as the evidence was not taken before the District Judge, we do not think that he has *tried* the case. The decree must be set aside, and the case remanded to the Court which has cognizance of suits of the nature of the present one for trial on the merits.

Appeal allowed.

NOTES.

[See also (1899) 23 Mad., 814; C. P. C., 1908, O. 18, r. 15, cl. 2.]

* First Appeal No. 114 of 1884, from a decree of G. J. Nicholls, Esq., Officiating District Judge of Azamgarh, dated the 27th June, 1884.

[7 All. 343]

The 15th January, 1885.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND
MR. JUSTICE BRODHURST.

Aziman Bibi and another... Plaintiffs

versus

* Amir Ali and others.....Defendants.*

*Pre-emption—Mortgage by conditional sale—Wajib-ul-arz—"Transfer"—
Act IV of 1882 (Transfer of Property Act), s. 58.*

A clause in the *wajib-ul-arz* of a village gave a right of pre-emption in respect of "transfer" by the sharers of their rights and interests by sale and mortgage.

[344] Held, that a deed of conditional sale of a share in the village, which did not transfer possession, was a transfer of an interest in the village, and was sufficient to let in the right of pre-emption. *Sheoratan Kuar v. Mahipal Kuar*, ante, p. 258, followed.

THE plaintiffs in this suit claimed to enforce the right of pre-emption in respect of a mortgage by conditional sale of an eight pies share of a village called Bamnauli, dated the 31st August 1882. The claim was based on a clause of the *wajib-ul-arz* of the village, which was to the following effect:—

"According to the proportion of the land or share in possession, every sharer has the power of transferring his rights and interests (*hakkiyat*) by means of sale and mortgage. But it is a condition that, at the time of transfer, whosoever may be desirous of transferring his rights and interests (*hakkiyat*), then first his nearest sharer will be entitled; and, in case of his refusal, the transfer will be made in favour of other sharers in that thok; and, in case of their refusal, in favour of sharers in the other thok; and when all these refuse or decline to give the proper price, then the transfer may be made in favour of others, and then no sharer will have the right of pre-emption."

The plaintiffs were sharers in the same thok as the conditional vendor of the share claimed, while the conditional vendees, defendants, were "strangers," that is to say, were not sharers in the village. The conditional sale was not one with possession.

The Court of First Instance (Munsif of Bansgaon) decreed the claim. On appeal, the Lower Appellate Court (Subordinate Judge of Gorakhpur) reversed the decree, observing as follows:—"The point to be determined is, whether a claim of pre-emption can be set up in respect of a document of conditional sale, without possession, in the way of a hypothecation. The principle of pre-emption is, that a neighbour or a partner should not be inconvenienced by a stranger gaining possession. When the loan is under hypothecation, and possession has not been transferred, there can be no right of pre-emption. What injury is shown to the plaintiffs by this mortgage without possession?"

The plaintiffs appealed to the High Court, contending that the decree of the Lower Appellate Court was opposed to the terms of the *wajib-ul-arz*.

[345] Mr. J. Simeon, for the Appellants.

The Senior Government Pleader (Lala Juala Prasad), for the Respondents.

* Second Appeal No. 35 of 1884, from a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 27th August 1883, reversing a decree of Muhammad Hafiz Rahim, Munsif of Bansgaon, dated the 20th June 1883.

The Court (PETHERAM, C.J., and BRODHURST, J.) delivered the following judgment:—

Petheram, C.J.—The sole question in this case is, whether this deed of conditional sale included a transfer of an interest in the property, and reference need only be made to s. 58 of the Transfer of Property Act, which defines every mortgage as including a transfer of an interest in the property hypothecated for the purpose of a security. A deed of conditional sale of this kind is a mortgage, and some interest in the property is transferred. This is sufficient to let in the right of pre-emption, and it is not necessary that there should be a transfer of possession. On this point we hold that the recent decision of the Full Bench in *Sheoratan Kuar v. Mahipal Kuar*, ante, p 258, is binding upon us, and the result is that this appeal must be allowed with costs.

Appeal allowed.

[7 All. 346]

REVISIONAL CIVIL.

The 15th January, 1885.

PRESENT :

MR JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Har Prasad and another.....Petitioners

versus

Jafar Ali.....Opposite party.*

. Civil Procedure Code, s. 622—High Court's powers of revision—

"Jurisdiction"—Limitation—Act XV of 1887

(Limitation Act), sch. ii, No. 164.

Where property had been attached in execution of a decree, *held*, that the date on which the property was attached, and not the date of the sale in execution, being the date of executing the first process for enforcing the decree, was the date from which limitation should be computed under art. 164†, sch. ii of Act XV of 1877. *Pachu v. Jaikishen*, Weekly Notes, 1884, p. 322, referred to.

A Court which admits an application to set aside a decree *ex-parte* after the true period of limitation has expired acts in the exercise of its jurisdiction illegally and with material irregularity within the meaning of s. 622 of the Civil Procedure Code, and such action may therefore be made the subject of revision [346] by the High Court under that section. *Amir*

* Application No. 197 of 1884 for revision under s. 622 of the Civil Procedure Code of an order of G.J. Nicholls, Esq., offg. District Judge of Azamgarh, dated the 3rd May 1884.

† [Art. 164 :—

Description of Application.	Period of limitation.	Time from which period begins to run.
By a defendant for an order to set aside a judgment <i>ex-parte</i> .	Thirty days.	The date of executing any process for enforcing the judgment.]

Hasan Khan v. Sheo Baksh Singh, I.L. R., 11 Cal., 6, and *Magni Ram v. Jiwa Lal*, *Ante*, p. 886, commented on by MAHMOOD, J.

Per MAHMOOD, J.—The term “jurisdiction” as used by their Lordships of the Privy Council in *Amir Hasan Khan v. Sheo Baksh Singh*, I. L. R., 11 Cal., 6, must be understood in its broad legal sense signifying the power of administering justice according to the means which the law has provided, and subject to the limitations imposed by the law upon the judicial authority.

THIS was an application for revision under s. 622 of the Civil Procedure Code, made under the following circumstances:—On the 15th September 1882, an *ex-parte* decree was passed by the Munsif of Azamgarh against Jafar Ali. In execution of that decree, the property of Jafar Ali was attached on the 19th June 1883, and on the 15th September 1883, a sale proclamation was made. On the 20th November 1883, the sale in execution took place. On the 13th December the judgment-debtor presented an application under s. 108 of the Civil Procedure Code for setting aside the *ex-parte* decree, alleging that by the fraud of the decree-holders he had not had knowledge of the suit and the execution-proceedings. The Munsif allowed the application. The decree-holders appealed to the District Judge of Azamgarh, contending that the application of the 13th December should not have been allowed by the Munsif, on the ground that it was barred by limitation under art. 164, sch. ii of the Limitation Act, more than thirty days having passed since the 19th June 1883, when the property was attached in execution.

The District Judge observed:—“The Court considers that the date of the sale (20th November 1883), is the date of execution of process under art. 164 of sch. ii, Act XV of 1877.” He held that the application was not barred by limitation, and that the judgment-debtor, Jafar Ali, had no notice of the original suit, but he did not try the questions whether the Judgment-debtor had notice of the execution-proceedings, and whether the decree-holders had acted in the fraudulent manner alleged. He dismissed the appeal with costs.

The decree-holders applied to the High Court for the revision of this order under s. 622 of the Civil Procedure Code, on the ground that the lower Courts had exceeded their powers in entertaining the application to set aside an *ex-parte* decree after the [347] time allowed by the Law of Limitation. On the other side it was objected that the High Court had no power of revision in the case under s. 622.

Munshi Hanuman Prasad, for the Petitioners.

Munshi Kashu Prasad, for the Opposite Party.

Oldfield, J.—(After stating the facts, continued):—Art. 164 of the Limitation Act provides thirty days, as the period of limitation for an order to set aside a judgment *ex-parte*, from the date of executing any process for enforcing the judgment, and by s. 4 of the Act it is enacted that “subject to the provisions contained in ss. 5 to 25 inclusive, every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by the second schedule of the Act, shall be dismissed, although limitation has not been set up as a defence.”

When therefore a Court has admitted an application to set aside an *ex-parte* judgment in contravention of the Law of Limitation, it must be held to have acted in the exercise of its jurisdiction illegally within the meaning of s. 622, and, there being no appeal to this Court in the case, this Court has, in my opinion, powers of revision under s. 622 of the Civil Procedure Code.

In the case before us the Judge erred in his application of the Law of Limitation. The period of limitation will run from the date of executing any

process for enforcing the judgment; and in this case will run from the date of attachment of the property of the judgment-debtor in execution of the decree; and the application will be barred unless the judgment-debtor has been kept by means of fraud from the knowledge of his right to make the application. This is a question which the Judge must determine before he can properly entertain the application."

The order is set aside, and the case will go back to the Judge for disposal with reference to the above remarks. Costs to follow the result.

Mahmood, J.—The question whether the order of the District Judge can be revised by this Court, under s. 622 of the Civil Procedure Code, opens up a very important question of law, in discussing which it is not necessary to go further back than Act VIII of 1859, the old Code of Civil Procedure. That Act, [348] as it originally stood, does not seem to have contained any provisions enabling the High Courts to interfere in revision, but s. 35 of Act XXIII of 1861 laid down the following rule:—"The Sudder Court may call for the record of any case decided on appeal by any subordinate Court in which no further appeal shall lie to the Sudder Court, if such subordinate Court shall appear in hearing the appeal to have exercised a jurisdiction not vested in it by law; and the Sudder Court may set aside the decision passed on appeal in such case by the subordinate Court, or may pass such other order in the case as to such Sudder Court may seem right."

It is important to notice here that the only cases in which the High Court had power to interfere in revision were those "decided on appeal," and in which the subordinate appellate Court had "exercised a jurisdiction not vested in it by law." So the law stood until Act X of 1877 was passed. Section 622 of that Act was as follows:—"The High Court may call for the record of any case in which no appeal lies to the High Court, if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested; and may pass such orders in the case as the High Court thinks fit." The changes here made are two: *first*, that not only the judgments of the subordinate appellate Courts, but those of Courts of First Instance, might be interfered with in revision; and *secondly*, that the cases in which such interference was justified were not only those in which there was *assumption* by the lower Court of a jurisdiction which it did not possess, but also cases in which there was *failure* to exercise a jurisdiction which it did possess. There was, therefore, a clear increase of the powers of revision, and it is important to see how legislation on this subject went further. Section 92 of Act XII of 1879 gave the High Court the power to interfere, not only in the two kinds of cases mentioned in s. 622 of the Code of 1877, but also in cases where the lower Court appeared "to have acted in the exercise of its jurisdiction illegally or with material irregularity," thus distinctly conferring a *third* power, distinct from those which the High Court previously possessed. Now s. 622 of Act X of 1877, as amended by s. 92 of Act XII of 1879, has been reproduced *verbatim* in the present Code, and therefore all arguments and decisions which apply to [349] the former section apply equally to the present. The question then arises, how the present section is to be interpreted. Does it mean that in cases where "no appeal lies to the High Court," the revisional powers of the Court are co-extensive with those which it has in second appeal by virtue of s. 584 of the Code? I cannot think that it means this. Here I may refer to the Full Bench case, decided by this Court, of *Maulvi Muhammad v. Syed Husain*, I.L.R., 3 All., 203, in which the majority of the Judges held that when, under s. 622 of Act X of 1877, the High Court had called for the record of a

case in which no appeal lay to it, it might, under that section, pass any order in such case which it might have passed if it had dealt with the case as a second appeal. The late Chief Justice even went further, and held that the High Court might, under that section, pass in such case any such order as it thought proper, whether in regard to fact or law. A similar view of s. 622 was taken by the Madras High Court in *Subbaji Rau v. Srinivasa Rau*, I. L. R., 2 Mad., 264, where it was held that where the lower Court had failed to do so, the High Court was competent to interfere in revision on the ground of fraud vitiating execution-sales.

Another case to which I wish to refer is *Shiva Nathaji v. Joma Kashinath*, I. L. R., 7 Bom., 341, in which WEST, J., in an elaborate judgment, with which, speaking generally, I agree, explained the scope of the revisional powers of the High Courts. All these rulings, however, with the exception of the principles of the last, must now be regarded as superseded by the recent decision of the Privy Council in *Amir Hasan Khan v. Shoo Baksh Singh*, I. L. R., 11 Cal., 6; but before I deal with the judgment in that case, I wish to refer to the recent Full Bench ruling of this Court in *Magni Ram v. Jiva Lal, Ante*, p. 336, in which the decision of their Lordships of the Privy Council was followed. That ruling was to the effect that the Privy Council had decided that only questions relating to jurisdiction can be entertained under s. 622.

I was a party to this ruling of the Full Bench, and I am anxious that its precise meaning—or at least my meaning in concurring in it, and effect should not be misunderstood. The question is, what was decided by the Privy Council in the case referred to? The substance of the judgment is contained in the concluding words of the penultimate paragraph:—"The question then is, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity."

The view of law here expressed is of course binding upon this Court, and I proceed to consider the exact meaning of the passage. And in doing so it seems to me that the word "*jurisdiction*," as used by their Lordships of the Privy Council, is the most important word.

The word in its ordinary meaning simply means the legal power or authority of hearing and determining disputes for the purposes of administering justice, and in its broad legal sense it may be taken to mean the power of administering justice according to the means which the law has provided, and subject to the limitations imposed by that law upon the judicial authority. Such limitations may either be territorial or pecuniary with reference to the value of the subject-matter in litigation, or they may relate to the nature of the litigation, or the domicile and nationality of the parties or the class or rank to which the tribunal belongs.

I am of opinion that the expression, as used by their Lordships, must be understood in its broad sense and not too narrowly, and this interpretation is supported by the fact that in the last paragraph of their judgment their Lordships say that "the Judicial Commissioner had no *jurisdiction* in the case" under s. 622 of the Civil Procedure Code. Considering that the Judicial Commissioner exercises in Oudh (to use their Lordships' own words) "the same powers as the High Court," the *dictum* cannot be understood to mean that he had no "*jurisdiction*," in the narrow sense of the word, to entertain an application for

revision under s. 622 in the case. I understand the passage simply to mean that he had exceeded his powers, and that his order was therefore *ultra vires*.

[351] Understanding in this sense the word "*jurisdiction*" in the judgment of the Privy Council, I proceed with my views in regard to the revisional powers of this Court under s. 622 of the Civil Procedure Code. I have already said that the section contemplates three cases in which the revisional powers of the High Court may be exercised. The *first* is *assumption* by the lower Court of a jurisdiction which it does not possess. The *second* is its *failure* to exercise a jurisdiction which it does possess. The *third* is where there is neither of these two, but there is exercise of the jurisdiction which the Court possesses, and has exercised in a manner which is vitiated by illegality or material irregularity. The precise question before the Privy Council was, whether or not a particular suit was barred by s. 13 or s. 43 of the Civil Procedure Code. Now I think it can be shown by considering this question that there may be a decision which is made in the legal exercise of jurisdiction which is erroneous, but not illegal or materially irregular. I gather from the report in *Amir Hasun Khan v. Sheo Baksh Singh*, I. L. R., 11 Cal., 6, that the lower Courts had found that the matter in issue was not *res judicata* under s. 13, and that it could not have been included in the former litigation so as to be affected by s. 43. In that case no appeal lay from the decision of the Lower Appellate Court to the Judicial Commissioner, because s. 21 of the Oudh Civil Courts Act allows no second appeal from two concurrent judgments of lower Courts. In such a case I myself should not think it right to interfere in revision. The lower Courts had jurisdiction, and did not exercise it in any illegal or irregular manner. But suppose either of the Judges in that case had said:—

"It is true that this same matter, which is now in dispute, was litigated before under the circumstances described in s. 13 of the Code; but although it was then tried and decided, the Judge trying the former suit appears to me to have decided erroneously, and I shall therefore try it myself, and determine it according to my own views." Or suppose the Court had said:—"This claim could, no doubt, have been made a part of the suit which was formerly tried, but the circumstances are such that I think it would be inequitable to apply the provisions of s. 43, and I therefore allow the plaintiff to sue." In these cases I think that there would be an exercise of [352] jurisdiction, but "*illegally*" and "*with material irregularity*." Or to take a case which actually came before my brother OLDFIELD and myself a few days ago. Suppose that a Judge, professing to act under s. 206 of the Civil Procedure Code, which empowers him in certain cases to amend his decree, chooses to say that "*dismissed*" means "*decreed*," and proceeds practically to alter the whole nature of the decree. There again we have jurisdiction, in its narrow sense, existing in the Judge, but exercised by him "*illegally*" and "*with material irregularity*." Or, again, take s. 624 of the Civil Procedure Code, which provides that (except in certain cases) "*no application for a review of judgment, other than that of a High Court, shall be made to any Judge other than the Judge who delivered it.*" And suppose that a Judge, disregarding this provision, reviews the judgment of his predecessor. I think that here, too, we have an example of jurisdiction being exercised illegally and with material irregularity. Once more, take the case of the Judge of a Small Cause Court (from whose decision there is no appeal), before whom a claim for Rs. 50 is brought, and witnesses produced, but who dismisses the claim without having heard the witnesses, on the ground that the plaintiff's story is obviously untrue. This is another instance of an illegal or materially irregular exercise of jurisdiction.

And so in the present case. Upon the findings recorded by the Judge, it is clear that he, though professing to apply the law of limitation, has in fact

contravened the provisions of that law as contained in s. 4 of the Limitation Act. To allow an application of the kind referred to in art. 164 of sch. ii to be made after the true period of limitation has expired is to act, not indeed without jurisdiction in its narrow sense, but "in the exercise of jurisdiction illegally or with material irregularity," in other words, to act *ultra vires*.

This is all that I desire to say in this case regarding the scope of the revisional powers of the High Court as explained by their Lordships of the Privy Council. The Full Bench ruling of this Court in *Magni Ram v. Jiwa Lal, Ante*, p. 336, does not appear to me to go beyond the views which I have expressed, and if I had thought otherwise I should not have assented to it.

The reason why I hold the District Judge to have decided wrongly on the question of limitation is this. Article 164 of sch. ii of [353] the Limitation Act makes the period of limitation for an application by a defendant for an order to set aside a judgment *ex parte* to run from "the date of executing any process for enforcing the judgment." In the case of *Pachu v. Jarkishen*, Weekly Notes, 1884, p. 322, it was held that "any" process must be taken to mean "first" process, and for obvious reasons I agree with that decision. Here the first process for enforcing the judgment of the 15th September 1882, was the attachment of the property on the 19th June 1883. The application to set aside the judgment was not made till the 13th December 1883, and was therefore obviously barred by limitation. The Muhsif, however, held on the evidence before him that the decree-holder was guilty of fraud in concealing the proceedings both of the suit and of the execution from the judgment-debtor Jafar Ali, and that the judgment-debtor is therefore entitled to claim the benefit of s. 18 of the Limitation Act. The Judge, in consequence of his mistake as to the period of limitation, did not go into the merits of the question, namely, into the question of fraud, and whether the execution-proceedings were within the knowledge of the defendant. I therefor concur in my brother OLDFIELD'S order allowing the application, setting aside the Judge's order, and remanding the case to him for disposal on the question of fraud.

NOTES.

[See the Notes to 7 All., 336.]

[7 All. 353]

APPELLATE CIVIL.

The 22nd January, 1885.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Azizullah Khan and others.....Defendants

versus

Ahmad Ali Khan and others.....Plaintiffs.

*Muhammadan Law—Muhammadan widow—Dower—Widow's heirs—
Determination of amount of dower—Admission by co-defendant.*

A Muhammadan widow lawfully in possession of her husband's estate occupies a position analogous to that of a mortgagee, and her possession cannot be disturbed until her dower-debt

* Second Appeal No. 3 of 1884, from a decree of H. D. Willcock, Esq., District Judge of Azamgarh, dated the 25th July 1883, affirming a decree of Rai Soti Behari Lal, Subordinate Judge of Azamgarh, dated the 24th April 1883.

has been satisfied, and after her death her heirs are entitled to succeed her in such possession, and if wrongfully deprived thereof, to maintain a suit for its recovery.

Held, that the ruling of the Court in *Balund Khan v. Janee*, N.-W. P.H.C. Rep., 1870, p. 319, that where a defendant is found to be in possession of landed property in lieu of dower, and it [354] is held that the plaintiff is not entitled to sue for possession of the property until such claim for dower has been satisfied, it is not necessary to determine the question of the amount of such dower, the matter being one which could be settled properly in a suit for an account of what was due as dower, was not applicable to a case where the plaintiffs seeking to recover possession did not claim as heirs of the widow's husband, but as heirs of the widow herself, and where the decree for possession passed in their favour would remain undisturbed even if an amount less than that fixed by the Lower Appellate Court were found to be what was due as dower.

In a suit for possession of immoveable property brought by three Muhammadan brothers, their three sisters were impleaded as defendants under s. 32 of the Civil Procedure Code, and two of the latter subsequently filed a written statement in which, after stating that they were on good terms with their brothers the plaintiffs and that the suit had been instituted with their knowledge and permission, they prayed that the suit might be decreed, subject to the condition that they would, on some future occasion, "settle with their own brothers as to their right and costs." The third sister did not appear to defend the suit.

Held, that the lower Courts were wrong in treating this admission as sufficient to entitle the plaintiffs to a decree for possession, not only of their own share, but also of the shares of their three sisters, it being a fundamental proposition connected with the administration of justice that a plaintiff cannot sue for more than his own right, and that no defendant can, by an admission or consent of this kind, convey the right or delegate the authority to one for more than his own share in property. *Lachman Singh v. Tansukh*, I. L. R., 6 All., 395, referred to.

THE plaintiffs in this suit claimed, as the heirs of Jamiyat Bibi, widow of one Ziaullah, possession of certain immoveable property, of which at the time of her death she had been in possession in lieu of dower. Ziaullah, a Sunni Muhammadan, died in September 1876, possessed of a 2-anna share in a village and a moiety of two houses. He left as his heirs Jamiyat Bibi and a brother's son, Azizullah, who had married his daughter by Jamiyat Bibi. This daughter had predeceased her father, leaving two sons by Azizullah, named Fateh Muhammad and Muhammad Bakar. According to the Muhammadan Law, three-fourths of the estate of Ziaullah devolved on Azizullah, and one-fourth on Jamiyat Bibi. Jamiyat Bibi died in 1878. If she was a Shia, her heirs were, it was admitted, the sons of her daughter, Fateh Muhammad and Muhammad Bakar. If she was a Sunni, her heirs were, it was admitted, her brother Ahmad Ali, one of the plaintiffs in this suit, and her sister Dulari. Dulari died in 1881, leaving as her heirs three sons, Nasir Ali, Abdul Karim and Amin Khan, the other plaintiffs in [355] this suit, and three daughters, Kulsum, Khadija and Shafia. In 1882, Ahmad Ali and the three sons of Dulari instituted the present suit against Azizullah and his two sons, Fateh Muhammad and Muhammad Bakar, for possession of the two annas share and the moiety of the houses mentioned above. They alleged that Jamiyat Bibi was a Sunni; that according to the law of that sect her estate devolved on them to the exclusion of the defendants; that, on the death of Ziaullah, Jamiyat Bibi had been placed by the defendant Azizullah in possession of the property in suit in lieu of the dower-debt due to her amounting to Rs. 17,000; that on her death the defendants had wrongfully taken possession of the property, and had alleged in a petition presented to the Revenue Court that $1\frac{1}{2}$ annas of the 2-anna share was the property of the defendant Azizullah as heir to Ziaullah, and, Jamiyat Bibi being a Shia, the remaining $\frac{1}{2}$ anna, the property of the other defendants as her heirs. The defendants set up as a defence to the suit that one-fourth only

of the estate of Ziaullah devolved on Jamiyat Bibi, and the remaining three-fourths on the defendant Azizullah; that Jamiyat Bibi had not been placed in possession of the property on her husband's death, but, on the contrary, the defendant Azizullah had taken possession; that her dower was not Rs. 17,000, but "Fatima's" dower, and she had remitted the amount; and that she was a Shia and not a Sunni, and therefore her property devolved on the defendants Fateh Muhammad and Muhammad Bakar, her daughter's sons, according to the law of inheritance governing Shias.

On the 24th January 1883, Kulsum, Khadija and Shafia were made defendants in the suit. On the 12th March 1883, two of them, Kulsum and Khadija, filed a written statement, in which, after stating that they were on good terms with their brothers, and that the suit had been instituted with their knowledge and permission, they prayed that the suit might be decreed, subject to the condition that they might, on some future occasion, "settle with their own brothers as to their right and costs." Shafia did not appear to defend the suit.

The Court of First Instance (Subordinate Judge of Azamgarh) found that Jamiyat Bibi was a Sunni; that on the death of her [356] husband she had been placed in possession of the property in suit by the defendant Azizullah, and was in possession when she died; and that there was a dower-debt due to her at the time of her death. It held on these findings that, as Jamiyat Bibi, being in lawful possession, and a dower-debt being due to her, had a right to possession till the debt was satisfied, the plaintiffs, as her heirs, were entitled to possession of the property under the same conditions; and it accordingly gave the plaintiffs a decree "for possession of the property in suit as heirs of Jamiyat Bibi, deceased," and directing that they "should continue in possession of the property decreed until the dower-debt of Jamiyat Bibi, was paid." On appeal by the defendants, the Lower Appellate Court (District Judge of Azamgarh) affirmed this decree. It found, amongst other things, that the dower-debt of Jamiyat Bibi was Rs. 17,000, and that possession of the property in suit had been relinquished to her in lieu of that debt.

In second appeal the defendants urged in their memorandum of appeal—(i) that the District Judge was not competent to entertain the appeal, the value of the subject-matter exceeding Rs. 5,000, the pecuniary limit of his jurisdiction; (ii) that as Jamiyat Bibi, having herself applied to be recorded in the revenue registers as an heir to Ziaullah, had made no mention of a dower-debt, the plaintiffs who represented her could not be allowed to plead otherwise; (iii) that there was no evidence to show that the defendant Azizullah had placed Jamiyat Bibi in possession in lieu of dower; (iv) that the plaintiffs were not entitled to sue for possession of the property, though they might have a right to sue for what was due to the estate of Jamiyat Bibi by way of dower; (v) that the District Judge was not competent in this suit to determine finally what was due for dower; (vi) that the finding that the defendants had not been in possession of the property since the death of Ziaullah was erroneous; and lastly, that "the decree for the whole estate in favour of the plaintiffs was wholly wrong, and the petition filed by Kulsum Bibi and Khadija was not sufficient to create any right in the plaintiffs."

Mr. T. Conlan, Pandit Ajudhia Nath and Munshi Kashi Prasad, for the Appellants.

[357] Mr. W. M. Colvin and Pandit Bishambhar Nath, for the Respondents.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgments:—

Mahmood, J.—The first ground of appeal has no force, because the record fails to show that the subject-matter of the suit exceeds Rs. 5,000 in value.

Nor do the findings of the lower Courts on the merits of the evidence leave room for the entertainment of the question raised in the second, third, sixth, and seventh grounds of appeal. The lower Courts have found that the deceased *Mrs. Jamiat* was a Sunni; that upon the death of her husband, *Ziaullah*, she obtained, with the acquiescence of his heirs, possession of the whole of his estate in lieu of dower; that the houses (to which the seventh ground of appeal before us relates) form part of his estate, and were in possession of the deceased lady whose dower has never yet been paid. These findings, which are based upon the evidence before the lower Courts, cannot be disturbed in second appeal. But it is contended by the appellants in their fourth ground of appeal that, even upon the findings at which the lower Courts arrived, the plaintiffs, as heirs of the deceased lady, were not entitled to maintain a suit for possession, and that their only remedy was to sue for recovery of such sum as may be due to the estate of the deceased lady as her dower. I am of opinion that this contention is based upon an erroneous view of the law. It has been held in many cases by this Court and the Lords of the Privy Council, that a Muhammadan widow, lawfully in possession of her husband's estate, occupies a position analogous to that of a mortgagee, whose possession cannot be disturbed until the dower-debt has been satisfied. *Jamiat's* position having been found to be of this nature, the plaintiffs, as her heirs, are entitled to succeed her in possession of the property.

In support of the fifth ground of appeal, the learned pleader for the appellants has cited the ruling of this Court in *Balund Khan v. Janec*, N.-W. P. H. C. Rep., 1870, p. 319, in which it was held that, where a defendant is found to be in possession of landed property in lieu of dower, and it is held that the plaintiff is not entitled to sue for possession of the [358] property until such claim for dower has been satisfied, it is unnecessary to determine the question of the amount of such dower, the matter being one which could be settled properly in a suit for an account of what is due as dower. Relying upon this ruling, the learned pleader asks us to set aside so much of the judgments of the lower Courts as relate to the finding that *Jamiat's* dower amounted to Rs. 17,000. Without doubting the authority of the ruling cited, I am of opinion that it is not on all fours with the present case, as here the plaintiffs, who seek to recover possession, do not claim as heirs of *Ziaullah*, but as heirs of his widow *Jamiat*. Whatever the effect of the finding may be, I do not think we are called upon to consider the question in this case, because the decree for possession passed in favour of the plaintiffs would remain undisturbed, even if an amount less than Rs. 17,000 was found to be the deceased lady's dower.

The only ground of appeal which remains to be considered is the last, which raises the question whether the lower Courts were right in law in decreeing the whole of the estate of *Jamiat* in favour of the plaintiffs. The plaintiff *Ahmad Ali* is the brother of the deceased lady, and the plaintiffs *Nasir Ali*, *Abdul Karim*, and *Amin Khan* are the sons of *Dulari*, sister of the deceased lady. *Jamiat* died in 1878, and her sister *Dulari* died in 1881, leaving, not only the three sons, but also three daughters, namely, *Kulsum*, *Khadija*, and *Shafia*, who have not joined the suit as plaintiffs. It is obvious that, under these circumstances, the share inherited by *Dulari* devolved also upon her three daughters to the extent provided by the Muhammadan Law. There is no allegation that they have conveyed their rights and interests to the plaintiffs; but it appears that, in the course of the trial of the suit in the Court of First Instance they were impleaded as defendants under s. 32 of the Civil Procedure Code, and on the 12th March 1883, only two of them, viz., *Kulsum* and *Khadija*, filed a written statement, in which, after stating that they were on good terms with

their brothers, the plaintiffs, and that the suit had been instituted with their knowledge and permission, they prayed that the suit might be decreed, subject to the condition that they would on some future occasion "settle with their own brothers as to their right and costs." The lower Courts have treated this admission as sufficient [359] to entitle the plaintiffs to a decree for possession, not only of their own share but also of the share of the three daughters of Dulari. Shafia did not appear to defend the suit. I am of opinion that the view of the case taken by the lower Courts was erroneous in law. I take it as a fundamental proposition connected with our system of administering justice that a plaintiff cannot sue for more than his own right, and that no defendant can, by an admission or consent of this kind, convey the right, or delegate the authority, to one for more than his own share in property. A similar question was decided in the case of *Lachman Singh v. Tansukh*, I. L. R., 6 All., 395, in which I concurred in the views of my learned brother OLDFIELD. I still entertain the same opinion upon this question of law, and if it were necessary to add anything to what was said by my learned brother in that case, I should say that one reason for not giving effect to such admissions against a co-defendant is, that it deprives the defendant against whom such admissions are used of the opportunity of raising pleas which might be raised, if the defendants making the admission appear in Court as plaintiffs suing for their rights.

Under this view of the case the decree of the lower Courts should be modified by dismissing the suit to the extent of the share of the three daughters of Dulari.

Oldfield, J., concurred.

The case was remanded to the Lower Appellate Court for a finding on the following issue:—

"What is the exact extent of the share of the plaintiffs, exclusive of the shares of Kulsum, Khadija, and Shafia?"

NOTES.

[As regards a Mahomedan widow's possession on account of dower-debts, this was followed in (1907) 9 Bom. L. R., 188; (1894) 16 All., 225; (1890) 10 A. W. N., 115. See also (1901) 23 All., 432, where the limits to the analogy of mortgage are pointed out.]

[7 All. 359]

The 24th January, 1885.

• PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Kifayat Ali and another..... Judgment-debtors
versus

Ram Singh.....Decree-holder.*

*Execution of decree—Application withdrawn by decree-holder—Limitation—
Act XV of 1877 (Limitation Act), sch. ii, No. 179 (4)—Civil Procedure
Code, ss. 374, 647.*

The holder of a decree for money dated the 7th June 1879, applied on the 20th July 1880, for execution thereof, but it appeared that in certain particulars [360] the decree

* Second Appeal No. 96 of 1884, from an order of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 22nd May 1884, reversing an order of Pandit Ratan Lal Munsif of (Haveli) Moradabad, dated the 31st March 1884.

required correction, and it was therefore ordered, at the request of the pleader for the decree-holder, that the application should be dismissed, and the decree returned to him for amendment.* The next application for execution of the decree was made by the decree-holder on the 19th February 1883. *

Held, that the application of the 20th July 1880, having been put in and afterwards taken back by the decree-holder, the proceeding became to all intents and purposes as though no application had been made; that therefore it could have no effect as an application made in accordance with law for execution within the meaning of art. 179, sch. ii, of the Limitation Act; that applying the rule contained in s. 374 of the Civil Procedure Code, in accordance with s. 647, to the application for execution of the 19th February 1883, the question of limitation must be determined as if the first application had never been filed; and that the application now in question was consequently barred by limitation. *Ramanadan Chetti v. Periatambi Shervai*, I. L. R., 6 Mad., 250, dissented from *Pirjade v. Pirjade*, I. L. R., 6 Bom., 681, referred to.

THE decree of which execution was sought in this case was one for money passed against Kifayat Ali and Wilayat Ali as the sons and heirs of Hidayat-ullah, deceased debtor, and Muhamdi Begam, as widow of Hidayat-ullah, and was dated the 7th June 1879. On the 20th July 1880, the decree-holder applied for execution of the decree, asking for attachment and sale of certain immoveable property. The muharrir in charge of execution of decree cases reported to the Court that Muhamdi Begam was not personally liable under the decree, yet execution was sought against her; and that whereas Kifayat Ali and Wilayat Ali were stated in the decree to be the sons and heirs of Hidayat-ullah, deceased debtor, they were stated in the application to be the sons and heirs of Inayat-ullah, deceased debtor, and the property sought to be attached appeared to be Inayat-ullah's property. It appeared that the decree erroneously stated that Kifayat Ali and Wilayat Ali were the sons and heirs of Hidayat-ullah, they being the sons and heirs of Inayat-ullah. On the 3rd August 1880, the Court passed the following order on the application :—

"To-day, at the hearing of the report, the pleader for the decree-holder stated that he would execute the decree after it had been corrected, and it might be returned. Therefore ordered, that according to the request of the pleader for the decree-holder the case be dismissed, and the decree returned to him." The decree-holder subsequently applied for amendment of the decree, and on the 28th April 1882, the decree was amended. On the 19th February [361] 1883, the decree-holder made the next application for execution, being the one out of which this appeal arose. This application the Court of First Instance (Munsif of Haveli Moradabad) rejected on the ground that it was barred by limitation. It held that limitation should be computed from the date of the decree, and not the date of the previous application of the 20th July 1880, as that application was not one for execution of the decree within the meaning of art. 179 of the Limitation Act. On appeal by the decree-holder, the Lower Appellate Court (Subordinate Judge of Moradabad) held that limitation should be computed from the date of the previous application, and that therefore the present application was within time.

The judgment-debtors appealed to the High Court, contending that the present application was barred by limitation, as the first Court had held.

The Senior Government Pleader (*Lala Juala Prasad*), for the Appellants. The respondent did not appear.

The judgment of the Court (OLDFIELD and MAHMOOD, JJ.), after stating the facts, continued as follows :—

Oldfield, J.—It appears to us that the application of the 20th July 1880 can have no effect as an application made in accordance with law for execution

within the meaning of art. 179. It cannot be said to have been made at all, having been put in and afterwards taken back,—in fact, what was done in the matter by the decree-holder had been undone by him, and the proceeding became, to all intents and purposes, the same as though no application had been put in.

We are unable to concur in the view taken by the learned Judges of the Madras High Court in *Ramanadan Chetti v. Periatambi Shervai*, 1. L. R., 6 Mad., 250. A similar case has been brought to notice, decided by the Bombay High Court—*Pirjade v Pirjade*, 1. L. R., 6 Bom., 681. It was there held that the rule in s. 374 of the Civil Procedure Code is made applicable by s. 647 to applications, and that cl. 4, art. 179 of Act XV of 1877 must be read subject to the rules contained in ss. 374 and 647 of the Civil Procedure Code, and in this view [362] we concur. Section 374 is to the effect that "in any fresh suit instituted on permission granted under the last preceding section, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been brought;" and applying this rule to the application for execution of the 19th February 1883, which is before us, the question of limitation must be determined as if the application of the 20th July 1880, had never been filed, and the present application will in consequence be barred by limitation. We set aside the order of the Lower Appellate Court, and allow the appeal with costs.

Appeal allowed.

NOTES.

[This was dissented from in (1891) 18 Cal., 635, but followed in (1887) 10 All., 71. See also (1895) 23 Cal., 217 at 223. In 26 Bom., 76 at 81, it is pointed out that "the effect of sec. 2 of Act VI of 1892 was to overrule 7 All., 359 and other similar cases, as to the effect of sec. 374 read with sec. 647 (C. P. C., 1882). Independently of it, the Privy Council decided in 17 All., 106 : 22 I. A., 44, that sec. 647 did not apply to applications for execution but only to original matters in the nature of suits."]

[7 All. 362]

The 2nd February, 1885.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Nihal Chand.....Defendant

versus

Azmat Ali Khan.....Plaintiff.*

Public highway—Diversion of road—Right of owners of land adjoining old road—Grant by Municipality of land forming old road—Act XV of 1873 (N.-W. P. and Oudh Municipalities Act), s. 38.

There is a presumption that a highway, or waste land adjoining thereto, belongs to the owners of the soil of the adjoining land.

Section 38 of Act XV of 1873 (N.-W. P. and Oudh Municipalities Act) "was not intended to deprive persons of any private right of property they might have in the land used as a public highway, or to confer such rights on the Municipality, nor has the section any such effect.

In a case where such land ceased to be used as a public highway, and was granted by the Municipality to third persons, who proceeded to build thereon,—*held*, that the owners

* Second Appeal No. 124 of 1884, from a decree of Maulvi Muhammad Maksud Ali Khan, Subordinate Judge of Saharanpur, dated the 10th December 1883, modifying a decree of Maulvi Muhammad Ruhullah, Munsif of Shamli, dated the 22nd June 1883.

had a good cause of action against such persons for the demolition of the buildings and restoration of the property to its original condition.

THE facts of this case, so far as they are material for the purposes of this report, were as follows: The plaintiff in this suit was one of the co-sharers in a patti in "*Qasbah*" Muzaffarnagar, that is to say, in the town of Muzaffarnagar. In this patti there was a plot of land numbered 2566 in the " *khasra 'abadi*" or list of town lands. The plaintiff, alleging that the defendant had wrongfully built on this plot, sued the latter for the demolition of the buildings and the restoration of the land to its original condition. The defence to the suit was that the land in suit formed a public road, and was therefore the property of the Municipality, under s. 38 of Act XV of 1873, and consequently the plaintiff had no [363] right to sue; and further that the road having been diverted from the land in question, and such diversion having deprived the defendant of a portion of a house belonging to him, the Municipality had made a grant of the land in question to the defendant, and he was entitled to build thereon. The Court of First Instance (Munsif of Shamli) held that the proprietary right of the plaintiff and his co-sharers in the land was not extinguished, because by s. 38 of Act XV of 1873 the road was vested in, and became the property of, the Municipality, and that the Municipality was not competent to make a grant of the land to the defendant. It further held that as the road had been abandoned, the land reverted to the plaintiff and his co-sharers in the patti. It therefore held that the suit was maintainable, and gave the plaintiff a decree in respect of the land as claimed. On appeal by the defendant, the Lower Appellate Court (Subordinate Judge of Saharanpur) affirmed this decree.

On second appeal by the defendant it was contended on his behalf that the Municipality were competent to convey the land to him, and that it did not revert to the zamindars of the patti because the road was abandoned.

For the respondent it was contended that the zamindars of the patti in which the land was situate had a proprietary right in it although it was used as a public road; that s. 38 of Act XV of 1873 only vested the road in the Municipality and could not extinguish such proprietary right; that the Municipality had no power to convey the land to the appellant, and that, when the road was abandoned, the zamindars acquired full proprietary rights in the land. *Empress v. Broionath Dey*, I. L. R., 2 Cal., 425, was referred to.

Munshis *Kashi Prasad* and *Hanuman Prasad*, for the Appellant.

Messrs. *W. M. Colvin* and *G. T. Spankie* and Pandit *Bishambhar Nath* for the Respondent.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

Oldfield, J.—The plaintiffs are zamindars of "*Qasbah*" Muzaffarnagar and sue the defendant, who is also a zamindar, on the allegation that a plot of land, comprising 175 square yards, formed a portion of a highway connecting Sulabtanganj with the [364] Shamli road and waste land adjoining it, entered as No. 2566 in the "*abadi khasra*," was owned by the plaintiffs and other co-sharers, and defendant has wrongfully enclosed it; also that another piece of land, comprising 28 square yards, No. 1300, is land adjoining the Shamli road, on which the defendant has built a *chabutra*. Plaintiffs seek to have the erections made by defendant demolished and the land restored to its original state. The defendant admits that the 175 square yards in No. 2566 was once part of a road, but alleges that the Municipality, in straightening the road, diverted it from this portion, and took the road through a portion of a house belonging to defendant, and gave the above land to him in exchange for

the land taken ; and that No. 1300 is part of an existing public road to which the plaintiffs have no right. The Court of First Instance (Munsif) decreed the entire claim. The Subordinate Judge (Lower Appellate Court) decreed the claim in respect to No. 2566 and dismissed the rest. The defendant has appealed. We are only concerned with the claim for No. 2566.

The Subordinate Judge has found that this land was formerly a highway, and that the plaintiffs and defendant as the zamindars of the "qasbah" are owners of the soil, and since it has ceased to be a highway, they have full rights over it ; that the Municipality had no power to make the land over to the defendant ; and the latter as a joint owner could not enclose it against the will of the plaintiffs. In our opinion the decision must be affirmed. The land was either a highway or waste land adjoining it, and there is a presumption that such land belongs to the owners of the soil of the adjoining land. The plaintiffs and defendant own jointly, as zamindars of the "qasbah," the adjoining land, and the presumption in their favour that they jointly own the highway has not been rebutted.

Section 38 of the Municipalities Act was not intended to deprive persons of any private right of property they might have in the land used as a public highway, or to confer such right on the Municipality, nor has the section any such effect. The plaintiffs, as joint owners, now that the land is no longer a public highway, have a good cause of action against the defendant. The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[See for similar decisions the following cases :—(1901) 25 Mad., 635, under the Madras District Municipalities Act, IV of 1881, as amended by Act III of 1897 ; also (1907) 30 Mad., 185 P.C. ; (1893) 20 Cal., 732, under the Bengal Act V of 1876.

See also (1888) 10 All., 553.]

[365] *The 4th February, 1885.*

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Hub Lal.....Judgment-debtor

versus

Kanhia Lal and another.....Decree-holders.*

Execution of decree—Sale in execution—Confirmation of sale—Objection that property is not liable to attachment—Civil Procedure Code, ss. 278, 311, 312.

Held, that an objection made by one whose property was attached and sold in execution of a decree for the payment of money for the performance of which he had become a surety, that he was no party to the decree, and his property was not liable to be attached and sold, and therefore the sale was invalid, was not an objection entertainable under s. 311 of the Civil Procedure Code, and was consequently no ground for setting aside the sale under that section, especially as it was preferred for the first time in appeal, and, moreover, might have been taken under s. 278 at the time of attachment, when the objector would have had his remedy as therein provided.

THIS was an appeal from an order confirming a sale of immoveable property in execution of a decree. It appeared that the appellant had, after the passing

* First Appeal No. 37 of 1884, from an order of Shaikh Sakhawat Ali, Munsif of Etah, dated the 5th March 1884.

of a decree for the payment of money, become surety for its performance, and it had been executed against him, and certain immoveable property belonging to him had been sold on the 20th December 1883. He objected to the confirmation of the sale on the ground of certain irregularities in the publication and conduct of the sale. The lower Court (Munsif of Etah), by an order dated the 5th March 1884, disallowed these objections, and confirmed the sale.

It was contended for the appellant that the sale, and the execution-proceedings generally, were void, as he had become liable as surety for the performance of the decree, after it had been made, and therefore the provisions of s. 253 of the Civil Procedure Code were not applicable, and the decree should not have been executed against him.

Babu Ram Das Chakrabarti, for the Appellant.

Munshi Hanuman Prasad and the *Senior Government Pleader (Lala Juala Prasad)*, for the Respondents.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

Oldfield, J.—This is an appeal from an order refusing to set aside a sale under s. 312 of the Civil Procedure Code. The first [366] plea taken is, that the appellant was no party to the decree, and his property, which has been the subject of the sale, was not liable to be attached and sold, and therefore the sale is invalid.

This is not an objection which is entertainable under s. 311, which permits a sale to be set aside for material irregularity in publishing or conducting it, and is not a ground, therefore, for setting aside the sale under that section. We cannot therefore hold that the order refusing to set aside the sale is wrong by reason of this objection.

Moreover, it is now preferred for the first time, and, we may add, was an objection which the appellant might or should have taken under s. 278 at the time of attachment, and he would then have had his remedy as therein provided.

The other pleas fail, as no material irregularity such as the appellant refers to in those pleas has been established. The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[This was referred to in (1891) 19 Bom., 276 (280).]

[7 All. 366]

The 6th February, 1885.

PRESENT.

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Gobardhan Das.....Judgment-debtor

versus

Gopal Ram and othersDecree-holders.*

Execution of decree—The decree to be executed where there has been an appeal.

The effect of the decision of the Full Bench in *Shohrat Singh v. Bridgman*, I. L. R., 4 All., 376, is nothing more than that the last decree is to be regarded as the decree to be

* Second Appeal No. 23 of 1884 from an order of A. F. Millet, Esq., District Judge of Shahjahanpur, dated the 17th September 1883, reversing an order of Maulvi Saiyid Muhammad, Munsif of West Budauu, dated the 6th July 1883.

executed, whether it reverses, modifies or confirms; but when it affirms and adopts the mandatory part of the first Court's decree, that decree may be, and should be referred to, and the mandatory part of it so affirmed should be executed as though it were the decree of the Appellate Court.

Kristo Kinkur Roy v. Rajah Burudacant Roy, 14 Moo. I. A., 465, referred to.

While the first Court of Appeal affirmed the decree of the Court of First Instance, and the High Court affirmed the decree of the Lower Appellate Court and dismissed the appeal, and the decree-holder made an application of which the object clearly was to have execution taken under the decree of the Appellate Court, by carrying out the mandatory part of the decree of the Court of First Instance, *held*, that the objection that the decree-holder did not in his application expressly ask the Court to execute the decree of last instance, was under the circumstances a mere technical objection, and there was no reason why the execution asked for should not be allowed.

[367] ON the 5th May 1879, an original decree was passed in favour of the respondents in this case against the appellant. This decree was affirmed, on appeal, on the 29th August 1879, and, on an appeal being preferred from the appellate decree, that decree was affirmed by the High Court on the 31st May 1880. The decree-holders made an application for execution to the Court of First Instance. In this application the decree sought to be executed was stated to be the original decree, dated the 5th May 1879. The judgment-debtor objected to this application being granted, on the ground that the decree-holders should have applied for execution of the High Court's decree, that being the final decree in the suit. This objection the Court of First Instance allowed, and made an order rejecting the application, referring to *Shohrat Singh v. Bridgman*, I. L. R., 4 All., 376. On appeal by the decree-holders, the Lower Appellate Court reversed this order, and directed the Court of First Instance to proceed with the application.

The judgment-debtor appealed to the High Court on the ground, among others, that the decree of the original Court was not executable, having been superseded by the High Court's decree.

Mr. T. Conlan and Munshi Hanuman Prasad, for the Appellant.

Pandit Ajudhia Nath and Munshi Kashi Prasad, for the Respondents.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

Oldfield, J.—The respondents obtained a decree against the appellant in the Court of the Munsif of West Budaun on the 5th May 1879. This decree was affirmed on appeal by the District Judge, and on second appeal by the High Court.

The decree-holders applied for execution in the Munsif's Court, and this application was rejected on the ground that the application was irregular, as it was an application to execute the decree of the first Court, whereas it should have been to execute the decree of the High Court, as the final Court of appeal. The District Judge reversed this order, on the ground that, however irregular the application may have been, execution had been allowed without [368] objection previously on similar applications, and the judgment-debtor was estopped from objecting to the execution. The judgment-debtor has appealed. His first plea relates to the ground on which the Judge has proceeded; but he has taken another plea, viz., that the decree of the Court of First Instance cannot be executed, the decree to be executed being the decree of the High Court, as the final Court of Appeal, and in consequence the Munsif's order disallowing execution is correct. I shall deal with the last objection, as it will dispose of the appeal.

The appellant supports the plea by reference to the Full Bench decision of this Court in *Shohrat Singh v. Bridgman*, I. L. R., 4 All., 376, and the case of *Muhammad Altaf Ali v. Bholanath*, Weekly Notes, 1882, p. 126.

o. In my opinion there has been a misconception of the meaning and effect of the Full Bench decision, and it does not support the contention of the appellant.

The question which was referred in *Shohrat Singh v. Bridgman* was "where a suit is heard in first or second appeal and a decree is passed, is the decree of the Court of last instance the sole decree which is capable of execution, or may the specifications contained in the decree of the lower Court or Courts be referred to and enforced by the Court to which the application for execution has been made?" and it was held that the "appellate decree is the final decree, and the only decree capable of being executed after it has been passed, whether the same reverses, modifies, or confirms the decree of the Court from which the appeal is made;" but it was added that, where the appellate decrees are not prepared as they should be, by entering the mandatory part of the lower Court's decree, which was affirmed, "but the decree of the lower Court, with all its specifications, is simply affirmed by, and adopted in, the decree of the last Appellate Court, it would then be open to the Court executing such last decree to refer to the decree of the lower Court for information as to its particular contents."

The effect is nothing more than that the last decree is to be regarded as the decree to be executed, whether it reverses, modifies or confirms; but when it affirms and adopts the mandatory part of the first Court's decree, that decree may be, and should be referred [369] to, and the mandatory part of it so affirmed should be executed as though it was the decree of the Appellate Court.

This question was raised in the case of *Kristo Kinkur Roy v. Rajah Burrodacant Roy*, 14 Moo. I. A., 465. Their Lordships of the Privy Council referred to the decisions of the Calcutta and Madras Courts to the effect that "whether the decree of the lower Court is reversed, or modified, or affirmed, the decree passed by the Appellate Court is the final decree in the suit, and, as such, the only decree which is capable of being enforced by execution."

Their Lordships remarked as follows:—"If the question were *res integra* they would incline to the view that the execution ought to proceed on a decree, of which the mandatory part expressly declares the right sought to be enforced. Considering, however, for the reasons already given (one of them was that whatever decree is executed is to be executed by the lower Court, in which the record remains or to which it is to be returned) that the question is not of much practical importance, their Lordships will not express any dissent from the rulings of the Madras Court and the Full Bench of the Bengal Court further than by saying that there may be cases in which the Appellate Court, particularly on special appeal, might see good reasons to limit its decision to a simple dismissal of the appeal, and to abstain from confirming a decree erroneous or questionable, yet not open to examination by reason of the special and limited nature of the appeal. Their Lordships may further suggest that in all cases it may be expedient expressly to embody in a decree of affirmance so much of the decree below as it is intended to affirm, and thus avoid the necessity of a reference to the superseded decree."

In the case above noticed, where the Appellate Court dismisses the appeal without affirming the decree of the lower Court, it is obviously the lower Court's decree which must be executed, and the necessity of referring to the superseded decree is recognized where the Appellate Court's decree has not embodied in its decree the mandatory part of the decree it intended to affirm. Speaking for myself, the decision of the Full Bench of this Court was meant to decide the

question in the sense in which it was regarded by their Lordships of the Privy Council.

[370] It is really, as their Lordships observe, of little practical importance whether the decree of the first Court or the last Court, in cases where the latter affirms the mandatory part, is to be regarded as the decree to be executed, for in either case the Court of First Instance executes the decree, and can refer to its own decree for particulars of the mandatory part affirmed.

The objection therefore that the decree-holder has not in his application expressly asked the Court to execute the decree of last instance becomes a mere technical objection, where the object of the application is clear and undoubted.

In the case before us, the first Court of Appeal affirmed the decree of the Court of First Instance, and the High Court affirmed the decree of the Lower Appellate Court and dismissed the appeal, and the object of the application was clearly to have execution taken under the decree of the Appellate Court, by carrying out the mandatory part of the decree of the Court of First Instance, and there was no reason why the execution should not have been allowed. On these grounds I would dismiss the appeal with costs.

Mahmood, J.—I concur so entirely in what my learned brother OLDFIELD has said that under ordinary circumstances I should not have added a single word. But I may add that I have, on several occasions, sitting as a Judge in Oudh, expressed my dissent from the Full Bench ruling of this Court in *Shohrat Singh v. Bridgman*, I. L. R., 1 All., 376, and acted upon the contrary opinion, which, of course, I was competent to do, the Courts in Oudh not being bound by the decisions of this Court, and I have in this Court also expressed my dissent from it. I only wish to say that the head-note to the report of that case does not fully explain the scope of the decision, and the judgment itself, if, with all deference to the learned Judges who passed it, I may say so, is liable to misapprehension. My brother OLDFIELD, however, has now explained its precise scope, and I entirely concur in the rule as explained by him. It has been seriously misunderstood by the Mutassal Courts, which have, in consequence, refused execution of decrees in many cases (which have come to my notice) in which it should have been allowed.

Appeal dismissed.

NOTES.

[DECREE FOR EXECUTION—

The decree of the final Court of Appeal is the decree for execution.

(1) It is so when the final decree modifies the decree of the lower Court :—(1891) 13 All., 394.

(2) Even though the appellate decree simply affirms the lower Court's decree, the Court competent to amend the decree is only the appellate Court —(1888) 11 All., 267 F.B. (*Mahmood, J., dissenting.*)

(3) But when the appellate Court also did not specify the lands, the subject of the decree, but simply affirmed the decree of the lower Court, the latter Court was held competent to amend the decree in that particular. —(1897) 10 All., 51.

(4) So in a simple decree of affirmance, the period mentioned in the lower Court for payment of money was incorporated in the appellate decree, though it was silent about it. —(1889) 11 All., 346.]

[371] The 19th February, 1885.

PRESENT.

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND
MR. JUSTICE STRAIGHT.

Mula Raj and others.....Judgment-debtors

versus

Debi Dihal and others.....Decree-holders*

Execution of decree - Application for refund of excess payment - Accrual of right to apply - Act XV of 1877 (Limitation Act), sch. II, No. 178.

The judgment debtors against whom a decree had been executed applied for a refund of money which they alleged had been recovered in execution by the decree-holders in excess of what was actually due under the decree. Upon this application an account was taken by order of the Court.

Held, that the limitation applicable to the case was that provided by art 178†, sch. II of the Limitation Act, and that the right to apply for the refund of the excess amount paid in execution accrued at the time when the account was taken and stated on the application of the judgment-debtors in the course of the proceedings in execution.

THE respondents in this case, on the 16th July 1880, applied for execution of a decree for costs which they held against the appellants. This decree had been previously executed, from time to time, since 1872. On the 3rd September 1880, the judgment-debtors preferred a petition to the Court executing the decree, in which they alleged that the decree-holders had recovered interest in execution of the decree, notwithstanding the decree did not award interest, and in so doing had recovered more than was due on the decree, and prayed that an account might be taken, and if it was found that more had been realized than was due, a refund might be ordered, and if it was found that the decree was still unsatisfied, they might be allowed to pay what was found due. On this application the Court ordered an account to be taken. On the 20th December 1880, the account having been taken, the Court held that the respondents had improperly recovered interest in execution of their decree, as it did not award interest, and that, the account showing, if the interest improperly realized were credited to the appellants, that the decree had been not only satisfied, but that the respondents had realized Rs 132 more than was due to them, satisfaction should be entered, and the appellants were entitled to recover the amount paid in excess. The appellants subsequently sued the respondents to recover such amount, but the [372] suit was dismissed on the ground that the amount was not recoverable by a fresh suit, but by

* Second Appeal No. 49 of 1884 from an order of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 17th January 1884 reversing an order of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 18th May 1883.

† [Art 178 -

Description of Application	Period of limitation	Time from which period begins to run
Applications for which no period of limitation is provided elsewhere in this schedule, or by the Code of Civil Procedure, Section 280	Three years	When the right to apply accrues.]

application to the Court executing the decree. On the 4th January 1883, the appellants applied to the Court executing the decree for a refund of the amount which the respondents had improperly recovered in execution of their decree by way of interest, on the ground that the decree did not order the payment of interest. The Court of First Instance (Subordinate Judge) allowed the refund applied for. On appeal by the decree-holders the Lower Appellate Court (District Judge), applying art. 178 of the Limitation Act, held that the application was barred by limitation, computing the period allowed by that article from the 20th November 1872, when the money, of which the refund was sought, was paid; and it therefore reversed the order of the first Court.

For the appellants it was contended that limitation had been improperly reckoned from the date when the money was paid to the respondents, and that it should be reckoned from the time the appellants became aware that the recovery of interest in execution of the decree was wrongful.

Munshi Sukh Ram, for the Appellants.

Munshi Kashi Prasad, for the Respondents.

The Court (PETHERAM, C.J., and STRAIGHT, J.) delivered the following judgment:—

Straight, J.—We do not find fault with the Judge's application of art. 178 of the Limitation Law, but we differ with him upon the question as to when the right accrued to the appellant to apply to be recouped the excess amount paid by him. We think that the proper date must be that when the account was taken and stated on the application of the defendants in the course of the proceeding in execution to enforce his judgment against the plaintiff. The appeal is decreed with costs, and the order of the Judge being reversed, that of the Subordinate Judge will be restored.

Appeal allowed.

[373] *The 19th February, 1885.*

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE STRAIGHT.

Kanji Mal.....Decree-holder

versus

Kanhia Lal.....Judgment-debtor.

Execution of decree —Decree payable by instalments —Civil Procedure Code, s. 230—Finality of order made in execution proceedings.

In 1868 a decree was obtained for Rs. 1,100, which provided that the amount should be paid in instalments, the first instalment being Rs. 200, to be paid at the end of the first year, and that the other instalments should be Rs. 100 at the end of each subsequent year, and that in the event of failure to carry this out, and 2½ months after the falling due of the instalment, the whole amount should be exigible in a lump sum with interest at 8 annas per cent. per mensem. In 1877, the decree-holder applied for execution of the decree, asserting

* Second Appeal No. 34 of 1884, from an order of C. W. P. Watts, Esq., District Judge of Saharanpur, dated the 28th January 1884, reversing an order of Maulvi Muhammad Maksud Ali Khan, Subordinate Judge of Saharanpur, dated the 1st September 1883.

that Rs. 600 had been paid up to that time by five instalments, one of Rs. 200, and four of Rs. 100 each, and that default had been made in payment of the fifth instalment of Rs. 100, and he asked to recover the whole amount due on the decree. No order was passed on this application, and eventually the case was struck off. In 1880, the decree-holder again applied for execution of the decree, upon the same grounds as those upon which the previous application was based. Notice was issued and served, and a warrant issued for the arrest of the judgment-debtor, but eventually the case was struck off. In 1883, the decree-holder on the same grounds made another application for execution. It was contended by the judgment-debtor that execution was barred by s. 230 of the Civil Procedure Code, inasmuch as no instalments had been paid, and even if they had been paid, they could not be recognised, not having been certified.

Held, that the proper time from which to reckon the limitation of twelve years was the fifth year from the date of the bond, the whole claim from the beginning and the order passed in 1880 having gone upon that basis, that the Court could not go behind that order, and that consequently the decree-holder was within time, and might take out execution.

On the 27th February 1868, the appellant obtained a decree against the respondent for Rs. 1,100, which provided that, commencing from the 2nd Phagun Sudi Sambat 1925 (13th February 1869), instalments of Rs. 100 yearly should be paid (Rs. 200 having been paid on that date); and that in the event of failure to carry this out, and 2½ months after the falling due of the instalment, the whole amount should be exigible in a lump sum with interest at 8 annas per cent. per mensem. On the 20th April 1877, the decree-holder applied for execution of the decree. He asserted that Rs. 600 had been paid up to that time by five instalments, one of Rs. 200 and four of Rs. 100 each, and default had been made in [374] payment of the 5th instalment of Rs. 100, and he asked to recover the whole amount due on the decree. Notice was served on the judgment-debtor; he did not appear; and eventually the case was struck off. On the 17th April 1880, the decree-holder applied again for execution of the decree, the grounds of the application being the same as those on which the previous application had been based. Notice was issued and served and a warrant issued for the arrest of the judgment-debtor, but eventually the case was struck off. On the 3rd March 1883, execution was again applied for on the same grounds. Notice was issued, but eventually the case was struck off. On the 2nd April 1883 the decree-holder made, on the same grounds, the application for execution out of which this appeal arose.

The judgment-debtor contended that the application should not be allowed, inasmuch as the first application for execution, dated the 20th April 1877, was barred by limitation, as no instalments had been paid, and time began to run from the date of the first default, which occurred more than three years before that application was made. The Court of First Instance disallowed this objection on the ground that the judgment-debtor had not at any time, after that application had been made, denied that the instalments which the decree-holder asserted had been paid had not in fact been paid. The Lower Appellate Court allowed the objection, holding that the application for execution of the 20th April 1877, should not have been granted, as the payments alleged by the decree-holder to have been made had not been certified, and were therefore not recognizable, and consequently that that application, time running from the first default, was barred by limitation.

It was contended, *inter alia*, for the appellant in this appeal that the lower Court should not have gone behind the previous proceedings.

For the respondent it was contended that execution of the decree was barred by s. 230 of the Civil Procedure Code, inasmuch as no instalments had

been paid, and, even if they had been paid, the payments could not be recognized, not having been certified.

Munshi *Kashi Prasad*, for the Appellant.

[375] Pandit *Ajudhia Nath* and Babu *Ratan Chaud*, for the Respondent.

Petheram, C. J.—I think that this appeal must be allowed. The question is whether the judgment-creditor is entitled now to execute his decree obtained in 1868. The facts are that in 1868 the judgment-creditor obtained a decree for a sum of Rs. 1,100. By the terms of the decree it was provided that the amount should be paid in instalments, the first instalment being Rs. 200, to be paid at the end of the first year, and that the other instalments, should be Rs. 100 at the end of each subsequent year. There was a proviso to the effect that, in the event of any instalment not being paid, the whole amount should become due. This happened in 1868, and in 1877 the decree-holder applied to the Court for leave to execute his decree for the balance due, and the account on which he asked this showed that a payment had been made of Rs. 600, that is to say, of the first five instalments, and the claim was made in respect of default in payment of the sixth instalment. For some reason, which is not very apparent, no order was made, and the application was abandoned by the decree-holder. In 1880 another application was made on the basis of the last one, and the result of this was that the decree-holder obtained an order allowing him to issue execution, and ordering the arrest of the judgment-debtor for the amount due, giving credit for what had been paid. On that order nothing was recovered by the decree-holder; and the question now arises whether the proper time from which to reckon the limitation period of twelve years is the date of the decree of 1868, or the time down to which credit was given for payment of instalments. In my opinion, the proper time from which to reckon limitation is the fifth year from the date of the bond. The whole claim from the beginning has gone upon this basis, and the order passed in 1880 also went upon it. It appears to me that we cannot now go behind that order, and that consequently the judgment-creditor is within time, and may take out execution. This seems to me the only conclusion which is in accordance with justice, because the judgment-creditor has always tried to obtain execution.

Straight, J.—I am of the same opinion.

Appeal allowed.

[376] The 23rd February, 1885.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE BRODHURST.

Fakir Bakhsh.....Defendant

versus

Sadat Ali and another.....Plaintiffs*.

Mortgage—Usufructuary mortgage—Satisfaction of mortgage-debt from usufruct—Suit for whole mortgaged property by some of several mortgagors.

In a suit by some of several co-mortgagors to redeem the entire property mortgaged, on the ground that the mortgage-debt had been satisfied out of the usufruct,—*Held* that the plaintiffs could only claim their own shares, and the Court of First Instance should determine the extent of the shares after making the other co-mortgagors parties.

THE claim in this suit was to redeem a usufructuary mortgage of a two annas and eight pies share in a village called Alawalpur, which share, subsequently to the mortgage, was constituted into a mahal of sixteen annas. It was alleged in the plaint that one of the two mortgagors, Ghulam Haidar, was the proprietor of an eight annas share of the mortgaged property, and that he died leaving two sons, Barkat Ali and Ali Bakhsh; that Barkat Ali, who succeeded to a four annas share of this eight annas share, sold his share to Ghisi Bibi, the wife of the defendant Fakir Bakhsh, the mortgagee; that on the death of Ali Bakhsh his son Bandhu sold the four annas share to which his father had succeeded to Sadat Ali; that the other mortgagor, Muhammad Ali, was the proprietor of the other eight annas share; that on his death his daughter, Pheki Bibi, succeeded to this share, and that on her death her daughter, Fatima Bibi, succeeded to the same. It was further alleged that the mortgage-debt had been satisfied from the usufruct of the mortgaged property. The plaintiffs in the suit were Sadat Ali and Fatima Bibi. They claimed to recover the whole estate on the allegation that Ghisi Bibi, the proprietor of a four annas share of it, refused to join in the suit. The defendant Fakir Bakhsh set up as defence to the suit, amongst other things, that the mortgage-debt had not been satisfied from the usufruct of the mortgaged property; that Bhandu had not sold his four annas share to the plaintiff Sadat Ali, but to Sadat Ali and one Amat-un-nissa Bibi jointly in equal shares; that the latter had sold her moiety to Ghisi Bibi; and that consequently Sadat Ali was not competent to claim alone that four annas share. Subsequently, on the application of the [377] plaintiff Sadat Ali, Ghisi Bibi was added as a defendant to the suit. She filed a written statement, in which she claimed to be proprietor of a nine annas share of the estate. She alleged that Barkat Ali had sold her not only his ancestral share of four annas, but three annas more which he had acquired out of the eight annas share of Muhammad Ali. This three annas, she alleged, was acquired in this way:—Pheki Bibi predeceased her father Muhammad Ali, and on the latter's death two annas of his eight annas share devolved upon his widow, three annas upon Barkat Ali, and three annas upon Bandhu. She further alleged that Amat-un-nissa Bibi had sold to her two annas of the four annas share which Bandhu had sold to Amat-un-nissa Bibi and Sadat Ali.

The Court of First Instance found that the mortgage-debt had been satisfied from the usufruct of the mortgaged property, and that Sadat Ali's share was

* Second Appeal No. 433 of 1884, from a decree of M. S. Howell, Esq., District Judge of Allahabad, dated the 4th January 1884, modifying a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Allahabad, dated the 25th June 1883.

two annas and Fatima Bibi's eight annas; and, holding, that they were only entitled to recover their own shares, gave them a decree for a ten annas share of the estate.

Both the defendants appealed, contesting Fatma Bibi's right to eight annas. Fakir Bakhsh also contested the finding of the Court of First Instance that the mortgage-debt had been satisfied from the usufruct of the mortgaged property. The plaintiff Sadat Ali preferred an objection to that part of the decree of the Court of First Instance which reduced the share claimed by him to two annas.

The Lower Appellate Court held that it was not necessary to determine in this suit the question as to what the shares of the representatives of the mortgagors were, and Ghisi Bibi should therefore not have been made a defendant to the suit, because the plaintiffs were admittedly representatives of the mortgagors, and were consequently entitled to redeem the whole estate, leaving it to the other representatives to recover their shares from them. The Court accordingly, affirming the decision of the first Court as to the satisfaction of the mortgage-debt, made a decree dismissing Ghisi Bibi from the suit and giving the plaintiffs possession of the whole estate.

The defendant Fakir Bakhsh appealed to the High Court, contending that the plaintiffs were only entitled to possession of their own shares.

[378] The *Junior Government Pleader* (Babu Dwarka Nath Banarji) and Pandit Ajudhia Nath, for the Appellant.

Munshis Hanuman Prasad and Kashi Prasad, for the Respondents.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment :—

Oldfield, J.—The plaintiffs are some of several co-mortgagors, and sue to redeem the entire property mortgaged, on the ground that the mortgage-debt has been satisfied out of the usufruct. The Courts below have decreed the claim. The only point taken in appeal by the mortgagee in this appeal, and by one of the co-mortgagors who had been made a party to the suit as a defendant, is that the plaintiffs can only obtain possession of their shares of the property.

It appears to us that this contention has force. The debt having been satisfied from the usufruct, the plaintiffs can only claim their own shares, and the Court below should determine the extent of the shares after making the other co-mortgagors parties.

The case is remanded in order that the issue be tried. Ten days will be allowed for objections.

Issues remitted.

NOTES.

[This case was followed under similar circumstances in (1894) 16 All., 254.]

The 24th February, 1885.

PRESENT:

MR. JUSTICE^c OLDFIELD AND MR. JUSTICE MAHMOOD.

Shahi Ram.....Plaintiff

versus

Shib Lal.....Defendant.*

Suit for refund of proceeds of execution sale—Small Cause Court Suit—Mortgage—First and second mortgagees—Registered and unregistered mortgages—Act III of 1877 (Registration Act), s. 50—Civil Procedure Code, s. 295.

S and L held mortgage-bonds executed in their favour by the same person. S's bond was dated the 16th June 1882, and was registered, the registration being compulsory. L's bond was of prior date, the 30th December 1880, and was not registered, the registration being optional. Both instituted suits on their bonds against the obligor, and obtained decrees for sale of the property, the decrees being passed on the same day. The property was attached in execution of both decrees on the 14th August 1882. The sale-proceeds were divided by the Court executing the decrees equally between the parties by an order dated the 1st May 1883, notwithstanding that S claimed the whole on the ground that he was an incumbrancer under a decree passed on a registered instrument, and therefore entitled [379] to priority. S, being dissatisfied with this order, brought a suit to recover from L the moiety of the sale-proceeds paid to him.

Held that the suit being one to compel the defendant to refund assets of an execution-sale which he was not entitled to receive, and to set aside the order of the Court executing the decree, which directed the payment of the assets to him, was expressly allowed to be brought under the provisions of the penultimate paragraph of s. 295 of the Civil Procedure Code, and could not be regarded as a suit of the nature cognizable in a Court of Small Causes.

* *Held* also that the registered bond of the plaintiff took effect as regards the property comprised in it against the defendant's unregistered bond, under s. 50 of the Registration Act (III of 1877), which gave priority to the incumbrance created by the former bond over the incumbrance created by the latter; and this priority was not affected by the subsequent decrees obtained on the bonds, which only gave effect to the respective rights under the bonds.

The meaning of s. 295 of the Civil Procedure Code is that when immoveable property is sold in execution of decrees ordering its sale for the discharge of incumbrances, the sale-proceeds are to be applied in satisfaction of incumbrances according to their priority.

THE plaintiff and the defendant in this suit were simple mortgagees of the same property, the defendant being the prior mortgagee. The plaintiff's deed of mortgage, dated the 16th June 1882, was registered, the registration being compulsory. The defendant's deed, dated the 30th December 1880, was not registered, its registration being optional. Both parties instituted suits for the sale of the mortgaged property, and on the same day obtained decrees for its sale. The plaintiff applied on the 9th August 1882, for the attachment and sale of the property, and the defendant made a similar application on the 12th August. The property was attached in execution of both decrees on the 14th August. On the 28th February 1883, the property was sold in execution of both decrees. The sale-proceeds were divided by the Court executing the decrees equally between the parties by an order dated the 1st May 1883,

* Second Appeal No. 343 of 1884, from a decree of J. L. Denniston, Esq., Officiating District Judge of Moradabad, dated the 9th January 1884, affirming a decree of Maulvi Muhammad Ezid Bakhsh, Munsif of Moradabad City, dated the 31st August 1883.

notwithstanding that the plaintiff claimed the whole on the ground that he was an incumbrancer under a decree passed on a registered instrument and therefore entitled to priority. The plaintiff being dissatisfied with this order, brought the present suit to recover from the defendant the moiety of the sale-proceeds paid to him, amounting to Rs. 52-8. The Court of First Instance held that, after decrees had been obtained on the deeds of mortgage, the question of priority with reference to registration and non-registration of the deeds was no longer relevant, and dismissed the suit. [380] On appeal by the plaintiff, the Lower Appellate Court affirmed the decree of the first Court, observing as follows:—"The case of *Parshadi Lal v. Khushal Rai*, Weekly Notes, 1882, p. 15, is decisive. The appeal is dismissed with costs." The plaintiff appealed to the High Court, contending that as both the mortgage-deeds were executed after Act III of 1877 came into force, the lower Courts had improperly refused to go behind the decrees.

Babu *Ratan Chand* for the Appellant.

Pandit *Bishambar Nath*, for the Respondent.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

Oldfield, J. (After stating the facts continued):—A preliminary objection has been taken that no appeal lies, as the suit is of the nature of one cognizable by a Court of Small Causes. This objection fails. The suit is brought to compel defendant to refund assets of an execution-sale which he was not entitled to receive, and to set aside the order of the Court executing the decree, which directed the payment of the assets to him. This is a suit expressly allowed to be brought in a Civil Court under the provisions of the penultimate paragraph of s. 295, and cannot be regarded as one of those cognizable by a Court of Small Causes.

With regard to the appeal, it appears that the plaintiff and the defendant hold mortgage-bonds executed in their favour by the same person. The plaintiff's bond is dated the 16th June 1882, and is registered, the registration being compulsory. The defendant's is of prior date, the 30th December 1880, but unregistered, the registration being optional.

Both instituted suits on their bonds against the obligor, and obtained decrees for sale of the property mortgaged, the decrees being made on the same day. The plaintiff took out execution, and applied for attachment and sale of the property on the 9th August 1882, and the defendant did likewise on the 12th August, and attachment was made of the property on the 14th August 1882, apparently on both applications.

The property was sold in satisfaction of both decrees on the 28th February 1883, and bought by plaintiff, who deposited the sale-price; [381] and he claims the right to the assets of the sale to satisfy his decree before any can be taken by the defendant, on the ground that his incumbrance has preference over defendant's under his registered bond, under the provisions of s. 50 of the present Registration Act, which governs the deeds in this case.

Now there is no doubt in my mind that the registered bond of the plaintiff takes effect as regards the property comprised in it against the defendant's unregistered bond under s. 50. This gives priority to the incumbrance created over the incumbrance created by defendant's bond; and this priority is not affected by the subsequent decrees obtained on the bonds, which only give effect to the respective rights under the bonds.

We have then here attachments and a sale of property in execution of two decrees, which ordered the sale of the property for the discharge of incumbrances thereon—a state of things which is provided for by s. 295, Civil Procedure

Code, which contemplates the application of the sale-proceeds according to priority of incumbrances. The 3rd proviso to s. 295 is as follows:—"When immovable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—*first*, in defraying the expenses of the sale; *secondly*, in discharging the interest and principal money due on the incumbrance; *thirdly*, in discharging the interest and principal moneys due on subsequent incumbrances (if any); and *fourthly*, rateably among the holders of decrees for money against the judgment-debtor, who have, prior to the sale of the said property, applied to the Court which made the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof." The meaning of the section is obvious, that when immovable property is sold in execution of decrees ordering its sale for the discharge of incumbrances, the sale-proceeds are to be applied in satisfaction of incumbrances according to their priority. On this view the plaintiff is entitled to have the money due on his incumbrance first discharged, and the appeal prevails, and the decrees of the lower Courts are set aside, and the claim is decreed with all costs.

Appeal allowed. •

• **NOTES.** •

[I. PRIORITY.]

A decree or order in respect of an unregistered document must, to have priority, be before the execution and registration of a registered document:—(1890) 13 All., 298; (1885) 8 All., 23; (1885) 7 All., 888 where this case was distinguished on the ground that decrees on both the registered and unregistered documents were simultaneous.

II. JURISDICTION.

In (1885) 9 Mad., 250, this case was not followed and it was there held that a suit under the penultimate clause of S. 295 of the Civil Procedure Code (1882) was cognizable by Small Cause Court.

But see also (1887) 11 Mad., 269.]

[382] The 25th February, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE STRAIGHT.

Lachman.....Judgment-debtor

• *versus*

Thondi Ram.....Decree-holder.*

Execution of decree—Limitation—Transmission of decree for execution—Application for execution of attached decree—"Step in aid of execution"—Act XV of 1877 (Limitation Act), sch. ii., No. 179 (4)—Civil Procedure Code, ss. 223, 228, 273.

A decree was passed on the 20th February 1878, by the Munsif of M. In November 1878, it was, in accordance with the provisions of s. 223 of the Civil Procedure Code, transferred to the Munsif of J. On the 21st January 1879, an application for execution of the decree was made to the Munsif of J, who thereupon issued an order for the attachment of some immovable property belonging to the judgment-debtor and also for the attachment of three decrees standing in his Court in favour of the judgment-debtor against other persons. On the 18th March 1882, the decree-holder applied to the Munsif of J to execute one of these decrees in his behalf, and he further asked that whatever might be realized in such execution should go to the account of the decree which had been transferred, and which was being executed.

* Second Appeal No. 41 of 1884, from an order of Babu Abinash Chandar Banarji, Subordinate Judge of Agra, dated the 10th February 1884, reversing an order of Maulvi Nazar Ali, Munsif of Mahaban, dated the 28th July 1883.

Held that the application of the 18th March 1882 was perfectly legal, and such a proceeding as could keep alive the decree of the 20th February 1878, and that a subsequent application for execution dated the 12th April 1883, was therefore not barred by limitation.

An application to execute an attached decree is a "step in aid of execution" of the original decree, within the meaning of art. 179, sch. ii of the Limitation Act, inasmuch as its object is to obtain money in order to pay off the judgment-debtor.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of STRAIGHT, J.

Mr. *Amiruddin*, for the Appellant.

Munshi *Hanuman Prasad*, for the Respondent.

The Court (PETHERAM, C. J., and STRAIGHT, J.) delivered the following judgments:—

Petheram, C. J.—I think that this appeal must be dismissed with costs, and for the purposes of my judgment, I propose only to state the view which I take in connection with art. 179 of the Limitation Act. My brother STRAIGHT will deal with the facts of the case, and with the procedure which has been followed.

The question as to art. 179 is whether an application to execute an attached decree is a "step in aid of execution" of the original [383] decree. It appears to me that an application for execution of a money-decree means an application to the Court to get the money by sale of property belonging to the judgment-debtor, so that the Court may be able to pay the creditor the amount due to him. In the present case such an application was made by the judgment-creditor, and the Court then took the first step in aid of the execution of the decree by attaching the debtor's property, and the property so attached included a judgment-debt. That judgment-debt had to be sold or realized in some way, and it could only be done by applying to the Court in which the judgment was to execute it by selling the debtor's property. It would then be necessary to make an application to the Court executing the original decree to bring the amount so received into account, and that is what was done in the present case. If I am right in the view which I take of execution of decree, this must be "a step in aid of execution" within the meaning of art. 179 of the Limitation Act, because the object of it was to obtain money in order to pay off the judgment-debt; and it was in execution for that reason. I am therefore of opinion that the order of the Lower Appellate Court was right, and that the appeal must be dismissed with costs.

Straight, J.—It will be convenient, in reference to what the Chief Justice has said, that I should illustrate his observations by describing the circumstances of the case. The decree now in question was passed on the 20th February 1878, and it was passed by the Munsif of Muthra. On the 21st November 1878, an application was put in for the transfer of the decree to the Munsif of Jalesar, and, in accordance with the provisions of s. 223 of the Civil Procedure Code, it was transferred to him, and he then became seized of it, and, under s. 228 of the Civil Procedure Code, acquired thereupon the same powers in regard to its execution as if he had himself passed it. On the 21st January 1879, the application for execution proper, so to speak, was made to the Munsif of Jalesar, who seems to have issued an order for the attachment of some immoveable property belonging to the judgment-debtor, as also for attachment of three decrees standing in his Court in favour of the judgment-debtor against other persons. Two at least of these decrees related to immoveable property. On the 18th March 1882, a formal application was made by the decree-holder, the res-[384]pondent in the present appeal, to the Munsif of Jalesar to execute

one of these decrees on his behalf, and he further asked that whatever might be realized in such execution should go to the account of the decree which had been transferred, and which was being executed. We are now invited by the learned counsel for the appellant to hold that a subsequent application for execution of the decree, dated the 12th April 1883, was barred by limitation. He contends that the application of the 18th March 1882, was not such a proceeding as could keep alive the decree of the 20th February 1878. I am wholly unable to accept this contention. Under s. 228 of the Code, the decree having been transferred to the Munsif of Jalesar, he had, in executing it, the same powers as if he had himself passed it; and any order passed by him under s. 273 would be made under the first paragraph of that section, because it would be an order directing the proceeds of the former decree to be applied in satisfaction of the latter decree. I cannot see what other course the judgment-creditor could have adopted than that which he actually took. It appears to me that the application of the 18th March 1882, was perfectly in order and perfectly legal, and I therefore hold that the application of the 12th April 1883 was not barred by limitation, and the appeal should be dismissed with costs. I may add that I entirely concur with the Chief Justice in the construction which he puts upon the terms used in the third column of art. 179 of the Limitation Act.

Appeal dismissed.

[7 All. 384]

The 27th February, 1885.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Umrai and others.....Defendants

versus

Ram Lal and others.....Plaintiffs.*

Suit for share of compensation awarded for land acquired for public purposes—

Suit for money had and received for plaintiff's use—Small Cause Court suit.

A suit was brought by some of the co-sharers in a patti of a mahal in which land had been taken for public purposes under the Land Acquisition Act, against the other co-sharers in the patti for the proportion due to them out of a sum of money which had been awarded as compensation for the acquisition of the land, and which the defendants had received.

[385] *Held* that the suit was one for money had and received for the plaintiff's use, and was therefore cognizable by a Court of Small Causes. *Sohan v. Mathura Das*, I. L. R., 6 All., 449, followed.

THE parties to this suit were co-sharers in a patti of a mahal. Certain land in this patti had been taken for public purposes under the Land Acquisition Act. A sum of Rs. 29-1-4 had been awarded as compensation for the acquisition of the land. This sum had been received by the appellant Umrai, one of the

* Second Appeal No. 487 of 1884, from a decree of Rai Pandit Jagat Narain, Subordinate Judge of Furrakhabad, dated the 12th February 1884, reversing a decree of Maulvi Muhammad Anwar Husain, Munsif of Kaimganj, dated the 1st September 1885.

co-sharers. The respondents, asserting that they were entitled to receive Rs. 10-14-6 out of the compensation awarded, that sum representing proportionately the extent of their interest in the land, sued the appellants, the other co-sharers in the patti, for the same. In this second appeal in the suit, it was contended by the respondents that a second appeal would not lie, as the suit was one of the nature cognizable in a Mufassal Court of Small Causes.

Lala Lalta Prasad, for the Appellants.

Munshi Hanuman Prasad, for the Respondents.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

Oldfield, J.—A preliminary objection has been taken that the appeal will not lie, as the suit is of the nature of a suit cognizable by a Court of Small Causes. We are of opinion that the objection is valid. The suit is for money had and received for the plaintiff's use, and following the decision of this Court in *Sohan v. Mathura Das*, 1. L. R., 6 All., 449, we hold such a suit to be cognizable by a Court of Small Causes. The appeal is dismissed with costs.

Appeal dismissed.

[7 All. 385]

FULL BENCH.

The 27th February, 1885.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE STRAIGHT,
MR. JUSTICE OLDFIELD, MR. JUSTICE BRODHURST AND MR. JUSTICE
MAHMOOD.

Queen-Empress

versus

Abdullah.

Statement as to cause of death—Cause of death signified in answer to question—

Admissibility of evidence as to signs—Act I of 1872 (Evidence Act) s. 3, s. 8,

Explanations 1, 2, ss. 9, 32, (1) "Fact"—"Conduct"—

"Verbal" statement.

In a trial upon a charge of murder, it appeared that the deceased shortly before her death was questioned by various persons as to the circumstances [386] in which the injuries had been inflicted on her, that she was at that time unable to speak but was conscious and able to make signs. Evidence was offered by the prosecution, and admitted by the Sessions Judge, to prove the questions put to the deceased, and the signs made by her in answer to such questions.

Held by the Full Bench (MAHMOOD, J., *dissenting*) that the questions and the signs taken together might properly be regarded as "verbal statements" made by a person as to the cause of her death within the meaning of s. 32 of the Evidence Act, and were therefore admissible in evidence under that section.

Per STRAIGHT, J., that statements by the witnesses as to their impressions of what the signs meant were inadmissible, and should be eliminated; but that assuming that the questions put to the deceased were responded to by her in such a manner as to leave no doubt in the mind of the Court as to her meaning, it was not straining the construction to hold that the circumstances were covered by s. 32.

Per MAHMOOD, J., that the expression "verbal statements" in s. 32 should be confined to statements made by means of a word or words, and that the signs made by the deceased, not being verbal statements in this sense, were not admissible in evidence under that section.

Per PETHERAM, C. J., that the signs could not be proved as "conduct" within the meaning of s. 8 of the Evidence Act, inasmuch as, taken alone, and without reference to the questions leading to them, there was nothing to connect them with the cause of death, and so to make them relevant; while the questions could not be proved either under *Explanation 2* of s. 8, or under s. 9, inasmuch as the condition precedent to their admissibility under either of these provisions was the relevancy of the conduct which they were alleged to affect or of the facts which they were intended to explain. The "conduct" made relevant by s. 8 is conduct which is directly and immediately influenced by a fact in issue or relevant fact, and it does not include actions resulting from some intermediate cause, such as questions or suggestions by other persons.

Per MAHMOOD, J., that the word "conduct" as used in s. 8 does not mean only such conduct as is directly and immediately influenced by a fact in issue or relevant fact; that the signs made by the deceased were the conduct of "a person an offence against whom was the subject of any proceeding" and were relevant as such under s. 8; and that the questions put to her were admissible in evidence either under *Explanation 2* of the same section, or under s. 9, by way of an explanation of the meaning of the signs.

THIS was an appeal from an order of Mr. R. H. S. Aikman, Officiating Sessions Judge of Aligarh, dated the 24th December 1884, convicting the appellant of murder. The appellant, Abdullah, son of Chhote, was charged before the Court of Session with the murder of one Dulari, a prostitute, by cutting her throat with a razor. It appeared that on the morning of the 27th September 1884, Dulari, with her throat cut, was taken to the police-station, and thence to the dispensary. She lived till the morning of the 29th. The *post mortem* examination showed that the windpipe and the anterior [387] wall of the gullet had been cut through. The deceased had also a cut on the left thumb. When she was taken to the police-station, she was questioned by her mother, Chunna Jan, in presence of the Kotwal (sub-inspector of police), Ghulam Ali. She was also at the same time questioned by the Kotwal and again, subsequently, by Munshi Behari Lal, Deputy Magistrate, and Babu Mulraj, Assistant Surgeon. She was unable to speak, but was conscious and able to make signs. Evidence was offered by the prosecution to prove the questions put to Dulari, and the signs which she made in answer to such questions. Objection was taken to the reception of this evidence, on the ground that, under s. 32 of the Evidence Act, only written or verbal statements made by a deceased person as to the cause of his death were admissible, and that signs were not "verbal" within the meaning of that section. The Sessions Judge overruled this objection, and allowed the evidence to be given. That evidence was as follows:—

Chunna Jan stated:—"The same day, in the evening, the Deputy Magistrate came to the dispensary. He asked her, Dulari, who had wounded her. She closed her lips so. Then the Deputy Magistrate mentioned a great many names to her until the name of Abdullah was mentioned, when she nodded her head and said 'han' (yes) in a low voice. He asked her what he had wounded her with, and she raised her finger as she had done before. He asked her if she had been wounded with a razor, and she nodded her head. He asked

her how she had seen the razor. She pointed to her throat, and showed a wound on the finger of her left hand. He asked her if a lamp was burning. She made a sign with her hand that there had been no lamp. He asked her how she had seen if there had been no light, and she pointed and looked up at the sky as if to indicate that it was morning. The next morning the Kotwal came to the dispensary with a man whom I recognized as the man who had come to fetch her. The Kotwal in my presence asked her if that was the man who had killed her, and she made a sign that it was not. He asked her whether this was the man who had taken her away, and she made a sign that it was. I repeatedly asked her who had wounded her, and she always made signs that it was Abdullah."

[388] *Ghulam Ali Khan* stated:—"Dulari was unable to speak. I asked her who had cut her throat. She could not speak. Then her mother asked if the *sipahi* had cut her throat. She remained quiet. (Then said) She made a negative sign with her hand. Her mother asked whether the Munshi had cut her throat. She again made a negative sign with her hand. After mentioning two or three other names, to all of which she made the same sign, the mother mentioned Abdullah's name. Then she made an affirmative sign with both hands, thus (showing the manner in which deceased moved her hands). When I asked which Abdullah, the mother said it was a *Bhatiyara*, a shoe-seller. She only mentioned Abdullah's name without describing him as a shoe-seller when she questioned her daughter. When I asked her what he had cut her throat with, she lifted her fore-finger so. I understood her to mean a pocket-knife."

Munshi Behari Lal stated:—"On the 27th September last, between 7 and 8 P.M., I went to the Koil dispensary to take the deposition of a woman named Dulari. I found her unable to speak. The woman now in Court, Chunna Jan, was with her. The eyes of Dulari were shut, but she opened them when I called out to her. The Assistant Surgeon and her mother, Chunna Jan, said that though she could not speak, she could make signs. I mentioned several names,—i.e., Ismail, Akbar Khan, Akbar Husain, Khuda Bakhsh, and asked regarding them one by one if they had wounded her. Dulari was unable to lift her hand, but her mother raised her (i.e., Dulari's) forearm, holding it below the elbow. When her arm was raised, Dulari was able to move her hand from the wrist, and when the above names were mentioned to her, she waved her hand backwards and forwards, thus making a negative sign. Some of the above names were told me by Chunna Jan, and some I mentioned at hap-hazard. I then, at Chunna Jan's instigation, asked her if Abdullah had wounded her. On this she moved her hand up and down. I understood this to be a sign of affirmation. I only mentioned the name Abdullah; did not mention his parentage, caste, or trade. I then asked her if he had wounded her with a sword or knife. She made a negative sign with her hand. I then asked her if he had wounded her with a razor. She, in answer to this, made an affirmative sign [389] with her hand. I asked her if she had been awake when he cut her throat. She made a negative sign. I asked her if she had been asleep at the time. She made an affirmative sign. I asked her if she had been wounded during the night. She made a negative sign. I then asked her if she had been wounded towards morning (*subah hote*). She made the affirmative sign to this. I asked her if she had recognised Abdullah. To this she made the affirmative sign. I asked her if any other man save Abdullah had been present when her throat was cut. To this she made the negative sign. The Assistant Surgeon was present during the time I examined Dulari. Chunna Jan was supporting Dulari's arm all the time, holding it close to the elbow. Dulari moved her hand herself from the wrist, the motion was not communicated to her

hand by Chunna Jan moving her arm. Dulari's eyes were generally open during the examination, but she may have shut them from time to time : she seemed to me to be under 20 and over 15 years of age. I was with her between 15 minutes and half an hour. From her making signs of affirmation and negation, I am of opinion that she understood the questions I put to her."

Babu Mulraj stated :—" When she was questioned at first, she endeavoured to nod her head, and did nod it several times, but I forbade her doing so, as it was prejudicial to the wound. I told her when she wished to express a negative, to move her hand backwards and forwards, the usual mode of expressing a negative ; and when she wished to express an affirmative, to move her hand up and down, thus (witness here indicated the gesture indicated by the Deputy Magistrate as the mode in which deceased expressed an affirmative). I think the Deputy Magistrate came on the evening of the 28th. I was present when the deceased was examined by the Deputy Magistrate. I heard the Deputy Magistrate ask her about the man who killed her, and I saw her make the affirmative sign. She made the affirmative sign at the mention of the name of Abdullah. I do not remember now whether I saw her make a negative gesture to any question put by the Deputy Magistrate. She was conscious, but weak, when the Deputy Magistrate questioned her. I think when the Deputy Magistrate questioned her, she tried to nod her head and I forbade, and told her to make signs with her hand. I do not remember whether she [390] lifted her arm herself or whether any one supported her arm, but she was not at that time so weak as not to be able to lift her arm. In my opinion she was able to understand questions put to her when the Deputy Magistrate questioned her. I do not remember whether any other official save the Deputy Magistrate questioned her in my presence. I several times questioned her as to how she came to be wounded. I mentioned several names to her, and asked her regarding them whether any one of them had killed her. To all she made the negative sign. When I asked her whether it was Abdullah who had wounded her, she made the affirmative sign. I do not know what Abdullah was referred to. I questioned Dulari regarding him from hearing what the mother said. After hearing from her mother what Abdullah it was,—i.e., whose son he was, and that he was a shoe-seller, I asked Dulari specifically whether it was Abdullah, the son of such a one, the seller of shoes, who had wounded her, and she made the affirmative sign. I do not remember whose son Chunna Jan said Abdullah was, but she mentioned Abdullah's father's name. I also questioned her about the time at which the wound was inflicted. I asked her whether she had been wounded at the time she went to the house. She made a negative sign to this. I asked her whether it was towards dawn, and she made an affirmative sign. I also asked her what she had been wounded with. I think she made an affirmative sign at the mention of a razor. From what I heard, I asked whether Abdullah had taken her into his father's house. To this question she made an affirmative sign. I asked her whether any one along with Abdullah had killed her, and she made a negative sign."

In overruling the objection to this evidence, the Sessions Judge observed as follows :—

" I do not think the section means that the statements must either be written by the deceased or uttered by the deceased in an audible voice. Evidence given by a dumb witness, or a witness unable to speak, by the medium of signs, is, according to the provisions of s. 119 of the Evidence Act, deemed to be oral evidence. And in like manner, in a case like the present, if deceased was able to convey her meaning by means of signs, I think her statement is to be considered as a 'verbal' statement, although she herself was [391] unable

to put it into words. I accordingly held that the witnesses might give evidence as to the signs they saw deceased make when questions were put to her. From the evidence of these four witnesses it appears that the deceased, when questioned as to whether the Munshi, the *sipahi* (i.e., the pretended tahsil *chaprasi*), and others who were mentioned by name had cut her throat, made to all the ordinary negative sign used by the natives of this country (this is made by moving from right to left and from left to right the open hand held perpendicularly with the palm turned away from the body), but that when the name of Abdullah was mentioned, she made a different sign by moving the hand up and down. This gesture can be best described by saying that she 'nodded' with her hand if one may be allowed the expression. The Assistant Surgeon states that she endeavoured to, and did more than once, nod her head, but that he forbade her doing so, as it was hurtful to the wound, and instructed her to use the signs of assent and dissent indicated above. The Deputy Magistrate, who visited her on the evening of the 27th, states that from her making signs of affirmation and negation he is of opinion that she understood the questions that were put to her. The Civil Surgeon states that she remained conscious up to the 28th, and the Assistant Surgeon, in whose immediate charge she was, says that she remained conscious until shortly before she died,—i.e., the morning of the 29th. None of the larger blood-vessels were injured, and the wound itself was not one which would directly affect the brain. I think, then, that there is no reason to doubt that the deceased, when questioned by these four witnesses, understood what was said to her. I think it is clear from the evidence of these four witnesses that the deceased intended to charge, and did charge the accused, Abdullah, with having cut her throat. In answer to these witnesses, she indicated that she had been attacked towards the morning while she was asleep, and that her throat had been cut with a razor. She indicated to the Assistant Surgeon that it was the accused Abdullah who had taken her from the *barthak* into the adjoining house. The cut on her thumb appears to indicate that she offered resistance. I think, therefore, that though she may have been asleep when first attacked, she had the opportunity of recognizing her murderer, whoever he was. On learning that Abdullah was charged, the sub-[392]inspector caused a search to be made for him in all directions, but it was not until the evening of the 29th September,—i.e., after Dulari was dead,—that he was arrested. He could not therefore be confronted with the deceased, but I think there can be no reasonable doubt that it was the Abdullah in Court whom she meant to accuse of her murder."

It was contended for the appellant that the evidence which has been set out above was improperly received.

With reference to this contention, the Divisional Bench (PETHERAM, C.J., and MAHMOOD, J.) hearing the appeal referred the following question to the Full Bench:—"Whether, under the circumstances of this case, the evidence of the witnesses to prove the impression created on their minds by signs made by the deceased, was admissible, as forming a statement made by her or otherwise?"

Mr. G. E. A. Ross and Mr. C. Dillon, for the Appellant.

Mr. C. H. Hill (*Public Prosecutor*), for the Crown.

The *Public Prosecutor* (Mr. Hill), for the Crown, contended that the signs made by the deceased were the "conduct" of a "person, an offence against whom was the object of any proceeding," and such conduct "was influenced by" the cutting of her throat by the prisoner, which was a fact in issue. They were therefore admissible in evidence under s. 8 of the Evidence Act,

and, that being so, the questions also in answer to which they were made were admissible under *Explanation 2* of the same section, and also under s. 9. They might also properly be regarded as amounting to a dying declaration under s. 32. Without contending that the signs taken alone amounted to a verbal statement, they at least signified an assent to or adoption of the verbal statements implied by the questions, and therefore, taken in conjunction with such questions, should be treated as "verbal statements." In England it has been held that no continuous statement by a dying person is necessary to constitute a dying declaration, and that such a declaration is sufficiently made by answers to leading questions. In such a case, the statements implied by the questions would be treated as having been made by the person giving his assent, though it might be that not one word of such statements was [393] uttered by himself. In *Regina v. Steele*, 12 Cox. Cr. Cas., 168, it was decided that a statement made by a deceased person, under circumstances which would not render it admissible as a dying declaration, becomes admissible if repeated in his presence and at his request by the person to whom it was previously made, and it assented to by the deceased (presuming that he is then in such a state that, if he had made a statement, it would have been admissible as a dying declaration).

Mr. G. E. A. Ross, for the Appellant.—The signs cannot be regarded as "conduct" within the meaning of s. 8 of the Evidence Act, because, in the first place, assuming them to amount to "statements," (which was the highest point at which the prosecution can put them), *Explanation 1* shows that they are not admissible, since they did not "accompany and explain acts other than statements." Further, the condition precedent to their admissibility as "conduct" is that they should "influence or be influenced by any fact in issue or relevant fact," and "influence" cannot be construed so loosely as to include everything which remotely affects conduct: it must be confined to direct and immediate causes. The signs here used were not the direct and natural result of the fact in issue, *i.e.*, the murder, for they were the result of the questions put to the deceased. The prosecution are in fact attempting to make out that the signs were "conduct" and also to bring them in as "statements." In regard to s. 32, the provisions of the Act must, according to recognized principles, be construed strictly, and the prisoner is entitled to the benefit of such construction. In this view, the signs cannot be taken to be "verbal statements." In regard to the argument that they were an adoption of the statements contained in the questions, it would be unsafe to act upon such a principle in this country, though it might be safe and reasonable in England. The admission of such a class of evidence would be dangerous in the highest degree, considering its necessarily indefinite character, and its consequent liability to misapprehension and perversion. Section 119 of the Evidence Act indicates that the Legislature intended the admission of such signs to be subject to the condition of being made in open Court, so that the Court trying the case may be in a position to test their mean-[394]ing for itself, instead of depending upon the unverified impressions of others.

The following judgments were delivered by the Full Bench:—

Petheram, C. J.—I understand the question submitted to us by the reference to come to this. When a witness is called who deposes to having put certain questions to a person, the cause of whose death is the subject-matter of the trial, which questions have been responded to by certain signs, can such questions and signs, taken together, be properly regarded as "verbal statements" under s. 32 of the Evidence Act, or are they admissible under any other sections of the same Act?

I propose to deal first with the other sections to which reference has been made. It is contended that the questions which were put to the deceased, and the responses which she made to those questions, are "facts" within the purview of ss. 3 and 9. I do not, however, concur in this view. It appears to me that a fact must be proved to be relevant before another fact can be proved to explain its meaning; and since, without words being used, the signs could not be proved to be relevant, the words themselves are also not relevant.

The next question is, whether mere signs can be regarded as "conduct" within the meaning of s. 8. Upon this point it must be remembered that the 2nd paragraph of that section makes relevant the conduct of any person who is a party to any suit or proceeding "in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto." And of course the conduct of a party interested in any proceeding at the time when the facts occurred out of which the proceeding arises, is extremely relevant, and therefore any conduct on the part of the deceased in this case, which had any bearing on the circumstances in which she met her death, would be relevant. But the state of things is this. She, being in a dying state at the hospital, made, in the presence of certain persons, the signs which have been referred to. It is clear that, taking these signs *alone*, there is nothing to show that they are relevant, because there is nothing which connects them with the cause of death. Then it is argued that since conduct is relevant under certain circumstances, you may, [395] with reference to *Explanation 2* of s. 8, prove any statements made to the person whose conduct is in question. In order to decide this point the language of s. 8 must be carefully considered. It is to the following effect:—

"The conduct of any party or of any agent to any party to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceedings, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto. *Explanation 1*.—The word 'conduct' in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act. *Explanation 2*.—When the conduct of any person is relevant, any statement made to him or in his presence or hearing, which affects such conduct, is relevant." Now the question here in issue is—Did Abdullah kill the deceased by cutting her throat? The only conduct which is alleged on the part of the deceased is, that she moved her hand in answer to questions put to her by some of the persons at the hospital. If we went no further than this, there would be nothing to show that her conduct in lifting her hand either influenced or was influenced by the fact in issue,—i.e., the cutting of her throat. Then *Explanation 2* is brought in; but it is obvious that before you can let in the words of a third person, you must show that the conduct which they are alleged to affect is relevant. And in the present case it is clear that *until* you let in the words, the conduct is not relevant, and therefore the words cannot be let in because the condition precedent to their admissibility has not been satisfied, and that not having been done, their whole basis fails.

Explanation 1 of s. 8 points to a case in which a person whose conduct is in dispute mixes up together actions and statements; and in such a case those actions and statements may be proved as a whole. For instance, a person is seen running down a street in a wounded condition, and calling out the name of his assailant, and the circumstances under which the injuries were inflicted. Here what the injured person says and what he does may be taken

[396] together and proved as a whole. But the case would be very different if some passer-by stopped him and suggested some name, or asked some question regarding the transaction. If a person were found making such statements without any question first being asked, then his statements might be regarded as a part of his conduct. But where the statement is made merely in response to some question or suggestion, it shows a state of things introduced, not by the fact in issue, but by the interposition of something else. For these reasons I think that the signs made by the deceased cannot be admitted by way of "conduct" under s. 8 of the Evidence Act.

I now turn to the other part of the argument,—that which relates to s. 32.

In the first place, it is clear that s. 32 was intended by the framers of the Act to provide for cases of "dying declarations;" that is to say, where a person mortally injured makes certain statements regarding the cause and other circumstances of the injury, and then dies. These statements may be given in evidence under s. 32. If I had been compelled to hold that these signs were not admissible under s. 32, I should have regretted it, because I feel that they are admissible under s. 32 or not at all. I think that the Legislature intended that such evidence should be admitted only within the limits provided by that section, and that if they cannot be brought under that, we ought not to search too carefully for other provisions under which to admit them. The statement, assuming it to be such, was here made by a witness, that is, by one who was conscious, and who knew the truth, and whose evidence would have been the best possible if she had continued to live. The only question would then have been as to the truth of her evidence. Of her competency to speak the truth of the matter, there could, of course, be no doubt. But she is dead, and cannot be called as a witness, and the question then arises whether you can, as it were, make her a witness notwithstanding her death, and give in evidence the statements which she made. To make such a state of things possible, s. 32 of the Evidence Act was passed. That section says that the statement, whether written or verbal, must be a statement as to relevant facts. In the present case that condition is of course satisfied. **[397]** The question then arises—Is the statement a "verbal" one? "Verbal" means by words. It is not necessary that the words should be spoken. If the term used in the section were "oral," it might be that the statement must be confined to words spoken by the mouth. But the meaning of "verbal" is something wider. From the earliest times it has been held that the words of another person may be so adopted by a witness as to be properly treated as the words of the witness himself. The same objection which is now made to the admission in evidence of these signs might equally be made to the assent given by a witness in an action to leading questions put by counsel. If, for example, counsel were to ask—"Is this place a thousand miles from Calcutta?" and the witness replied "Yes," it might be said that the witness made no statement as to the distance referred to. The objection to leading questions is not that they are absolutely illegal, but only that they are unfair. The only question here is, whether the deceased, by the signs of assent which she made, adopted the verbal statements employed by the questions? I think it must be held that she did so. I have felt some difficulty in arriving at this conclusion, because it is plain that evidence of this description requires strong safeguards before it can properly be accepted. But since the deceased might undoubtedly have adopted the words of the Deputy Magistrate by express words, such as "Yes," though even in that case the words in which the statement was actually made would not have been her own, I think she might equally adopt them by signs

also. On these grounds, I would answer the reference in the amended form, which I indicated at the outset, in the affirmative.

Straight, J.—I also am of opinion that the signs made by the deceased Duluri, in response to the questions put to her, may be given in evidence, with the object of supplying material from which the inference may properly be drawn, that she either adopted or negatived the matter of such questions. If the significance of these signs is established satisfactorily to the mind of the Court, then I think that such questions, taken with her assent or dissent to them, clearly proved, constitute a "verbal statement" as to the cause of her death, within the meaning of s. 32 of the Evidence [398] Act. Statements by the witnesses as to their impressions of what those signs meant were, in my judgment, inadmissible, and should be eliminated; but, assuming that the questions put to the deceased were responded to by her in such a manner as to leave no doubt in the mind of the Court as to her meaning, then I consider it is not straining the construction to hold that the circumstances are covered by s. 32. It has been held more than once in England that it is no objection to the admissibility of a dying declaration that it was made "in answer to leading questions or obtained by earnest and pressing solicitations."—(*Russell On Crimes*, vol. 3, p. 269); and I am not disposed, as we have remarked, to draw such a purely technical distinction as to say that while questions adopted or negatived by a mere "Yes" or "No" constitute a "verbal statement," within s. 32, they become inadmissible when assent or dissent is expressed by a nod or a shake of the head. In the view of the matter I have indicated, it is unnecessary to discuss s. 8 of the Evidence Act, and I would accordingly answer the question of the reference as now amended in the affirmative.

Oldfield, J.—I entirely concur in the answer given to the reference by the learned Chief Justice and in his reasons for that answer.

Brodhurst, J.—I also concur.

Mahmood, J.—I have arrived at the same conclusion as my learned brethren; but I am obliged to say that my reasons for doing so are not precisely the same. I should accept the view expressed by the learned Chief Justice, if we had not to interpret the language of the statute, and if I did not feel unable to extend the meaning of the term "verbal" in s. 32 of the Evidence Act beyond that of "a word." I take it to be a fundamental principle of the interpretation of statutes that their language must be understood in its most ordinary and popular acceptation. In such a matter, I would, in general, willingly defer to the opinions of those whose mother-tongue is English, but, sitting here as a Judge, I am bound to form the best opinion that I can, and to act on such opinion, and to me "verbal" cannot mean more than "by means of a word or words." Nodding the head or waving the [399] hand is not a word. I therefore put aside cl. (1) of s. 32, which can only apply to "statements written or verbal."

I proceed to explain my reasons for holding that nevertheless my answer to the present reference should be in the affirmative. In the first place, let me refer to s. 2 of the Evidence Act, which in effect prohibits the employment of any kind of evidence not specifically authorized by the Act itself. This is the opposite of the rule adopted in continental countries, such as France, where everything is admissible as evidence which the law does not expressly exclude. Our Act has followed the English rule, which is thus expressed in s. 5:—"Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant, and of no others." The learned Public Prosecutor no doubt appreciated the importance of this provision, when he

addressed us on what I think he must have regarded as the strongest part of his argument, I mean when he tried to show that the signs used by the deceased were admissible in evidence as part of the *res gestæ*, under the earlier sections of the Act to which he referred. Now s. 8 says:— "Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto." It will be useful to analyse the leading terms employed in this section. In the first place, what is a "fact?" This question is answered by s. 3, which defines "fact" to mean and include "anything, state of things, or relation of things, capable of being perceived by the senses," and "any mental condition of which any person is conscious." This, then, is the only sense in which, in interpreting the statute, I can understand the word "fact." The next leading word in s. 8 is "party." I understand this to include not only the plaintiff and the defendant in a civil suit, but parties in a criminal prosecution, as, for instance, a prisoner charged with [400] murder. Section 8 provides that the term is to include any one against whom an offence is the subject of any proceeding, and the reason why the Legislature said this was probably the fact that by a pure legal technicality the Crown occupies in criminal matters a position analogous to that of a plaintiff in a civil suit.

Let me now refer to *Illustration (f)* of s. 8, which runs thus:—

"The question is, whether A robbed B. The facts that, after B was robbed, C said in A's presence—'the police are coming to look for the man who robbed B,'—and that immediately afterwards A ran away, are relevant."

Now, if I were to hold that the word "conduct," as used in s. 8, meant only conduct *directly* resulting from the circumstances in which the crime was committed and without any intervening cause, I should be holding that this *Illustration* was at variance with the section which it was designed to explain. For although A's conduct is undoubtedly "influenced" by the fact in issue, it is only influenced through the intervention of a third person C. Hence I conclude that "conduct" does not mean only such conduct as is directly and immediately influenced by a fact in issue or relevant fact. The present case is the same in principle as that given in the *Illustration*. The deceased would not have acted as she did if it had not been for the action of those who questioned her. Nor do I see any difference in principle between the act of A in running away when told that the police were coming, and the act of the deceased in moving her hand in answer to the questions. Both equally seem to me to be cases of conduct within the meaning of s. 8.

The Evidence Act was principally the work of Sir JAMES STEPHEN, one of the most eminent of European jurists. It appears to me that in several particulars his method of treating questions of evidence differs from that which is common among English lawyers. Under the English law, a dying declaration, even when consisting of words, would be admissible only as an exception to the general rule which exclude all but direct evidence. The principle of the Evidence Act is different. Section 60 provides that "oral evidence must, in all cases whatever, be direct;" that is to say, the evidence of the senses of the person who is called as a witness. This is, so far, only a repetition of the English Law. But an [401] ordinary English writer on the Law of Evidence would classify ss. 32 and 33 as exceptions or provisos to s. 60. The framers of the Evidence Act,

on the other hand, regarded the facts referred to in those sections as independent *indicia* of truth, and furnishing in themselves direct grounds for legitimate inference.

For the reasons which I have given above, I hold that the signs made by the deceased were the conduct of a "person an offence against whom was the subject of any proceeding," and that they are therefore relevant under s. 8 of the Evidence Act. There remain the question, whether the questions put her were admissible, and whether she can be considered to have adopted the statements which they implied. Now, *Explanation 2* to s. 8 provides that "when the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affect such conduct, is relevant." I confess that I am quite unable to hold that for "when" you must read "before." If you read the section as I do, the law stands thus. The conduct of the person an offence against whom is being investigated is relevant. The question whether it is intelligible or not arises afterwards, and the only way of ascertaining its meaning is to admit what *Explanation 2* says may be admitted, namely, statements made to, or in the presence and hearing of, the person and which affect his conduct. This can only be done by taking the questions word for word, so as to explain the meaning of the conduct which they affected.

Finally, I may add that if s. 8, with the *Explanations* contained in it, were not sufficient to justify the view which I take of the question referred to the Full Bench, I should have relied on the provisions of s. 9, in order to allow an explanation of the meaning of the signs. In conclusion, I feel that, although what I may call the principle of exclusion adopted by the Evidence Act,—*i. e.*, the principle that all evidence should be excluded which the Act does not expressly authorise, is the safest guide in regard to the admissibility of evidence, yet it should not be so applied as to exclude matters which may be essential for the ascertainment of truth. Adopting an expression once used by Mr. Justice STORY, I think that the Law of Evidence would not be worthy of its name if it made possible any such result. My answer to the reference is in the affirmative.

[402] APPELLATE CIVIL.

The 27th February, 1885.

PRESENT :

SIR W. COMER PETHERAM, Kt., CHIEF JUSTICE AND MR. JUSTICE
MAHMOOD.

Ram Prasad Rai and others.....Judgment-debtors

versus

Radha Prasad Singh.....Decree-holder.*

Rules prescribed by Local Government under s. 320 of the Civil Procedure

Code— Notification No. 671 of 1880, dated the 30th August 1880—

*"Ancestral" property—Alluvial Land—"Ancestral" riparian
property—Alluvial land held on same title as riparian land.*

Held that the ownership of alluvial land which had accreted to a riparian village must rest upon the same title as that upon which the original village was held, and that as the riparian village was ancestral the accreted property must be ancestral also.

THE question raised by this appeal was whether certain land belonging to the appellants, which had been attached and proclaimed for sale in execution of a decree, was "ancestral property," within the meaning of the Rules prescribed by the Local Government under s. 320 of the Civil Procedure Code (Notification No. 671 of 1880, dated 30th August 1880). This land, it appeared, was alluvial land which had accreted to a riparian village belonging to the appellants, which admittedly was "ancestral property" as defined in those Rules. The lower Court (District Judge) held that the land in question was not "ancestral property." It observed on this point as follows:—"Now it is not contended that there is anything to show that any or if so what area of such land was even above water prior to 1870. There were formal measurements then, but before such measurements nothing seems to have been on record, and there can be nothing to go upon. If the land was under water (as it may have been) till 1870, it will not come under the Notification. There does not seem to be anything in the old Regulation (worded without any thought of such Notification) which would justify us in treating the Notification as applicable to land rescued in or about 1870 from the river. The debtor contends that the land may have crossed the river from other villages of his,— not perhaps all in the area affected by the Notification. We need not follow out all these suppositions. It is enough that the land is not clearly ancestral."

[403] For the appellants it was contended that the lower Court had improperly held that the alluvial land was not "ancestral property."

The Senior Government Pleader (Lala Juala Prasad), for the Appellants.

Mr. T. Conlan and Lala Lalta Prasad, for the Respondent.

The Court (PETHERAM, C. J., and MAHMOOD, J.) delivered the following judgment:—

Mahmood, J.—The learned Chief Justice has asked me to explain the simple reasons for which we agree in thinking that this appeal should be decreed. The land to which the appeal relates is admitted to be alluvial land,

* First Appeal No. 123 of 1884, from an order of J. L. Denniston, Esq, Offg. District Judge of Ghazipur, dated the 5th July 1884.

to which the present appellants-judgment-debtors acquired a title by owning a riparian village, admitted to be ancestral property. The only question is, whether the ownership of the land so acquired rests upon a title other than that upon which the original village was held. Under such conditions, however, there can be no two titles; and, as the riparian village was ancestral, the other property must be ancestral too. This decision comes within several rulings of the Privy Council, to which I need not more particularly refer.

The appeal must be decreed with costs, and the Judge must deal with the property as ancestral property, with reference to s. 320 of the Civil Procedure Code.

Appeal allowed.

[7 All. 403]

APPELLATE CRIMINAL.

The 27th February 1885.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE STRAIGHT.

Queen-Empress

versus

Syed Husain.

Act XLV of 1860 (Penal Code), ss. 24, 25, 471—Fraudulently using as genuine a forged document—"Dishonestly"—"Fraudulently."

The creditors of a police-constable applied to the District Superintendent of Police that Rs. 2 might be deducted monthly from the debtor's pay until the debt was satisfied. Upon an order being passed directing that the deduction asked for should be made, the debtor produced a receipt purporting to be a receipt for Rs. 18, the whole amount due. It subsequently appeared that the receipt was one for Rs. 8, which the debtor had altered by adding the figure "1," so as to make it appear that the receipt was for Rs. 18.

Held that the real intent in the prisoner's mind being to induce his superior officer to refrain from the illegal act of stopping a portion of his salary, the Court [404] in a criminal case ought not to speculate as to some other intent over and above this that might have presented itself to him, that it did not necessarily follow that he contemplated setting up the altered receipt to defeat his creditor's claim, and that therefore he ought not to have been convicted of an offence under s. 471 of the Penal Code.

THIS was an appeal from an order of Mr. G. E. Knox, Sessions Judge of Agra, dated the 3rd December 1884, convicting the appellant of forgery.

The appellant, a police-constable serving at Muttra, was convicted in respect of a document purporting to be a receipt acknowledging the payment of money. The facts on which the conviction was founded were as follow:—He was indebted to one Debi Lal to the amount of Rs. 18-10-3 for cloth supplied. This cloth was supplied through the agency of one Balmukand. Owing to this fact such payments as the appellant made were made to Kishen Lal, Balmukand Lal's son. Debi Lal and Kishen Lal wrote a letter to the District Superintendent of Police at Muttra, complaining that the appellant owed Debi Lal Rs. 10-10-3, and would not pay him, and asking that Rs. 2 might be deducted monthly from the appellant's pay until the debt was satisfied. On this application the District Superintendent of Police made an order directing that the deduction asked for should be made, forwarding the order to the Inspector of the Muttra City Police, under whom the appellant was immediately

serving. The Inspector showed the order to the appellant, who asserted that he had paid the debt, and in support of this assertion produced a receipt, in Mahajani character, which he gave to the Inspector, who forwarded it to the District Superintendent with a report and a petition from the appellant, in which he stated that he had paid the debt as the receipt showed. With reference to the receipt and the appellant's petition, the District Superintendent made an order directing the Inspector to refer Debi Lal and Kishen Lal to the Civil Courts. The Inspector accordingly sent for these persons, and informed them of the order, and showed them the receipt. On seeing the receipt, Kishen Lal said that it was one for Rs. 8, which had been given by him to the appellant, and that it had been altered, so as to make it appear that it was a receipt for Rs. 18. It appeared that in the receipt the sum acknowledged to have been paid had been stated in words and figures to be Rs. 8. [405] Where the sum was stated in figures, it appeared that the figure "1" had been added to the figure "8."

The appellant's defence was, that he had paid Rs. 18 to Kishen Lal, and had received from him a receipt for that amount, that he had given that receipt to the Inspector and not the receipt which had been forwarded to the District Superintendent, and in respect of which he was charged with forgery, and that the latter receipt had been forwarded, instead of the original, by the police of the Muttra station, who were hostile to him.

In this appeal, Mr. G. T. Spankie (with him Mr. W. M. Colvin) contended for the appellant that the receipt in respect of which he had been convicted was not the receipt which Kishen Lal had given him and which he had given to the Inspector; and that, assuming that this was not so, the appellant had not acted in the matter "dishonestly" or "fraudulently," within the meaning of the Penal Code, inasmuch as his intention, in regard to the receipt, was to induce the District Superintendent to refrain from the illegal act of stopping his pay to satisfy Debi Lal's claim. The following cases were referred to:—*Reg. v. Bhavanushankar*, 11 Bom. H. C. Rep., 3; *Queen v. Lal Gummul*, N.-W. P. H. C. Rep., 1870, p. 11; *Queen v. Jageshur Pershad*, N.-W. P. H. C. Rep., 1874, p. 55; *Empress v. Mazhar Husain*, I. L. R., 5 All., 553.

The Junior Government Pleader (Bahu Dwarka Nath Banarji), for the Crown.

The Court (PETHERAM, C.J., and STRAIGHT, J.) delivered the following judgment:—

Straight, J.—We think it must be taken as satisfactorily established that the receipt forwarded by the appellant to his official superiors, and now upon the record, was the receipt for Rs. 8 originally given him by Kishen Lal, and that it had been altered in the manner sworn to by that person. There is, however, no proper evidence against the appellant of forgery, and the charge made against him would more properly have been framed under s. 471 of the Penal Code. It is in this aspect that we think the case against him should be regarded, and the question for determination in his appeal therefore is, did the appellant use the receipt as a [406] genuine document, knowing or having reason to believe it had been altered, with intent to defraud, or to cause wrongful gain to himself, or wrongful loss to Debi Lal? That is to say, is the intent required by the law made out in fact? It must be observed that the alteration in the receipt, which is in Mahajani character, is made very clumsily by the interpolation of a Hindi figure, and it could hardly be expected to escape any but the most cursory inspection. It seems scarcely credible the appellant could ever have contemplated that it would pass muster in any Court, or prove of any practical use except to save his pay from being cut. It is obvious that

this was the immediate object and purpose he had in view in using it, and that the actual intent he had in his mind at the time was to deceive the police authorities and lead them to refuse to accede to the petition put in by Debi Lal. But it must be borne in mind that they had no legal right or authority to stop any portion of the appellant's salary except upon a proper attachment by a Civil Court; and therefore it comes to this, that the appellant used the altered receipt in order to induce his superior officer to refrain from doing an illegal act. This, to our minds, was the real intent in the mind of the prisoner, and we do not think that in a criminal case we ought to speculate as to some other intent over and above this that might have presented itself to him. For it does not, in our opinion, at all necessarily follow that, because the appellant objected to have his pay put under monthly stoppages to satisfy his creditor's debt, that he therefore necessarily contemplated setting up the altered receipt to defeat his creditor's claim. In this view of the matter we think there was a doubt in the case to which the appellant was entitled, and under these circumstances his appeal must be allowed, and the conviction and sentence being set aside, he will stand acquitted, with the result that he may be discharged.

[407] CIVIL REVISIONAL.

The 15th December, 1884.

PRESENT:

MR. JUSTICE BRODHURST AND MR. JUSTICE MAHMOOD.

Sundar Das.....Purchaser

versus

Mansa Ram and others.....Judgment-debtors *

Execution of decree—Civil Procedure Code, s. 320—Transfer of decree to Collector for execution—Jurisdiction—Rules made by Local Government—Civil Procedure Code, s. 622—High Court's powers of revision.

A decree passed by a Subordinate Judge upon a bond, in which certain immoveable property was mortgaged, was, in accordance with the rules made by the Local Government under s. 320 of the Civil Procedure Code, transferred to the Collector for execution. A sale in execution took place, and the Collector gave the purchaser a certificate of the sale. Upon this certificate the purchaser applied to the Subordinate Judge to give him possession of a larger amount of property than that specified in the certificate, and, upon the refusal of the Court to do so, applied to the Collector to amend the certificate. The amendment having been made as desired, the purchaser again applied to the Subordinate Judge for possession of the amount claimed by him, and the Subordinate Judge again rejected the application, holding that only the lesser amount had been sold in execution of the decree.

Held that, with reference to the second paragraph of Rule 19 of the Rules framed by the Local Government under s. 320 of the Civil Procedure Code regarding the transmission,

* Application No. 111 of 1884, for revision under s. 622 of the Civil Procedure Code of an order of Babu Kashi Nath Biswas, Subordinate Judge of Benares, dated the 1st March 1884.

execution, and re-transmission of decrees, and published in the *N.-W. P. and Oudh Gazette* of the 4th September 1880, the matter of delivery to the purchaser was within the jurisdiction of the Subordinate Judge, notwithstanding the terms of s. 320, and notwithstanding the ruling of the Full Bench in *Madho Prasad v. Hansa Kuar*, I. L. R., 5 All., 314.

Held also that, inasmuch as the Subordinate Judge had jurisdiction to decide the question, and inasmuch as, even if his decision were wrong, the purchaser had a remedy by bringing a regular suit, the matter did not fall within s. 622 of the Civil Procedure Code, so as to call for the interference of the High Court in revision. *Shivanathaji v. Jona Kashinath*, I. L. R., 7 Bom., 341; and *Amir Hasan Khan v. Sheo Baksh Singh*, I. L. R., 11 Cal., 6, referred to.

THIS was an application for revision under s. 622 of the Civil Procedure Code of an order passed by the Subordinate Judge of Benares, and dated the 1st March 1884, under the following circumstances:—It appeared that a mauza called Sabahipur, together with six smaller villages, formed a single taluqua which was called by the name of the principal village Sabahipur, and the whole taluqua was assessed with the revenue payable to Government, and [408] amounting to Rs. 203. At the settlement, all papers connected with the settlement record were separately prepared, and the papers of each village formed a separate book. All the villages belonged to the same persons, who were judgment-debtors under a decree passed by the Subordinate Judge upon a bond executed by them in favour of one Murari Das, in which Mauza Sabahipur was mortgaged as bearing the revenue payable in respect of the whole taluqua. In the plaint in that case, the mortgage was sought to be enforced against Mauza Sabahipur only, and the decree apparently did not affect any other village. An application for execution of the decree was made to the Subordinate Judge by the decree-holder, in which no reference was made to any of the other six villages, and only Sabahipur was attached in execution. The decree was transferred by the Subordinate Judge, in accordance with the rules made by the Local Government under s. 320 of the Civil Procedure Code, to the Collector for execution. A sale then took place, and the Collector gave the purchaser a certificate of sale in which the sale of Mauza Sabahipur only was certified. Upon this certificate the purchaser applied to the Subordinate Judge to give him possession of the entire taluqua, and, upon the refusal of the Court to do so, applied to the Collector to amend the certificate of sale so as to include the other six villages. The Collector having amended it as desired, the decree-holder again applied to the Subordinate Judge for possession of the taluqua, and the Subordinate Judge again rejected the application, holding that only Mauza Sabahipur had been sold in execution of the decree.

The purchaser now applied to the High Court to revise the Subordinate Judge's order on the following grounds:—

(i) That the Subordinate Judge had no jurisdiction to pass any order on the case, it having been transferred to the Collector.

(ii) That in disposing of the application of the purchaser for possession of the property, the lower Court ought not to have gone behind the sale-certificate to determine what property had actually been sold.

(iii) That all proceedings connected with the sale showed that the whole taluqua had been sold.

[409] Mr. T. Conlan, Mr. N. L. Patillogus, and Pandit Ajudhia Nath for the Petitioner.

Lala Lalita Prasad and Munshi Kashi Prasad, for the Judgment-debtors.

The pleaders for the judgment-debtors were not called on.

Mahmood, J.—Mr. Conlan has argued that we are bound by the ruling of this Court in *Madho Prasad v. Hansa Kuar*, I. L. R., 5 All., 314, to revise

the order of the Subordinate Judge in this case, on the ground that he had no jurisdiction to alter the sale-certificate, or to dispute the entries contained therein as to the amount of property sold. We have considered this argument, but we are of opinion that, with reference to the second paragraph of Rule 19 of the Rules framed by the Local Government under s. 320 of the Civil Procedure Code, regarding the transmission, execution, and re-transmission of decrees, and published in the *N.-W.P. and Oudh Gazette* of the 4th September 1880, the matter of delivery to the purchaser was within the jurisdiction of the Subordinate Judge, notwithstanding the terms of s. 320, and notwithstanding the Full Bench ruling to which Mr. Conlan has referred. It may be (though as to this I express no opinion) that the Subordinate Judge's order of the 1st March 1884, was erroneous upon the merits. But we hold that he had jurisdiction to pass the order, and even if his order was erroneous, the matter does not fall within s. 622 of the Civil Procedure Code, so as to call for the interference of this Court in revision. Any other view would lead to the conclusion that s. 622 virtually gives a right of appeal in cases where the Legislature distinctly intended the decision to be final. This I regard as erroneous. I agree in the principles laid down by WEST, J., in the Bombay Full Bench case of *Shivanathaji v. Joga Kashinath*, I. L. R., 7 Bom., 341, in which the other Judges of the Bombay High Court concurred, and in particular with the following observations reported at p. 372 :—"Where a decree or order of a subordinate Court is declared by the law to be, for its own purposes, final or conclusive, though in its nature provisional, as subject to displacement by the decree in another more formal suit, the Court will have regard to the intention of the Legislature that promptness [410] and certainty should, in such cases, be in some measure accepted, instead of juridical perfection. It will rectify the proceedings of the inferior Court where the extrinsic conditions of its legal activity have plainly been infringed; but where the alleged or apparent error consists in a misappreciation of evidence, or misconstruction of the law, intrinsic to the injury and decision, it will respect the intended finality, and will intervene peremptorily only when it is manifest that, by the ordinary and prescribed method, an adequate remedy, or the intended remedy cannot be had." In the present case, it is not contended that if the petitioner has really been aggrieved, he has no remedy by bringing a regular suit.

A similar view of s. 622 appears to have been taken by their Lordships of the Privy Council in the recent case of *Amir Hasan Khan v. Sheo Baksh Singh*, I. L. R., 11 Cal., 6. That was an appeal from a decision of the Judicial Commissioner of Oudh reversing the concurrent judgments of two lower Courts. By s. 21 of Act XIII of 1879 (the Oudh Civil Courts Act), such reversal was only possible by exercise of the powers conferred by s. 622 of the Civil Procedure Code. In allowing the appeal, their Lordships made the following observations :—"The question then is, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity? It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case, and, even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity."

This appears to me to settle the question. I have already said that the Subordinate Judge had jurisdiction to decide the present matter; and that, although he may have decided wrongly, the petitioner would not be deprived of his remedy by a regular suit. I am therefore of opinion that no sufficient

ground for interference in revision has been established, and that consequently the application should be dismissed with costs.

Brodhurst, J., concurred.

Application dismissed.

NOTES.

[See also (1887) 10 All., 119; (1883) 7 Bom., 341.]

[411] • *The 14th January, 1885.*

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Suita and others.....Plaintiffs

• *versus*

Ganga and others.....Defendants.*

*Civil Procedure Code, ss. 206, 622—Order amending decree—
High Court's powers of revision.*

A District Judge, by an order passed under s. 206 of the Civil Procedure Code, altered a decree passed by his predecessor in the terms, "I dismiss the appeal," to read "I accept the appeal," on the ground that his predecessor had obviously meant to say that he accepted the appeal, and that the decree as it stood failed to give effect to the judgment.

Per OLDFIELD, J.—That the order passed by the Judge under s. 206 could not be made the subject of revision by the High Court under s. 622 of the Civil Procedure Code, because there was an appeal from the amended decree, which became the decree in the suit, and superseded the original decree.

Per MAHMOOD, J.—That an order passed under s. 206 of the Civil Procedure Code constituted an adjudication separate from that concluded by a decree under the Code passed after the parties had been heard and evidence taken, and that the order in the present case was therefore a separate adjudication, and was not appealable under s. 588. Also that, in saying that by "dismissed," his predecessor meant "decreed," the Judge had altered the decree in a manner not warranted by the terms of s. 206, that he had therefore exercised his jurisdiction "illegally and with material irregularity," within the meaning of s. 622 of the Code, and that the Court was consequently competent to revise his order.

Raghunath Das v. Raj Kumar (ante, p. 276) referred to.

THIS was an application by the plaintiffs in a suit for revision, under s. 622 of the Civil Procedure Code, of an order amending the appellate decree in the suit passed under s. 206 by the District Judge of Saharanpur. The terms of that order were as follow :—

"This application is made with regard to an order of my learned predecessor, Mr. Keene, on the 4th May 1882, in appeal. The Munsif had given the plaintiffs a decree for a half share in the *chaupal* of a village. On appeal, the Judge held that the *chaupal* was common to the two *pattis*, and its court-yard with it, and that it must be held to be exempt from partition. The Munsif's order was entirely cancelled. But by an obvious error the Judge wrote, 'I therefore dismiss the appeal with costs,' when clearly what he meant to say was

* Application No. 201 of 1884, for revision under s. 622 of the Civil Procedure Code of an order of C. W. P. Watts, Esq., District Judge of Saharanpur, dated the 10th June 1884.

that he accepted the appeal, and cancelled the order of the lower Court with costs.....Section 206 seems especially applicable to a case of this kind, when the decree, [412] by an oversight, is out of all harmony with the judgment. I accept this application, and order that the last clause of the appellate order do run thus—'I therefore accept the appeal, and cancel the Munsif's order with costs,' instead of—'I therefore dismiss this appeal with costs.'"

On the present application it was contended on behalf of the petitioner that s. 206 of the Civil Procedure Code did not authorize the alteration of the decree of the 4th May 1882, in the manner shown.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the Applicants.

Babu *Ram Das Chakrabati* and Munshi *Ram Prasad*, for the Defendants.

Oldfield, J.—In my opinion, there is no power to entertain this reference under s. 622 for the reasons I have given in the similar case of *Raghunath Das v. Raj Kumar*, ante, p. 276. There is, in my opinion, an appeal from the amended decree, and consequently s. 622 has no application. The amended decree becomes the decree in the suit and supersedes the original decree. If, instead of applying under s. 622, the party had instituted an appeal from the decree as amended, I cannot think he could be met by the plea that there was no appeal, and if this is so, his proper cause is by way of appeal. Section 540 allows an appeal from every decree or from any part of them, and the decree as amended becomes, in my opinion, the decree in the suit. It is not the decree as it stood before amendment that can be considered the decree in the suit, but the decree after amendment, and there cannot be two decrees at one and the same time in the same suit.

I would, on the above grounds, dismiss this application. I shall make no order as to costs.

Mahmood, J.—I regret that, for the second time on a question of this nature, my brother **OLDFIELD** and I are unable to arrive at the same conclusion. I need not say much on the subject, because in the recent case of *Raghunath Das v. Raj Kumar* (ante, p. 276) I explained my reasons for thinking that an order passed under s. 206 of the Civil Procedure Code constituted an adjudication separate [413] from that concluded by a decree under the Code passed after the parties have been heard and evidence taken. The order in the present case then is a separate adjudication, and is not appealable under s. 588. So that the only question which we have to consider is, whether the matter is one of which we can take cognizance in revision under s. 622. To decide this the following facts must be borne in mind :—

The plaintiffs' claim for a share in certain property was decreed by the Munsif of Deoband on the 31st October 1881. The defendants appealed to Mr. H. G. Keene, at that time District Judge of Saharanpur, who, on the 4th May 1882, passed a decree, in which he clearly said that he dismissed the appeal with costs. No appeal from this decree was filed, though I should say that a second appeal would lie, under s. 584 of the Code. But on the 10th June 1884, the defendants filed an application, purporting to be one under s. 206 of the Civil Procedure Code, to Mr. Watts, who had succeeded Mr. Keene as Judge of Saharanpur, praying him to amend the decree by substituting the word "decreed" for "dismissed." Of course there could be no question here of an "arithmetical" error in the decree, so that it was probably said that there was a "clerical" error. Mr. Watts was asked to interfere under the last paragraph of s. 206 of the Civil Procedure Code.

Now in my judgment in *Raghunath Das v. Raj Kumar*, (ante, p. 276) to which I have already referred, I anticipated the very difficulty which arises

here if we cannot interfere in revision with the order passed by Mr. Watts. I observed that a "Court which goes beyond what is warranted by the last paragraph of s. 206 may practically be altering the nature of the decree. If such a course were allowed, any Judge, who (as sometimes happens) took an erroneous view of his own judgment, might say, "I meant so and so by my judgment on this point and on that," and thus might make alterations going far beyond merely clerical or arithmetical corrections." That anticipation has actually been realized in the present case. Not only have we here the case of a Judge who undertakes to say what his predecessor meant, but he goes so far as to say that by "dismissed" his predecessor meant "decreed!"

[414] I do not consider that Mr. Watts has correctly interpreted the language used by Mr. Keene, or that the decree of the latter failed to give effect to his judgment. I am therefore of opinion that Mr. Watts has exercised his jurisdiction "illegally and with material irregularity," within the meaning of s. 622 of the Civil Procedure Code, and that the Court is therefore competent to revise his order. I would allow the application, and, without interfering with the decree of the 4th May 1882, set aside the order of the 10th June 1884.

NOTES.

[The question in this case was referred to a Full Bench as the Judges differed in their opinion and the Full Bench decision is reported in (1885) 7 All., 375. See the notes to that case.]

[7 All. 414]

FULL BENCH.

The 17th January, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE OLDFIELD,
MR. JUSTICE BRODHURST, MR. JUSTICE MAHMOOD, AND MR. JUSTICE
DUTHOIT.

Queen-Empress

versus

Pershad and others.

Act XLV of 1860 (Penal Code). s. 71—Criminal Procedure Code, ss. 39, 235—Rioting, grievous hurt, and hurt—Punishment for more than one of several offences—Powers of Magistrate of first class conferred on Magistrate of second class during trial—Power to sentence as first class Magistrate—Charge, alteration of.

On the 8th August 1884, a Magistrate of the second class began an inquiry in a case in which several persons were accused of rioting and of voluntarily causing grievous hurt. On the 6th September, the powers of a Magistrate of the first class were conferred on the Magistrate by an order of Government, which was communicated to him on the 8th September. On the 9th September, the case for the prosecution having closed, the Magistrate framed charges against each of the accused under ss. 323 and 325 of the Penal Code, recorded the statements of the accused and the evidence for the defence, and, on the 10th September, convicted the accused of all the charges, passing upon each of them, in respect of each charge

sentences which he could pass as a Magistrate of the first class, but could not have passed as a Magistrate of the second class. On appeal, the Sessions Judge, on the ground that the prisoners had committed the offence described in s. 148 of the Penal Code, held that the sentences passed by the Magistrate were illegal, as being inconsistent with the provisions of s. 71, paragraphs 2 and 4; and he accordingly reduced the sentences to imprisonment which the Magistrate had passed to the maximum of imprisonment which the Magistrate could have inflicted under s. 148.

Held, by the Full Bench (PETHERAM, C.J., and BRODHURST, J., dissenting) that the sentences passed by the Magistrate were legal.

Per OLDFIELD, MAHMOOD, and DUTHOIT, JJ., that, with reference to the terms of s. 39 of the Criminal Procedure Code, a Magistrate of the second class who has begun a trial as such and continued it in the same capacity up to the passing of sentence, and who, prior to passing sentence, has been invested with the powers of a Magistrate of the first class, is competent to pass sentence in the case as a Magistrate of the first class.

[415] *Per* OLDFIELD and DUTHOIT, JJ., that the provisions of s. 71 of the Penal Code had no application to the case, inasmuch as the offences of causing grievous hurt and hurt formed no part of the offence of rioting.

Per PETHERAM, C.J., that a case must be taken to be tried upon the day the trial commences; that, for all the purposes of the trial, the Magistrate in this case retained the status of a Magistrate of the second class; and that he was therefore not competent to pass sentence as a Magistrate of the first class.

Also *per* PETHERAM, C.J., in this case, had no power to alter the charge or to frame a new charge in any way.

Per BRODHURST, J., that the sentences passed by the Magistrate were, as a whole, illegal; that, if he had convicted the accused under s. 148 of the Penal Code, his order would, under the circumstances, have been legal; that a Court of Appeal is not competent to alter the finding of a Magistrate so as to convict an accused person of an offence which the Court of which the order is in appeal was not competent to try; and that a member of an unlawful assembly, some members of which have caused grievous hurt, can be legally punished for the offence of rioting as well as for the offence of causing grievous hurt. *Empress v. Dungan Singh* (*Ante*, p. 29) referred to.

THIS was a case which was reported to the High Court for orders by Mr. C. J. Daniell, Sessions Judge of Farukhabad. It appeared that on the 8th August 1884, Mr. A. L. Saunders, Magistrate of the second class, commenced the inquiry in a case in which Pershad, Karan, Dharam Pal, and four other persons were accused of rioting and voluntarily causing grievous hurt. Of the accused, only the persons whose names are mentioned were present before the Magistrate, the others not having been arrested. On the 8th September 1884, the Government Order, dated the 6th September 1884, conferring on Mr. Saunders the powers of a Magistrate of the first class, was communicated to him. On the 9th September 1884, the Magistrate, the case for the prosecution being concluded, framed two charges against Pershad, Karan, and Dharam Pal, jointly, under s. 325 of the Penal Code, the first being a charge of voluntarily causing grievous hurt to one Kundan, and the second, a similar charge in respect to one Chittar, the time and place in both charges being the same. He also framed a third charge against them, under s. 323 of the Penal Code, of having, at the same time and place, voluntarily caused hurt to four persons named in the charge. On the 10th September 1884, the Magistrate convicted the three accused, and in the exercise of the powers of a Magistrate of the first class, sentenced them as follows:—For voluntarily causing [416] grievous hurt to Kundan, to two years' rigorous imprisonment each, and a fine of Rs. 20, or, in default, to two months' further rigorous imprisonment: for voluntarily causing grievous hurt to Chittar, one year's rigorous imprisonment each, and a fine of Rs. 10, or, in default, to one month's further rigorous imprisonment:

for voluntarily causing hurt to the persons named in the third charge, three months' rigorous imprisonment each, and a fine of Rs. 5, or, in default, to further rigorous imprisonment for fifteen days, in respect of each of the four persons injured. The total sentence passed on each accused was thus four years' rigorous imprisonment and Rs. 50 fine, or, in default, five months' further rigorous imprisonment. The Magistrate further directed, under s. 106 of the Criminal Procedure Code, that each accused should give certain security to keep the peace for two years.

The convicted persons appealed to the Sessions Judge, who reported the case to the High Court, for the reasons which appear in his judgment, which was in these terms:—

"I think the Subordinate Magistrate's arguments are ingenious, under which he has sentenced each of the appellants to more than three years' imprisonment and fine, but that the decision is not consistent with the provisions of s. 71, paras. 2 and 4.

"The offenders were part of a gang of more than five men, who committed the offence described in s. 148 of the Indian Penal Code, and the beating and injuries which they inflicted on Kundan and Hulas were the natural result of the prosecution of their common and unlawful object, that is, the forcible rescue of their cattle from persons who were lawfully driving them to the cattle pound. It is not denied by the vakil of the accused persons that they committed rioting armed with lethal weapons (s. 148) and grievous and simple hurt (ss. 325, 323); and that being the case, the 2nd and 4th paras. of s. 71 of the Indian Penal Code seem to me particularly to apply. This seems to me to be the view taken by STRAIGHT, J., in *Empress v. Ram Partab*, I.L.R., 6 All., 121, in a similar case.

"The Subordinate Magistrate's (1st class) powers are not sufficient for the proper punishment of the appellants' offences, and he should have committed the case to the Sessions. As the case stands, [417] neither of the three offences above described as committed by appellants being exclusively triable by the Court of Session, I cannot order their commitment, and I must reduce the sentences to the limit laid down in the last para. of s. 71, Indian Penal Code, that is, to two years' rigorous imprisonment and a fine, which in his decision the Subordinate Magistrate has fixed at Rs. 50, or an alternative (rigorous) imprisonment for five months more, and I shall refer the case to the High Court with a view to this sentence being enhanced."

The case came for disposal before MAHMOOD and DUTHOIT, JJ., who referred the following questions to the Full Bench:—

"(1) Were the sentences passed by the Magistrate legal or illegal?

"(2) If Mr. Saunders had convicted the accused persons under s. 148 of the Indian Penal Code, would his order have been legal?

"(3) Is a Court of Appeal competent to alter the finding of a Magistrate, so as to convict an accused person of an offence which the Court of which the order is an appeal was not competent to try?

"(4) May, or may not, a member of an unlawful assembly, some members of which have caused grievous hurt, be punished for the offence of rioting, as well as for causing grievous hurt?"

The *Public Prosecutor* (Mr. C. H. Hill), for the Crown.

The following judgments were delivered by the Full Bench:—

Duthoit, J.—The first of the questions referred to the Full Bench is, whether the sentences passed by the Magistrate were legal or illegal?

The learned Sessions Judge has held them to have been illegal, as being inconsistent "with the provisions of s. 71, paras. 2 and 4."

But the provisions of s. 71 of the Indian Penal Code do not fit the facts found by the Magistrate. *Illustration (b)* to that section runs thus:—"But if, while *A* is beating *Z*, *Y* interferes, and *A* intentionally strikes *Y*, here, as the blow given to *Y* is no part of the act whereby *A* voluntarily causes hurt to *Z*, *A* is liable to one punishment for voluntarily causing hurt to *Z*, and to another for the blow given to *Y*."

[418] And this is precisely the state of the facts found by the Magistrate in this case. It has also been suggested that as, when the trial commenced, the Magistrate, Mr. Saunders, had the powers of a second class Magistrate only, he had not the power to pass sentences of one year's imprisonment. I do not think that this fact makes the sentences passed by him illegal. Mr. Saunders was at the beginning of the trial only a Magistrate of the second class. Such a Magistrate is empowered by law to try charges under ss. 323 and 325 of the Indian Penal Code, but he cannot pass a sentence of imprisonment for a term exceeding six months. When, however, Mr. Saunders convicted the accused persons, he had the powers of a Magistrate of the first class. Section 39 of the Criminal Procedure Code provides that an order conferring powers under the Code shall take effect from the date on which it is communicated to the person so empowered. The District Magistrate has reported that the powers of a Magistrate of the first class, which were conferred on Mr. Saunders by orders of Government dated the 6th September 1884, were communicated to Mr. Saunders on the 8th idem. The sentences were inflicted on the 10th September 1884, and were within the competence of a Magistrate of the first class.

The question as to cumulative sentences has been disposed of by the ruling of the Full Bench of this Court in *Daulatia's Case*, I. L. R., 3 All., 305.

My answer to the first question put to us is, that the sentences were legal. And this being so, it is unnecessary for me to answer any of the other questions put to the Full Bench.

Mahmood, J.—I have arrived at the same conclusion. My reasons are concerned with ss. 39 and 349 of the Criminal Procedure Code. I understand the first question referred to us to be limited to the point whether a Magistrate of the second class, who begins a trial in that capacity, and continues it in the same capacity up to the passing of sentence, and who, previously to passing of sentence, has been empowered as a Magistrate of the first class, can inflict a severer sentence than he could have inflicted as a Magistrate of the second class. My opinion on this point is, [419] that he can. It seems to me that, in dealing with the point, the distinction between the competency of a Magistrate as regards his powers to try and his powers to pass sentences must be borne in mind. Section 39 of the Criminal Procedure Code says that every order conferring powers under the Code shall take effect from the date the order is communicated to the person so empowered. The order conferring on Mr. Saunders the powers of a Magistrate of the first class reached him on the 8th September. The sentence which he passed was within those powers. There is no doubt that he was competent to try the case. All that remained for him to do in the case when he was empowered as a Magistrate of the first class, was to pass sentence. Section 349 of the Code says that in a case of this kind, whenever a Magistrate of the second class, having jurisdiction, is of opinion that he cannot pass a sufficiently severe sentence, he may submit his proceedings to the District Magistrate. The analogy offered by this section shows the distinction between competency to try a case and competency to pass sentence.

Supposing Mr. Saunders had not been invested with the powers of a Magistrate of the first class, he could have submitted the case under s. 349. But having those powers, it seems to me that, if he had not exercised them and had submitted the case under that section, he would have acted erroneously. The District Magistrate might have properly said to him, "you are a Magistrate of the first class, this section is intended for Magistrates of the second class."

Under this view of the case and of the distinction between competency to try a case and competency to pass sentence, I hold that Mr. Saunders was competent to pass the sentences he did. My answer to the first question is, therefore, in the affirmative, and that being so, I need not answer the remaining questions, which do not seem to me to be necessitated by the exigencies of the case.

Brodhurst, J.—The Assistant Magistrate, Mr. Saunders, at the time that he heard the evidence for the prosecution in this case, on the 8th and 13th August 1884, was a Magistrate of the second class. He became a Magistrate of the first class on the 8th September 1884; on the 9th *idem* he framed the charges, [420] recorded the statements of the accused and the evidence for the defence, and, on the following day, the 10th September, he decided the case, and convicted and sentenced the accused under ss. 323 and 325 of the Indian Penal Code.

With reference to the evidence on the record the accused should, I consider, have been tried for the offences punishable under ss. 148, 323 and 325 of the Indian Penal Code; and the Assistant Magistrate, when drawing up the charges on the 9th September, should, I think, with reference to the provisions of s. 254 of the Criminal Procedure Code, have done so under each of the three last mentioned sections of the Penal Code. He should then, under s. 255 of the Criminal Procedure Code, have read and explained the charges to the accused, and should have asked them whether they were guilty or had any defence to make. If they did not plead guilty, but claimed to be tried, he should, under s. 256, have called upon each of them to enter upon his defence, and to produce his evidence, and he should at any time whilst they were making their defences have allowed them "to recall and cross-examine any witness for the prosecution present in the Court or its precincts."

As it is, the convictions generally, under ss. 323 and 325 of the Penal Code, are, in the absence of charges under ss. 148 and 149 of the Code, unsupported by the evidence, and cannot be sustained with reference to the provisions of ss. 109 and 114 of the Penal Code; and as very serious offences have been committed, the accused should, I think, be re-tried under ss. 148 and 149, and ss. 323 and 325 of the Indian Penal Code.

My answer to the four questions referred are as follows:—

1. The sentences passed by the Magistrate are, as a whole, illegal.
2. If Mr. Saunders had convicted the accused persons under s. 148 of the Indian Penal Code, his order would, under the circumstances above stated, have been legal.
3. A Court of appeal is not competent to alter the finding of a Magistrate, so as to convict an accused person of an offence which the Court of which the order is in appeal was not competent to try.

[421] 4. For reasons which I have stated at length in my judgment in *Empress v. Dungar Singh* (Ante, p. 29) a member of an unlawful assembly, some members of which have caused grievous hurt, can, in my opinion, be legally punished for the offence of rioting as well as for the offence of causing grievous hurt.

Oldfield, J.—The accused Pershad, Katan, and Dharam Pal, were sent up by the Police to the Court of Mr. Saunders, a Magistrate of the second class, for trial on charges of rioting (s. 147) and voluntarily causing grievous hurt (s. 325).

Mr. Saunders commenced the trial, as a Magistrate of the second class, on the 13th August. He was appointed by Government to be a Magistrate of the first class by order dated the 6th September 1884, which was communicated to him on the 8th of that month, and subsequently he framed charges against the accused—(1) of 'voluntarily causing grievous hurt (s. 325) to Kundan; (2) a like charge in respect of one Chittar; and he further charged the accused with voluntarily causing hurt (s. 323) to—(1) Hulas, (2) to Kesri, (3) to Dharamjit, and (4) to Akbar; and, after taking their defence, he convicted them on all the charges, and on the first charge sentenced each to two years' rigorous imprisonment, and a fine of Rs. 20, or two months' rigorous imprisonment; on the second charge to one year's rigorous imprisonment, and a fine of Rs. 10, or one month; and on the further charges, to three months' rigorous imprisonment, and a fine of Rs. 5, or fifteen days' rigorous imprisonment in respect of each offence charged, making the total sentence amount to four years' rigorous imprisonment, and a fine of Rs. 50, or five months' rigorous imprisonment.

He further directed them to execute a bond for keeping the peace, with sureties, under s. 106 of the Criminal Procedure Code.

We are asked whether the sentences passed are legal or illegal. In my opinion they are legal.

Mr. Saunders had jurisdiction to try the accused as a Magistrate of the second class, but the sentences of imprisonment which he could pass as a Magistrate of the second class were limited to [422] imprisonment for a term of six months, and he had no power to take security for keeping the peace under s. 106.

He could not, therefore, as a second class Magistrate, pass the sentences or make the order which he did, but on the 6th September, the Government appointed him to be a first class Magistrate, under the authority given by s. 13, Criminal Procedure Code, and the order was communicated to him on the 8th September, and in my opinion his appointment took effect from that date, and he was in a position to deal with the case as a Magistrate of the first class, and to exercise the powers which the law confers on a Magistrate of the first class, and to pass the sentences which he passed and to make an order under s. 106, all which were within his competency as a Magistrate of the first class.

I do not think that his power to deal with the case as a Magistrate of the first class is at all affected by the fact that the case came before him in the first instance in his capacity as a Magistrate of the second class.

There is here no question of jurisdiction to try the case, as Mr. Saunders could try the charges either as a Magistrate of the second or first class. The only question is one as to the sentence or order which could be passed upon convictions, the power of a second class Magistrate being more limited; but when his powers were extended by his appointment to be those of a Magistrate of the first class, he was in a position to exercise them at once; for the order of Government took effect under s. 39 of the Code from the date on which it was communicated to him.

If it were otherwise, it is difficult to see how he was to deal with the case, when he considered the punishment which a Magistrate of the second class could inflict was not sufficient.

Section 349 provides that in such a case a second or third class Magistrate shall submit the case to the Magistrate of the District, or Sub-Divisional Magistrate to whom he is subordinate, for sentence; but it is only a second or third class Magistrate who can make such a reference; and he had ceased to be a Magistrate of the second class at the time when such a reference could be made under that section. He would have been in the singular [423] position of a *de facto* Magistrate of the first class taking proceedings as a Magistrate of the second class, which, as a fact, he was not, and referring the case to another Magistrate, to pass a sentence, which, as a first class Magistrate, it was in his power to pass. I cannot think the Code contemplates such a state of things.

Nor do I consider that the separate convictions are illegal. The Judge is wrong in holding that s. 71 of the Penal Code has any application. There is here no case of an offence made up of parts, any of which parts is itself an offence. The offence of voluntarily causing grievous hurt and hurt form no part of the offence of rioting, which is a separate offence; and in the same way each assault forms a separate offence, and could be dealt with separately. The *Illustrations* to s. 235, Criminal Procedure Code, especially *Illustration (g)*, sufficiently show this to be so.

I would answer the first question by saying that the Magistrate's sentences are legal, and in this view the grounds on which the Judge interfered with the convictions and sentences, and on which he made a reference to this Court, cannot be supported, and it is unnecessary to consider the other questions put to us.

It will be for the Divisional Bench to dispose of the reference from the Judge, and make such orders as the case requires.

Petheram, C.J.—I am of opinion that the sentences are illegal. The prisoners were charged before Mr. Saunders, Magistrate of the second class. He had power to try them, but he had not power, as a Magistrate of the second class, to inflict the sentences which he did. For all purposes of the trial, Mr. Saunders' *status* could not be altered. As I understand the law, a case is supposed to be tried on the day the trial commences, and after that day the case proceeds by adjournment. The only date to be looked at as the date of trial is the date of the first day of trial. Therefore, for all intents and purposes, the Mr. Saunders who finished the trial is the same Mr. Saunders who began it. The case is the same case, the day, the same day, the trial, the same trial, all through. If the books are examined, it will be found that this point has been repeatedly decided. My answer therefore to the first question is in the affirmative.

[424] As to the other questions, with the exception of the third, they do not arise. As to the power of altering the charge, I am of opinion that the Judge had no power to alter the charge, or frame a new charge, in any way.

NOTES.

[See the following cases on s. 71, Indian Penal Code :—(1885) 7 All., 757 F. B. ; (1887) 9 All., 645 : (1889) 16 Cal., 442 F.B., and (1891) 19 Cal., 105 where the point has been elaborately discussed.

This was referred to under analogous circumstances in (1886) 8 All., 576.]

APPELLATE CIVIL.

The 2nd February, 1885.

PRESENT :

MR. JUSTICE OLDFIELD, AND MR. JUSTICE MAHMOOD.

Fateh Muhammad.....Judgment-debtor

versus

Gopal Das.....Decree-holder.*

*Execution of decree—Contract superseding decree—Adjustment of decree—
Certification—Civil Procedure Code, s. 258—Limitation—Acknowledgment
in writing—Act XV of 1877 (Limitation), s. 19.*

In the course of proceedings in execution of a decree dated the 14th June 1878, the parties, on the 11th January 1881, entered into an agreement, which was registered, and filed in the Court executing the decree. The deed recited that the decree was under execution, and that a mortgage-bond dated the 1st December 1873, in favour of the judgment-debtor by a third party, had been attached and advertized for sale, and that the decree-holder and judgment-debtor had arranged the following method of satisfying the decree: that the judgment-debtor should make over the said bond to the decree-holder, in order that he might bring a suit thereon at his own expense against the obligor, and realize the amount secured by the bond, and out of the amount realized satisfy the decree under execution, with costs and future interest, together with all costs of the suit to be brought against the obligor, and together with a sum due by the judgment-debtor to the decree-holder under a note-of-hand for Rs. 250 with interest; and other details which need not be stated. On the same day that this deed was executed, the decree-holder filed a petition in the Court, to the effect that under the agreement an arrangement had been made for payment of the judgment-debt, by which the judgment-debtor made over to him the bond advertized for sale, in order that the petitioner should file a suit under it at his own cost against the obligor, and realize the debt due under the decree in execution, with interest and costs; and he prayed that the sale to be held that day might be postponed, and the application for execution struck off for the present, and the previous attachment maintained; and stating that, after realization of the amount entered in the bond advertized for sale, an application for execution would be duly filed. On this the order was that the execution case be struck off the file, and the attachment maintained. On the 24th December 1883, the decree-holder applied for execution of the decree, alleging that the judgment-debtor had failed to make over the bond to him according to the agreement. The judgment-debtor objected that the decree was no longer capable of execution, having been superseded by the agreement of the 11th January 1881, and that the application was barred by limitation, the previous application being dated the 9th November 1880.

[424] Held, that the application was within time, inasmuch as the acknowledgment in the deed of the 11th January 1881, came within the terms of s. 19 † of the Limitation Act, so

* First Appeal No. 110 of 1884, from an order of J. L. Denniston, Esq., District Judge of Ghazipur, dated the 19th March 1884. *

† [Sec. 19.—If, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed.

as to originate a fresh period of limitation in respect of the execution of the decree. *Ghansham v. Mukha*, 1 L.R., 3 All., 320, *Janaki Prasad v. Ghulam Ali*, 1 L.R., 5 All., 201, and *Ramhal Ras v. Satgur Ras*, 1 L.R., 3 All., 247 followed.

Per OLDFIELD, J — That the agreement of the 11th January 1881, did not contemplate and had not the effect of cancelling the decree and substituting for it a new contract, inasmuch as the deed contained nothing to the effect that the decree was superseded, and all it did was to provide means by which the decree, together with another small sum due by the judgment debtor to the decree holder, might be satisfied without having recourse to the sale of the bond attached and the effect would be that, on realization, satisfaction would be certified in whole or in part to the Court executing the decree. Further, if the arrangement was to be regarded as within the meaning of an adjustment of the decree under s. 258 of the Civil Procedure Code, it could only be recognized by the Court when certified by the decree holder or judgment debtor and in this case the only certification which was made was by the decree holder, by his petition of the 11th January 1881, which was in respect of a temporary arrangement under which the decree remained in force.

Per MAHMOOD, J — That the agreement of the 11th January 1881, was intended by the parties as a performance of the obligation created by the decree, by substituting a fresh obligation founded upon contract, but that the deed could not be regarded as such an adjustment of the decree as satisfied the requirements of s. 258 of the Civil Procedure Code, because the creditor, whilst admitting the creation of a separate contract, took care to say that the decree was to be kept alive, and the attachment thereunder was to subsist, and that therefore the certification of the adjustment was inadequate, and could not be recognized in executing the decree.

THE decree of which execution was sought in this case was dated the 14th June 1878. It appeared that on the 11th January 1881, in the course of proceedings in execution of the decree, the parties entered into an agreement, which was registered, and filed in the Court executing the decree, with a petition by the decree holder. That agreement was to the following effect —

“We, Fateh Muhammad, and Gopal Das, decree holder, do hereby declare as follows — That I, Fateh Muhammad, owe up to this time Rs 1,385-1-3 under a decree to Gopal Das, decree-holder, of Benares, and Rs 250 under a note-of-hand held by the said creditor, that the decree is under execution in the District Court of Benares, under certificate, and on the application of the said decree holder for attachment, a mortgage-deed, dated the 1st [426] December 1873, in favour of Kandhaia Lal, is advertized for sale on the 11th January 1881, that I, the debtor, and the decree-holder have arranged for the payment of the amount of the decree in this way,—that I, the debtor, should make over the said mortgage deed to the judgment-creditor in order that he should bring a suit thereon on my behalf under his own superintendence and at his own expense against the mortgagor, Kandhaia Lal, and realize the amount secured by the deed, that out of the said amount he is to realize the whole of the amount of the decree under execution, with costs and future interest which may be found due from the date of the decree to date of realization, also costs of all sorts up to date of realization on account of the regular suit to be brought against Kandhaia Lal aforesaid, and also the sum due to him (decree-holder) under the note of hand for Rs 250 mentioned above, with interest thereon.

When the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed but oral evidence of its contents shall not be received.

Explanation 1 — For the purposes of this section an acknowledgment may be sufficient, though it does not specify the exact nature of the property or right or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, or to perform or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right.

Explanation 2 — In this section ‘signed’ means signed either personally or by an agent duly authorized in this behalf.]

due to the said Babu by me the said debtor; that from the balance the Babu is to receive his remuneration for the trouble of instituting the aforesaid suit, at the rate of 5 per cent., and to pay what remains out of the amount realized to me, the debtor; that I, the debtor, shall have no right to interfere, except to receive the balance; that I shall not make any contract of adjustment or transfer of any sort, as regards the amount secured by the mortgage-deed aforesaid, with the obligor of the said document, or with any other person, and if I do so, such contract shall be invalid; that should the obligor aforesaid or his representative come forward to settle the matter, then I, the debtor, and the aforesaid creditor, Babu Gopal Das, shall with mutual consent come to some terms, and accordingly a detailed compromise will be executed under the signatures of me, the debtor, and the Babu Sahib aforesaid; that if the settlement of the matter should appear at the time to be expedient, each party shall be bound by such settlement; and that the decree-holder has accepted this arrangement and admitted it for the benefit of me.

"I, Babu Gopal Das, decree-holder, creditor, do hereby declare that I have accepted the conditions of this compromise.

"For this reason we, both parties, having executed this compromise, as defined in art. 20, sch. i, Act I of 1879, on a stamped paper of the value of Rs. 10, have got it registered."

[427] The petition of the decree-holder was to the following effect:—

"That the case of execution of decree of the petitioner (decree-holder) against Shaikh Fateh Muhammad, judgment-debtor, is pending in the Court, and a mortgage-deed attached at the instance of the decree-holder is advertised for sale to be held to-day, the 11th January 1881. The judgment-debtor came to the petitioner, and under an agreement executed to-day and duly registered made this arrangement for payment of the judgment-debt: that he made over to the petitioner the original deed advertised for sale, in order that he (the petitioner) should file a suit under it at his own cost against the obligors thereof, and realize the judgment-debt due under the decree sought to be executed, with interest and costs, &c. The petitioner (decree-holder) has accepted this arrangement. He therefore files this petition and prays that the sale to be held to-day may be postponed and the application for execution of decree be struck off for the present and the previous attachment maintained. After realization of the amount entered in the document advertised for sale, an application for execution of the decree will be duly filed."

On this petition the Court made an order directing that the execution-case should be struck off the file and the attachment should be maintained.

On the 24th December 1883, the decree-holder applied for execution of the decree. The judgment-debtor objected to this application on the ground that the decree was no longer capable of execution, having been superseded by the agreement of the 11th January 1881, and that the application was barred by limitation, the previous application being dated the 9th November 1880. The decree-holder replied to these objections that, as the judgment-debtor had failed to carry out the provisions of the agreement, and there was nothing in the agreement preventing execution of the decree, he, the decree-holder, was entitled to execution; and that, as in the agreement the judgment-debtor acknowledged the debt, under s. 19 of the Limitation Act, a fresh period of limitation began to run from the date of the agreement, and the application was within time.

The lower Court disallowed the objections of the judgment-debtor, allowing the contention of the decree-holder.

[428] The judgment-debtor appealed to the High Court, repeating the objections taken by him in the Court below.

Lala Lalta Prasad, for the Appellant.

Munshi Hanuman Prasad, for the Respondent.

Oldfield, J.—This is an appeal from an order on an application by the decree-holder for execution of a decree dated the 14th June 1878. It has been allowed by the Judge and the judgment-debtor has appealed. The objection that the application is barred by limitation has no force, since the Judge is right in holding that there was an acknowledgment of liability on the part of the judgment-debtor on the 11th January 1881, in writing, which saves limitation. The other objection is, that the decree is no longer fit to be executed, since it was superseded by a new contract under the instrument of the 11th January 1881. It appears that execution had been taken out, by attachment and sale of a mortgage bond in favour of the judgment-debtor by one Kandhaia Lal, and the sale was advertized to take place on the 11th January 1881. On that day the parties executed a deed on which the judgment-debtor relies. That instrument refers to the fact that the decree is under execution, and that a mortgage-deed, dated the 1st December 1873, executed by Kandhaia Lal, *Kakwar*, of Mirdadpur, is advertized for sale, and that the decree-holder and judgment-debtor have arranged the following method of paying the decree: that the judgment-debtor shall make over the said deed to the decree-holder, in order that he shall bring a suit thereon on behalf of the judgment-debtor at his own expense against Kandhaia Lal, and realize the amount secured by the deed, and out of the amount realized satisfy the decree under execution, with costs and future interest, together with all costs of the suit to be brought against Kandhaia Lal, and together with a sum due by the judgment-debtor to the decree-holder under a note-of-hand for Rs. 250 with interest: that the decree-holder shall from the balance receive a remuneration for the trouble of instituting the aforesaid suit at the rate of 5 per cent., and pay to the judgment-debtor what remains out of the amount realized; and it proceeds to say that any settlement between the judgment-debtor and Kandhaia Lal will be the subject of future arrangement between the judgment-debtor and the decree-holder.

[429] On the same day that this deed was executed, the decree-holder filed a petition in the Court, to the effect that under the agreement an arrangement had been made for payment of the judgment-debt, by which the judgment-debtor made over to him the deed advertized for sale, in order that the petitioner should file a suit under it at his own cost against the obligor, and realize the debt due under the decree in execution, with interest and costs; and he prayed that the auction-sale to be held that day be postponed, and the application for execution of the decree be struck off for the present, and the previous attachment maintained; after realization of the amount entered in the deed advertized for sale, an application for execution of the decree will be duly filed. On this the order was that the case for execution of decree be struck off and the attachment be maintained. It appears that nothing was done under this agreement, and the decree-holder has now applied to execute his decree, alleging that the judgment-debtor failed to give effect to the agreement by making over the bond to him, and this has not been denied by the judgment-debtor. I am unable to hold that the arrangement entered into contemplated, or had the effect of, cancelling the decree and substituting a new contract in its place. All it did was to provide means by which the decree, together with another small sum due by the judgment-debtor to the decree-holder, might be satisfied, without having recourse to the sale of the bond attached, and the effect would be that, on realization, satisfaction would be certified in whole or in part to the Court executing the decree. If in whole, the decree would then be written off as satisfied; if in part, execution would proceed, the decree remaining in force until satisfied; and there is nothing in

the deed to prevent the decree-holder executing the decree when the judgment-debtor failed to carry out the condition of the agreement. In a similar way a judgment-debtor might agree to make over the property to a decree-holder in order that he should realize the decretal amount from its proceeds, but the decree would not, in such a case, be cancelled. The deed contains nothing to the effect that the decree is superseded, and that henceforth the decree-holder's money is to be confined to the realization by suit on the bond. It is unlikely also that there should have been such an intention, considering the hazard and uncertainty of litigation.

[430] The terms of the deed, in the absence of any words to the effect that the decree was to be considered as cancelled and inoperative and the remedy confined to realization by suit on the bond, are susceptible of the meaning I have put on them, and that this was the meaning intended is shown by the petition put in on the same day by the decree-holder, and the order for continuing the attachment of the bond; and it is significant that the judgment-debtor never objected to the petition or to the continuance of the attachment. In this connection it is deserving of notice that if the arrangement is to be considered to come within the meaning of an adjustment of the decree under s. 258, Civil Procedure Code, it can only be recognized by the Court when certified by the decree-holder or judgment-debtor; and in this case the only certification which was made was by the decree-holder, by his petition of the 11th January 1881, which was in respect of a temporary arrangement under which the decree remained in force. The objections, therefore, on the part of the appellant fail, and the appeal is dismissed with costs.

Mahmood, J.—I am of the same opinion, and I will add a few words only in order to explain my reasons. There appear to be two questions which require consideration. The first relates to limitation, as to the right of the decree-holder-respondent to obtain execution of his decree. The second is a question as to the merits, and it is whether the "*ikrar-nama*" of the 11th January 1881, extinguished the decree, leaving the judgment-creditor a right to proceed under the contract then made.

Upon the first point the ruling of this Court in *Ghansham v. Mukha*, I. L. R., 3 All., 320, and the ruling of TYRRELL, J., and myself in *Janaki Prasad v. Ghulam Ali*, I. L. R., 5 All., 201, which followed the Full Bench ruling in *Ramhit Rai v. Satgur Rai*, I. L. R., 3 All., 247, settle the matter. These decisions leave no doubt that the acknowledgment in the *ikrar-nama* comes within s. 19 of the Limitation Act, so as to originate a fresh period of limitation in respect of the execution of the decree.

The second question relates to the merits, and upon this point my view is somewhat different from that of my brother OLDFIELD. In my opinion this agreement of the 11th January 1881, was intended [431] by the parties as a performance of the obligation created by the decree, by substituting a fresh obligation founded upon contract. But that is not the real matter before us, and the question really is whether, whatever may have been the effect of the agreement, the decree-holder has lost his right to execution. The law, as expressed in s. 258 of the Civil Procedure Code, allows the parties to a decree to satisfy it by subsequent arrangement. But it is obvious that, in order to effect its policy, and to make the exercise of this right beneficial, the Legislature was constrained to impose some limit. If the question were now before me, whether the agreement of the 11th January 1881, did or did not extinguish the decree, and if I could go into the merits, I should perhaps answer the question in the affirmative. That deed of agreement, after reciting the conditions under which it was made, and what had been done in execution, and what money was due to the decree-holder, shows that both parties agreed

to satisfy the decree by the decree-holder obtaining possession of a mortgage-deed executed in favour of the judgment-debtor by a third person. It also refers to a note-of-hand executed by the judgment-debtor in favour of the decree-holder, which must also be regarded as included in the scope of the new contract, as substituting a new obligation in lieu of a document creating an obligation in favour of the decree-holder and providing a method of payment. The only question now is, even assuming that this deed of agreement was intended as a fresh adjustment of the decree, is that adjustment of such a character as to allow us to say in the execution department that the decree has been extinguished? At first I entertained some doubt upon this question, but having considered the deed of the 11th January 1881, I am now of opinion that it cannot be regarded as such an adjustment of the decree as s. 258 of the Code contemplates. The section, after creating the right to certify adjustments made out of Court, proceeds to limit that right by providing that "the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree." What this means is that the judgment-creditor must go to the Court and say:—"My decree has been adjusted and extinguished; strike off the case." Now, in the present case, this application of the 11th January 1881 did mention the agreement, but the certificate was imperfect, that is, insufficient [432] to satisfy the requirements of s. 258 of the Code, because the creditor, whilst admitting the creation of a separate contract, took care to say that the decree was to be kept alive, and the attachment thereunder was to subsist. This is not a sufficient compliance with the provisions of s. 258, and therefore, without deciding what was the intention expressed by the agreement, I hold that the certification of the adjustment was inadequate, and that we cannot recognise it in executing the decree. This question leaves the parties their mutual rights under the agreement, but in connection with the execution of the decree, I concur in the order passed by my learned brother OLDFIELD.

Appeal dismissed.

NOTES.

[In (1888) 11 All., 228, it was held that when parties enter into a compromise in execution proceedings and get it sanctioned by the executing Court, the parties are bound by it, even though there may be some irregularity—not amounting to want of jurisdiction—in the Court granting the sanction.

See also (1897) 22 Bom., 998 where it was held that an acknowledgment of liability was necessary to save limitation.]

[7 All. 432]

• The 5th February, 1885.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Jaswant Singh and others.....Judgment-debtors

versus

Dip Singh and others.....Decree-holders.*

Reversal of decree—Repayment of money realized—Restitution—Interest—

• *Question for Court executing decree—Fresh suit—Civil Procedure*

Code, ss. 244, 583.

In a suit for redemption of a mortgage, a decree was passed for possession by redemption on the plaintiff paying the sum of Rs. 43,625-7-0, the amount of the mortgage-debt.

*First Appeal No. 41 of 1884, from an order of Maulvi Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 29th March, 1884.

Prior to the institution of the suit, the defendant had taken proceedings in the Judge's Court to foreclose the mortgage, and the plaintiff paid the above-mentioned sum into that Court for the defendant, who took it. The plaintiff appealed to the High Court from the decree directing him to pay Rs. 43,625-7-0 as the mortgage-debt, and obtained a decree by which the decree of the first Court was modified, and the amount payable on redemption was reduced to Rs. 22,155. The plaintiff then took out execution of the decree to recover from the defendant the difference between the two sums with interest.

Held, that the effect of the Appellate Court's decree was to direct restitution of any sum paid under the first Court's decree which was disallowed by the Appellate Court's decree, and that the question was clearly one for determination by the Court executing the decree, and not by separate suit, being expressly provided for by s. 583* of the Civil Procedure Code.

Held, also, that the decree-holder was entitled to restitution of the amount with interest.

Roger v. The Comptoir d'Escompte de Paris, L. R., 3 P. C., 465, referred to. *Ram Ghulam v. Dwarka Rai*, *Ante*, p. 170, distinguished by MAHMOOD, J.

THE facts of this case are stated sufficiently for the purposes of this report in the judgment of OLDFIELD, J.

[433] Babu Jogindro Nath Chaudhri, for the Appellants.

*Pandit Ajudhia Nath and Pandit Nand Lal, for the Respondents.

Oldfield, J.—The respondent instituted a suit against the appellant for redemption of a mortgage. A decree was made for possession by redemption on the respondent paying the sum of Rs. 43,625-7-0, the amount of the mortgage-debt. Prior to institution of the suit, the appellant had taken proceedings to foreclose in the Judge's Court under the Regulation, and the respondent paid the above sum into that Court for the appellant, who took it out. The respondent instituted an appeal in this Court from the decree directing him to pay Rs. 43,625-7-0 as the mortgage-debt, and obtained a decree by which the decree of the first Court was modified, and the debt payable on redemption was reduced to Rs. 22,155. The respondent then took out execution of the decree to recover from the appellant the difference between the two sums with interest. Execution has been allowed, and the appellant contends in appeal that there was no remedy in the execution department, and interest could not be given. Both objections fail. The matter in dispute is clearly one arising between the parties to the suit in which the decree was passed and relating to the execution, discharge, or satisfaction of the decree, under s. 244, Civil Procedure Code.

The payment was directed by the decree of the first Court, and was made under it, and the effect of the Appellate Court's decree was to direct restitution of any sum paid under the first Court's decree, which was disallowed by the Appellate Court's decree, and the question was clearly one for determination by the Court executing the decree, and not by separate suit, and is expressly provided for by s. 583. Further, the decree-holder-respondent was entitled to restitution of the amount with interest. On both these points the case of *Roger v. The Comptoir d'Escompte de Paris*, L. R., 3 P. C., 465, is an authority in support of the view here taken. The appeal is dismissed with costs.

Mahmood, J.—I am of the same opinion, and have only a few words to add. The conclusion arrived at by my brother OLDFIELD appears to me to be perfectly consistent with the opinion expressed [434] by himself and myself in the recent Full Bench case of *Ram Ghulam v. Dwarka Rai*, *Ante*, p. 170.

* [Sec. 583.—When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this chapter desires to

Execution of decree of Appellate Court.

obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred; and such Court shall proceed to execute the decree passed in appeal, according to the rules hereinbefore prescribed for the execution of decrees in suits.]

The learned Chief Justice gave expression, in his judgment, to certain opinions which I did not altogether adopt, and for that reason I delivered a separate judgment. To prevent that judgment from being misunderstood, I may say that what distinguished my opinion from that of the Chief Justice was, that I held that the mesne profits which were the subject matter in litigation in that case were not realized in execution of the decree or of any mandate thereof, and that the matter could therefore be litigated again, and that such subsequent litigation was not barred by s. 244 of the Code. But in this case the circumstances leave no doubt that a surplus of Rs. 21,470-7-0 was realized over and above what should have been realized by the decree-holder, and was therefore a payment made strictly under the decree, and that distinguishes the present case from *Rum Ghulam v. Dwarka Rai*. Again, s. 583 of the Code provides that "when a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this chapter desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred; and such Court shall proceed to execute the decree passed in appeal, according to the rules hereinbefore prescribed for the execution of decrees in suits." It appears to me that the present case depends upon the meaning which we are to attach to the words "by way of restitution or otherwise," and this meaning has, as my brother OLDFIELD has observed, been explained by their Lordships of the Privy Council in *Roger v. The Comptoir d'Escompte de Paris*, L. R., 3 P. C., 465. I am anxious to incorporate the passage in which their Lordships deal with this question in my own judgment, in order that it may be made accessible to the Mufassal Courts, which seldom possess copies of the Privy Council reports. It is as follows:—

"It is contended, on the part of the respondents here, that the principal sum being restored to the present petitioners, they have no right to recover from them any interest. It is obvious that, if that is so, injury—and very grave injury—will be done to the petitioners. They will, by reason of an act of the Court, have [435] paid a sum which it is now ascertained was ordered to be paid by mistake and wrongfully. They will recover that sum after the lapse of a considerable time, but they will recover it without the ordinary fruits which are derived from the enjoyment of money. On the other hand, those fruits will have been enjoyed, or may have been enjoyed, by the person who by mistake and wrongfully obtained possession of the money under a judgment which has been reversed. So far, therefore, as principal is concerned, their Lordships have no doubt or hesitation in saying that injustice will be done to the petitioners, and that perfect judicial determination, which it must be the object of all Courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from them have the money restored to them, with interest, during the time that the money has been withheld.

"It is said, however, that there is no authority for ordering the payment of interest. The cases of writs of error which have been referred to can hardly be considered as precedents for a case of the present kind. The proceeding upon them was of a highly technical character. It was a matter of great rarity for a writ of error not to suspend execution in any case, where execution had not actually taken place before the writ of error was brought. Restitution no doubt was ordered, and it may well be that under the term 'restitution,' in the case of a money payment, interest was not given by the Court which carried the restitution into effect. But whether that be so or not, their Lordships do not think it necessary to inquire further into that matter. Upon proceedings which are much more analogous to the present, undoubtedly

interest has been given. One case has been mentioned in the House of Lords, the case of *Blake v. Mowatt*, in which money, which had been ordered to be paid under a decree—money consisting itself of principal and interest—that decree having been reversed in the House of Lords—was ordered by the Court below to be restored, together with interest upon the capital sum. It probably would be found that that case is by no means a solitary case in the practice of the House of Lords. Their Lordships have reason to believe that the practice of the Courts in India, when there has been a reversal in this country, and when money has [436] been ordered in India to be paid back in consequence of that reversal, is to order the payment of interest. Their Lordships, therefore, so far as any precedents applicable to the case are concerned, believe that the precedents will be found to be in favour of a restitution of the money with interest. They are quite satisfied that this practice is in accordance with the true principle to be applied to this case and with what the justice of such a case demands, and they think that it is pre-eminently so in a case in which the money, in the first instance, was ordered to be paid by the defendants in the action, with interest, during the time that the money had been in the defendant's possession after the conversion of the goods."

I have no more to say except that I concur in the order passed by my learned brother OLDFIELD.

Appeal dismissed.

NOTES.

[The principle of this case was applied to interest on mesne profits as being "fairly and reasonably consequential" upon the order of the Privy Council in that case:—(1891) 15 Mad., 208.

In (1896) 18 All., 262, it was applied to money kept in deposit by a party to a suit but ordered to be returned by an appellate Court.

See also a similar case in (1898) 20 All., 430.]

[7 All. 436]

The 23rd February, 1885.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE,
AND MR. JUSTICE STRAIGHT.

Nidhi Lal.....Defendant

versus

Mazhar Husain and others.....Plaintiffs.*

Mortgage—Transfer of mortgaged property by mortgagee in exchange for similar property—Right of mortgagor to property acquired by exchange.

In 1865, N was in possession of six shops in a market-place at Etawah. He was in possession of two as mortgagee, and of the remaining four as proprietor. The Municipal Committee of Etawah, having decided to establish the market in a fresh place, and to use the site of the old market for other purposes, arranged with N to take the sites of his six shops in the old market place, and to give him in lieu of them sites for six shops in the new. Under this arrangement, he built six shops in the new market-place. Subsequently, the mortgagor of one of the old shops claimed possession of one of the six new ones on payment of the mortgage-money and cost of constructing the shop.

Held, that the claim could not be allowed, inasmuch as it could be justified only by proof of an agreement binding upon the parties at the time when the transaction occurred that

* Second Appeal No. 1176 of 1883, from a decree of F. E. Elliot, Esq., District Judge of Mainpuri, dated the 17th May 1883, affirming a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 29th January 1883.

some specific one among the new shops should be substituted for the old one which was the subject of the mortgage, and it had not been found that any such agreement was made.

THE facts of this case were as follows :—In 1865 the defendant in this suit, Nidhi Lal, was in possession of six shops in a market-**[437]** place at Etawah called Humeganj. He was in possession of two as mortgagee, and of the remaining four as proprietor. One of the mortgaged shops was held by him under a usufructuary mortgage from one Muhammad Husain, through whom the plaintiffs in this suit claimed. In that year the Municipal Committee of Etawah, having decided to establish the market in a fresh place, and to use the site of the old market for other purposes, arranged, among other persons, with the defendant, to take the sites of his six shops in the old market-place, which he valued at Rs. 50 each or Rs. 300 in all, and to give him sites for six shops in the new market-place, valued at the same amount, and Rs. 50 for materials of each shop. Under this arrangement the defendant built himself six shops in the new market place in lieu of his six shops in the old one.

The plaintiffs in this suit, as the representatives of Muhammad Husain, claimed possession of one of these six new shops on payment of the mortgage-money, and cost of constructing the shop. The Court of First Instance gave them a decree, which, on appeal by the defendant, the Lower Appellate Court affirmed.

The defendant appealed to the High Court, the fourth ground of appeal being as follows :—"That the plaintiffs cannot be considered to be the owners of the shop in question, and the new shop cannot be substituted for the old one."

Pandit *Ajudhia Nath* and Babu *Baroda Prasad Ghose*, for the Appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and *Munshi Hanuman Prasad*, for the Respondents.

Petheram, C.J.—I think that this appeal must be allowed. The action is brought by persons who stand in the position of mortgagors against a mortgagee, and its object is the redemption of the mortgage. The facts are that, in 1863, the ancestor of the plaintiffs was in possession of three shops in the old market-place of Etawah, and that one of these was given under a usufructuary mortgage to the defendant, Nidhi Lal, to secure a debt of the value of Rs. 75, and it was agreed that the mortgagee should get the rent of the shop by way of interest. This was the state of things existing in 1865, when the Municipality elected to destroy the old **[438]** market and to build a new one. and, under these circumstances, it was necessary to compensate the owners of the shops which were destroyed, and it was arranged that the Municipality should purchase the shops before-mentioned from the mortgagee in possession, and give him for it Rs. 50 in cash, as half of the price, and, as representing the other half, a site for another shop in the new market. It was apparently arranged between the mortgagor and the mortgagee that they should join in transferring the old site to the Municipality. The mortgagee received the Rs. 50 in cash, and obtained possession of six shops in the new market. The representative of the mortgagor now brings the present suit, in which he claims to obtain possession by redemption of one of these six shops upon payment of Rs. 275, this sum including Rs. 75 on account of the mortgage debt, and Rs. 200 on account of expenses incurred by the mortgagee in re-constructing the mortgaged property.

I hold that, upon the facts which I have stated, no real inference of law arises, and I know of no authority and of no principle of law which could justify the contrary opinion.

If any such inference did arise, it could only do so from some agreement binding upon the parties at the time when the transaction occurred; that is, an agreement that one of the new shops should take the place of the old one, which was the subject of the mortgage. But neither the Court of First Instance nor the Lower Appellate Court has found that any agreement of the kind in fact was made. It has been suggested that we should remit an issue for the ascertainment of the question. But I do not think that we ought to do so. It would afford a temptation to the parties to concoct a case, and, if they did so, any finding arrived at by the Court below would be contrary to the evidence. It would be necessary for the Court to find that there was an agreement substituting, not merely some one of the six new shops for the old one, but some specific shop for it; because a mortgagor cannot claim to redeem a property which is uncertain. He must know what it is that he desires to redeem; and I regard this case as a mere vague attempt by the mortgagor to get hold of some shop or other, without knowing or caring which one out of the six it is to be. I am [439] therefore of opinion that the appeal should be decreed, the decree of the Courts below reversed, and the suit consequently dismissed with costs.

• **Straight, J.**—I am of the same opinion.

Appeal allowed.

[7 All. 439]

The 24th February, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE,
AND MR. JUSTICE STRAIGHT.

Jawahir Singh.....Judgment-Debtor

versus

Jadu Nath and others.....Decree-holders.*

*Execution of decree—Order for sale—Application for execution
struck off—Application for restoration—Finality of order.*

A decree for money was passed on the 19th March 1865. The first application for its execution, made after Act X of 1877 came into force, was dated the 16th December 1878. On this application an order was made by the Court executing the decree (Munsif) for the sale of certain property belonging to the judgment-debtor. The latter objected to execution of the decree, on the ground of limitation, and the decree-holders filed an answer to the objection. On the 14th July 1879, the case was struck off, because the decree-holder had not deposited certain process-fees, without the disposal of the objection. On the 1st October 1879, the decree-holders again applied for the sale of the property, and it was ordered to be sold. On the 17th February the judgment-debtor presented a petition repeating the objection, which on the 13th March 1880, the Munsif entertained and disallowed. This order was affirmed in appeal by the District Judge, and again by the High Court. Meanwhile the

* Second Appeal No. 93 of 1884, from an order of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 6th May 1884, reversing an order of Maulvi Abdul Razaq, Munsif of Basti, dated the 16th September 1883.

Munsif had struck off the case from the file of execution-cases pending in his Court, on the ground that the records had been despatched to the Appellate Court. On the 18th September 1882, the decree-holder again applied for execution of the decree, praying that "the suit might be restored to its number, and that the judgment-debt might be caused to be realized by attachment and sale of the judgment-debtor's property specified in the former schedule "

Held, that the decree-holder was entitled to execution of the decree, and that he could get it under the application which was made on the 1st October 1879, inasmuch as the matter was made *res judicata* by the decree of the High Court in appeal, and it must be taken that that decree was correctly passed, and that the order for sale passed upon it was properly made, and that the sale ought to have taken place

Held, also that the proper application for the decree-holder to have made in September 1882, was that the case might be restored to the Munsif, and that the present application might be so dealt with as to effect the same result, because the prayer contained therein referred to the number of the proceedings of October 1879, and to the schedule of the property then ordered to be sold.

[440] THE decree of which execution was sought in this case was one for money, bearing date the 19th March 1865. The first application for its execution, made after Act X of 1877 came into force, was dated the 16th December 1878. On this application an order was made by the Court executing the decree (Munsif of Basti) for the sale of certain property belonging to the judgment-debtors. On the 21st February 1879, the judgment-debtor objected to the execution of the decree on the ground of limitation. On the 21st February 1879, in obedience to an order of the Munsif, the decree-holders filed an answer to the judgment-debtor's objection. On the 14th July 1879, the case was struck off, because the decree-holders had not deposited certain process-fees, without the disposal of the judgment-debtor's objection. On the 1st October 1879, the decree-holders again applied for the sale of the property, and it was eventually ordered to be sold on the 20th March 1880. On the 17th February 1880, the judgment-debtor preferred a petition to the Munsif, in which he complained that his objection to the execution of the decree, dated the 21st February 1879, on the ground of limitation, had not been disposed of, and prayed that the Court would dispose of the same. On this application the Munsif ordered the decree-holders to file an answer to the judgment-debtor's objection. On the 2nd March 1880, the decree-holders filed a petition, in which they stated that they had already filed an answer. Eventually, on the 13th of March 1880, the Munsif entertained the judgment-debtor's objection, and disallowed it. The judgment-debtor appealed to the District Judge of Gorakhpur from the Munsif's order, who, on the 9th November 1880, affirmed it. In the meantime the Munsif had struck off the case from the file of execution-cases pending in his Court, on the ground that the records had been despatched to the Appellate Court. On the 19th April 1881, the second appeal preferred by the judgment-debtor to the High Court, from the District Judge's appellate order, was dismissed, and the latter order was affirmed.

On the 18th September 1882, the decree-holders again applied to the Munsif for execution of the decree. They prayed in this application that "the suit may be restored to its number, and that the judgment-debt may be caused to be realized by attachment [441] and sale of the judgment-debtor's property specified in the former schedule "

The Munsif rejected this application on the 18th September 1883, on the ground that the decree was more than twelve years' old, and therefore, under s. 230 of the Civil Procedure Code, execution could not be allowed. It appeared

that at the time the application was preferred the records of the case had not been returned to the Munsif's office, and that they were not returned to it till some time subsequently in 1883.

On appeal by the decree-holders the Lower Appellate Court (Subordinate Judge of Gorakhpur) was of opinion that the application should be allowed, as the decree-holders had applied within the period of three years' grace allowed by Act X of 1877 for execution, and had been prevented from prosecuting that application, not by reason of any default of their own, but by reason of the appeal preferred by the judgment-debtor and the removal of the case from his files by the Munsif.

The judgment-debtor appealed to the High Court.

Munshi Sukh Ram and Lal Lalta Prasad, for the Appellant.

Munshi Kashi Prasad and Maulvi Mehdi Hasan, for the Respondents.

Petheram, C. J.—I think the decree-holder is entitled to execution of his decree, and that he can get it under the application which was made on the 1st October 1879. It is possible that a difficulty may then arise as to whether he is entitled to make a second application for execution within the three years allowed to him under s. 230 of the Civil Procedure Code, the first application having been made in 1878. But that point does not really arise now, because to my mind the question is, whether execution can now be had under the proceedings of the 1st October 1879. The decision then arrived at appears to me to make the matter *res judicata*, because the same issue was decided by the Court, and between the same parties. The decree was passed by this Court in appeal, and we are bound to consider that it was correctly passed, and that the order for sale passed upon it was properly made, and that the sale ought to have taken place. The appeal was decided in [442] April 1881, and then the matter seems to have slept. The Munsif's file was apparently over-laden, and the case was transferred from his file to that of the District Judge, who does not appear to have taken any action in the matter. The proper application for the decree holder to have made in September 1882, was, that the case might be restored by the Munsif. The only question we have now to consider is, whether the present application can be so dealt with as to meet this state of things.

I think that it can, because the prayer contained in the application is, "that the suit may be restored to its number, and that the judgment-debt may be caused to be realized by attachment and sale of the debtor's property specified in the former schedule of property." Now the "number" here referred to is the number of the proceedings of October 1879, and the "schedule of property" means the schedule of the property then ordered to be sold. Under the circumstances, I think that the appeal should be dismissed with costs, but that the order should be modified by making it an order to the Munsif to restore the proceedings of the 1st October 1879, to his file, and to proceed to levy the debt under that order.

Straight, J.—I am of the same opinion.

Appeal dismissed.

[7 All. 443]

The 26th February, 1885.

PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Thamman Singh.....Plaintiff

versus

Jamal-ud-din and others.....Defendants.

Pre-emption—Partition of property sold on application of vendee—Silence of pre-emptor—Waiver—Estoppel.

Subsequently to the sale of a one-third share in a village, the vendee applied for partition of the share. A co-sharer, who had a right of pre-emption in respect of the sale, made no objection to this application, and the partition was effected. The co-sharer afterwards set up a claim to pre-emption.

Held, that there was nothing in the conduct of the pre-emptor which could amount to estoppel, or to a waiver of his right of pre-emption.

Motee Sah v. Goklee, N.-W. P. S. D. A. Rep., 1861, p. 506, distinguished and dissented from, and *Bhairon Singh v. Lalman*, Weekly Notes, 1884, p. 216, referred to by MAHMOOD, J.

[443] THE claim in this suit was to enforce the right of pre-emption in respect of the sale of a one-third share of a village to the respondent, Jamal-ud-din, under a deed dated the 14th August 1882. This claim was founded on the *wajib-ul-arz*. It appeared that there were three equal shares in this village, one belonging to the plaintiffs, one to one Jawahir Lal, and one the subject of this suit. This last mentioned share, at the time of sale, was in the possession of the respondent, Jamal-ud-din, the vendee, under a mortgage. After the sale to the respondent, Jawahir Lal applied for the partition of his one-third share. In the course of the proceedings which followed this application, the respondent applied for the partition also of the share which he had purchased. It further appeared that the plaintiff did not object to this application on the ground that he had a right of pre-emption, and the partition was effected. The lower Courts both held that the plaintiff was estopped by his conduct from suing to enforce his right of pre-emption. Upon this point the Court of First Instance observed as follows:—"In my opinion, though it was useless to raise the objection, or to assert the right of pre-emption in the Revenue Court, as the plaintiff, in consequence of the possession of the defendant-vendee and mortgagee, could not prevent the partition, and could not, except through the medium of the Civil Court, obtain the property by asserting the right of pre-emption, yet it has been clearly held in the case of *Motee Sah v. Goklee*, N.-W.P.S.D.A Rep., 1861, p. 506 on the authority of some other precedents (and no adverse ruling of a subsequent date has been found in the Indian Law Reports), that a pre-emptor, who has not preferred an objection to the partition, and who has not brought a suit prior to the partition, will be considered to have relinquished his right of pre-emption. In the present case, after the application of Jawahir Lal, the partition of the property sold and claimed by pre-emption was also effected in the course of the same partition suit, at the instance of the vendee, with the knowledge, nay, with the written consent, of the plaintiff, and therefore his right should, as is laid down in the precedent quoted above, be considered to have been extinguished.—*Vide* the plaintiff's application, dated the 13th July 1883, which shows

* Second Appeal No. 476 of 1884, from a decree of T. B. Tracy, Esq., Offg. District Judge of Bareilly, dated the 15th January, 1884, affirming a decree of Maulvi Muhammad Abdul Qayyum, Subordinate Judge of Bareilly, dated the 19th September 1883.

his knowledge and consent." Upon the same point, the Lower Appellate Court observed [444] as follows:—"It is perfectly clear that the plaintiff-appellant was all along aware that the defendant-respondent was a party to the partition. It is immaterial that the partition case was originally instituted by one Jawahir Lal, another co-sharer. It was open to the plaintiff-appellant to have urged his pre-emptive claim by way of objection under s. 113 of Act XIX of 1873, but as he failed to do this, and allowed the respondent (vendee) to incur all the trouble and expense attendant on partition proceedings, he must, in accordance with the ruling cited by the lower Court, be held to have waived his claim."

In this second appeal by the plaintiff, it was contended on his behalf that there was nothing in his conduct in respect to the partition proceeding: which constituted waiver of his right of pre-emption or estoppel.

Mr. T. Conlan and Pandit Bishambhar Nath, for the Appellant.

Mr. Amir-ud-din, for the Respondent Jamal-ud-din Khan.

Oldfield, J.—There is nothing in the conduct of the plaintiff during the partition proceedings which can amount to estoppel or to waiver of the exercise of his right of pre-emption. The decree of the Lower Appellate Court is set aside, and the case remanded to the Lower Appellate Court for disposal on the merits. Costs to abide the result.

Mahmood, J.—I am of the same opinion as my learned brother OLDFIELD, and I wish only to refer to two cases which were cited by the learned counsel for the respondent in support of his client. One of these cases is *Motee Sah v. Goklee*, N.-W. P. S. D. A. Rep. 1861, p. 506. I do not regard that case as by any means on all fours with the present, and I wish to say that I do not accept the rule of law as to acquiescence or estoppel which was there laid down, and from which I have already expressed my dissent upon a former occasion. The other case cited by Mr. Amir-ud-din was that of *Bhairon Singh v. Lalman*, Weekly Notes, 1884, p. 216, and the passage in that case to which the learned counsel referred was as follows:—

"The single question for our determination is whether, after having notice of the intended sale to the respondent-vendee, the appellant's conduct was such as to warrant the inference that he, [445] either expressly or impliedly acquiesced in or relinquished his claim to pre-emption. It is found by the Judge that he made no communication whatever to the vendor after he became aware that a sale was being negotiated, nor did he make it known to him that, while he stood upon his pre-emptive right, he declined to pay the Rs 4,000, because it was not the condition agreed on between the vendor and the vendee."

The rule laid down in that case was, that the pre-emptor may be estopped by conduct amounting to an admission before the sale occurs which is the basis of the exercise of the pre-emptive right. The report does not, of course, enter fully into the peculiar circumstances of the case; but if I thought that the decision bore the interpretation placed upon it by Mr. Amir-ud-din, I should be unable to concur in it,—an interpretation which could not be reconciled with the ruling of the same learned Judge in the case of *Subhag v. Muhammad Ishak*, I. L. R., 6 All., 463. I agree in the order passed by my learned brother OLDFIELD.

Appeal allowed.

[7 All. 446]

The 3rd March, 1885.

PRESENT:

MR. JUSTICE STRAIGHT AND MR. JUSTICE BRODHURST.

Sukrit Narain Lal.....Judgment-debtor

versus

Raghunath Sahai.....Decree-holder.*

*Insolvent judgment debtor—Civil Procedure Code, s. 351 (b)—“Property”—
Fraudulent intent.*

Section 351 (b) of the Civil Procedure Code contemplates a case of active concealment, transfer, or removal of substantive property since the institution of the suit in which was passed the decree in execution of which the judgment-debtor was arrested or imprisoned, with intent to deprive the creditor or creditors of available assets for division; and it does not cover an omission by the judgment-debtor, in his application for a declaration of insolvency, of a statement as to his right to demand partition of ancestral estate in which he is a sharer, especially where there is no evidence of any intent to defraud.

THIS was an appeal from an order under s. 351 of the Civil Procedure Code, refusing to declare the appellant an insolvent. The facts of the case are stated in the **judgment** of STRAIGHT, J.

Munshi Kashi Prasad, for the Appellant.

Munshi Sukh Ram, for the Respondent.

[446] Straight, J.—It appears to me that the Judge was wrong. The applicant in this case was arrested in execution of a decree for Rs. 263-4-0, and, no doubt, as my brother BRODHURST has suggested, it is extraordinary, considering the well-to-do relatives that he has, that the amount due under so small a decree has not been satisfied. But, after all, we have only to do with his own position as an imprisoned debtor seeking the protection of the Court, and to see whether the Judge was warranted in refusing his application to be declared an insolvent. He seems to be one of the three sons of a Hindu father, who, jointly with his two brothers and himself, holds ten ancestral villages in the Gorakhpur district, in which villages the appellant has at any time a right to demand a partition of his share, which right, it has been held, can pass by execution-sale to an auction-purchaser.

The value of this right must necessarily be to a certain extent doubtful, and I cannot say that, because the appellant did not disclose it in his application, he should be regarded as guilty of bad faith in respect thereof. The Judge was mistaken in supposing that such a case came within s. 351 (b) of the Civil Procedure Code. That does not contemplate such a case as this, but one of an active concealment, transfer or removal of substantive property since the institution of the suit in which was passed the decree in execution of which the judgment-debtor was arrested or imprisoned, with intent to deprive the creditor or creditors of available assets for division. It does not seem to

* First Appeal No 140 of 1884, from an order of R. J. Leads, Esq., District Judge of Gorakhpur, dated the 1st August 1884.

me to cover an omission by the judgment-debtor in his application for a declaration of insolvency of a statement as to his right to demand partition of ancestral estate in which he is a sharer, and certainly not where, as in the present case, there is no evidence of any intent to defraud. Under the circumstances, our order will be that the appeal is allowed, and, reversing the refusal of the Judge to entertain the petition, we direct him to restore the case to his file, and to dispose of it according to law.

Brodhurst, J.—I concur.

Appeal allowed.

[447] *The 4th March, 1885.*

PRESENT :

MR. JUSTICE STRAIGHT AND MR. JUSTICE BRODHURST.

Habibullah.....Plaintiff

versus

Kunji Mal.....Defendant. *

Partition of Mahal—Jurisdiction—Civil Courts—Act XIX of 1873

(*N.-W. P. Land Revenue Act*), s. 241 (f).

B, the recorded proprietor of a 7 biswas 10 biswansis share in a village, the recorded area of which was 476 bighas and 5 biswas, purchased a 16 biswansis and 13½ kachwansis share in the same village. In 1872, at the time of settlement, *B* was recorded as the proprietor of an 8 biswas 6 biswansis and 13½ kachwansis share, and the area of this was recorded as 476 bighas and 5 biswas, that is to say, the same area as was recorded before the purchase. In 1876, *H* purchased *B*'s rights and interests in the village, and in 1877 applied for partition of the share of which he had been recorded proprietor, and the same was partitioned, an area of 476 bighas and 5 biswas being allotted to him. Subsequently he brought a suit against the proprietors of the other estates into which the village had been divided, for 61 bighas 4 biswas and 8 biswansis of land, alleging that, at the settlement of 1872, the area of *B*'s rights and interests had been erroneously recorded as only 476 bighas and 5 biswas.

Held that the suit would not lie in the Civil Court, being barred by the provisions of s. 241 (f) of the *N.-W. P. Land Revenue Act* (XIX of 1873).

ONE Mrs. Berkeley, the recorded proprietor of a 7 biswas and 10 biswansis patti of a village, purchased a 16 biswansis and 13½ kachwansis share in the village belonging to one Gulab Singh, situated in another patti of the village called patti Guman Singh. At the time of this purchase the recorded area of Mrs. Berkeley's 7 biswas and 10 biswansis patti was 476 bighas and 5 biswas; and the recorded area of Gulab Singh's share was 61 bighas, 4 biswas, and 8 biswansis. In 1872, at the time of settlement, Mrs. Berkeley was recorded as the proprietor of an 8 biswas, 6 biswansis, and 13½ kachwansis share of the village, and the area of her share was recorded as 476 bighas and 5 biswas; that is to say, the area which was recorded before her purchase of Gulab Singh's share.

* Second Appeal No. 342 of 1884, from a decree of T. B. Tracy, Esq., Offg. District Judge of Bareilly, dated the 22nd December 1883, reversing a decree of Babu Nilmadhab Banarji, Munsif of Haveli, Bareilly, dated the 21st August 1883.

In 1876 the plaintiff in this suit purchased Mrs. Berkeley's rights and interests in the village. In 1877 the plaintiff applied for the partition of Mrs. Berkeley's 8 biswas 6 biswansis and $13\frac{1}{2}$ kachwansis share, of which he had been recorded proprietor, and the same was partitioned, an area of 476 bighas and 5 biswas being allotted to the plaintiff. In 1882, the plaintiff brought the present suit against the proprietors of the other estates into which the [448] village had been divided for 61 bighas 4 biswas and 8 biswansis of land as the area of Gulab Singh's 16 biswansis and $13\frac{1}{2}$ kachwansis share of patti Guman Singh, alleging that at the settlement of 1872 the area of Mrs. Berkeley's rights and interests in the village had been erroneously recorded as only 476 bighas and 5 biswas. The suit was originally dismissed by the Court of First Instance on the ground that the jurisdiction of the Civil Courts in respect of its subject-matter was barred by s. 241 (f) of Act XIX of 1873 (N. W. P. Land-Revenue Act). On appeal by the plaintiff the then Judge of the Lower Appellate Court held that the cognizance of the suit by the Civil Courts was not barred by that section, and remanded the case for re-trial. On appeal by the defendants to the High Court from the order of remand, STRAIGHT and BRÖDHURST, JJ., affirmed that order. The Court of First Instance re-tried the case, and decreed the claim against the defendants jointly. On appeal by Kunji Mal, defendant, the proprietor of one of the other estates into which the village had been divided, the then Judge of the Lower Appellate Court held that the suit was bad for many reasons; among others, because it was really an objection to the allotment of area at partition, and dismissed the suit.

The plaintiff appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the Appellant.

Munshi *Hanuman Prasad* and Pandit *Bishambhar Nath*, for the Respondent.

Straight, J.— In saying what I am about to say about this appeal, I think it right to remark that my brother BRÖDHURST, at the hearing of the original appeal that came up before us as an appeal from an order of remand, was inclined to take a view contrary to that which was ultimately expressed in our former order. He was indisposed, after consideration, on the materials then before us, to record a formal difference of opinion, and preferred to join with me in ruling that the suit did lie in the Civil Court. The effect of our order, as then made, was to remand the case, but it must be taken to have been passed solely in advertence to the materials then before us. The result of this remand is, that we have now a quantity of matter and information that was not available on the former occasion for consideration. It appears that in 1872 Mrs. Berkeley's [449] name was recorded in respect of a 7 biswas 10 biswansis share, the area of which, as shown in the revenue papers, was 476 bighas, 5 biswas. She subsequently purchased a 16 biswansis $13\frac{1}{2}$ kachwansis share from one Gulab Singh in patti Guman Singh, the area of which share was recorded as 61 bighas 4 biswas 8 biswansis. So that in 1876, when the plaintiff purchased the rights and interests of Mrs. Berkeley, he would appear to have been *prima facie* entitled to 476 bighas 5 biswas, *plus* 61 bighas 4 biswas, 8 biswansis. At the partition in 1877 the share of the plaintiff was recorded as 8 biswas 6 biswansis and $13\frac{1}{2}$ kachwansis, and the area appertaining to this share was still recorded as 476 bighas 5 biswas. From this it would appear that, on the face of it, there was a deficiency of 60 and odd bighas in the plaintiff's share; but, as the learned Pandit who appeared for the respondent has very properly remarked, the areas which are recorded at the settlement as pertaining to a particular fractional share are more or less approximate, and it is only when a partition is being carried out that the proportion of area to fractional shares can be ascertained

with anything like accuracy. In the present case, it may well have been that 476 bighas 5 biswas fairly represented the proportion of area to which the 8 biswas 6 biswansis and 13½ kachwansis share was entitled out of the whole area.

The question then substantially raised by the suit is, was the area allotted to plaintiff at the partition in respect of his 8 biswas 6 biswansis and 13½ kachwansis share a reasonable distribution?

Now under s. 241 of Act XIX of 1873, cl. (f), the distribution of the land or allotment of the revenue of a mahal by partition are matters over which the Civil Courts are forbidden to exercise any jurisdiction, and this is virtually what this suit invites us to do. Upon the fuller materials now before us, I feel myself constrained to hold that the suit does not lie in the Civil Court, being barred by the provisions of s. 241 of the Revenue Act, and I would dismiss the appeal with costs.

Brodhurst, J., concurred.

Appeal dismissed.

NOTES.

[This case was distinguished in (1887) 9 All., 429 and observed upon as follows:—"The point there (7 All., 447) was whether the allotment in partition was a reasonable distribution of the land partitioned, and did not involve a question of title."]

[450] *The 4th March, 1885.*

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Raghubar Dayal.....Defendant

versus

Ilahi Bakhsh and another.....Plaintiffs*

Execution of decree—Decree for sale of mortgaged property and for costs—

Attachment and sale of other property for whole amount of decree—Suit to set aside execution-sale—Civil Procedure Code, ss. 311, 312—

Finality of order in execution-proceedings.

In execution of a decree on a mortgage-bond, for the sale of the mortgaged property, and for the costs of the suit, amounting to Rs. 1,000, certain houses were attached, on the 30th September 1881, which were not part of the mortgaged property. On an objection raised by the judgment-debtors, that the decree was by its terms executable only against the mortgaged property, the High Court in appeal decided, on the 6th September 1882, that the houses were not liable to attachment and sale under the decree. In the meantime, on the 15th June 1882, the houses had been put up for sale, and purchased for Rs. 500, and the sale had been confirmed on the 16th August 1882. The judgment-debtors brought a suit against the purchaser to set aside the sale, on the ground that the houses were not saleable under the decree.

Held that the decree, in regard to costs, was a decree made personal against the judgment-debtor, and conferred a right upon the decree-holder to take out execution for the recovery of those costs, not only against the property mortgaged in the bond, but also against the person and other property of the judgment-debtor.

* Second Appeal No. 477 of 1884, from a decree of Maulvi Muhammad Abdul Qaiyum Khan, Subordinate Judge of Bareilly, dated the 4th December 1883, affirming a decree of Babu Nilmadhab Banarji, Munsif of Haveli, Bareilly, dated the 26th June 1883.

Per OLDFIELD, J. (MAHMOOD, J., doubting) that the attachment and sale in execution of the decree were valid, inasmuch as they were made in respect of the costs as well of the principal and interest decreed.

(*Per* MAHMOOD, J., that the suit was maintainable, and was not barred by any plea in *limine*. *Abdul Hays v. Nawab Raj*, B. L. R., Sup. Vol., 911, referred to.

Also *per* MAHMOOD, J., that inasmuch as the adjudication of the 6th September 1882 was one between the judgment-debtors on the one hand and the decree-holder on the other, and subsequent not only to the sale but to the confirmation of the sale, and inasmuch as the Court was not then called upon to decide anything in relation to the nature of the decree as to costs, the order then passed could not be used against the purchaser.

Also *Per* MAHMOOD, J., that it was doubtful whether the attachment having been made for the whole amount of the decree and not for costs, and no separate proceedings having taken place in respect of the personal decree against the judgment-debtor, the attachment, the notification of sale, and the sale itself, were valid; but that everything that was said against those proceedings constituted matters falling under s. 312 of the Civil Procedure Code, which enables parties to object to confirmation of sale; and that therefore, even assuming that the sale [451] and confirmation of sale were subject to the objection of "material irregularity in publishing or conducting" the sale, within the meaning of s. 311, a suit like the present, upon that ground, alone was prohibited by the last part of s. 312.

THE plaintiffs in this suit claimed to set aside an execution-sale. It appeared that on the 24th June 1880, one Jugal Kishore, represented by the defendant in this suit, obtained a decree against the plaintiffs on a mortgage-bond, for the sale of the mortgaged property, and for the costs of the suit. The decree-holder applied for execution of the decree, by the attachment and sale of two houses, belonging to the plaintiffs, which were not part of the mortgaged property. The houses were attached on the 30th September 1881. The plaintiffs objected to the attachment on the ground that the decree was, by its terms, executable only against the mortgaged property. This objection was disallowed by an order dated the 29th March 1882. The plaintiffs appealed from this order to the High Court which, on the 6th September 1882, decided that the houses were not liable to attachment and sale under the decree, as it confined the relief to the sale of the mortgaged property. In the meantime, on the 15th June 1882, the houses had been put up for sale, and had been purchased by the defendant for Rs. 500, and the sale had been confirmed on the 16th August 1882. The plaintiffs brought the present suit against the defendant to set aside the sale on the ground that the houses were not saleable under the decree.

The Court of First Instance gave the plaintiffs a decree, which, on appeal by the defendant, the Lower Appellate Court affirmed.

In second appeal by the defendant it was contended on his behalf that the sale had been improperly declared invalid, inasmuch as it had taken place in satisfaction not merely of the mortgage-debt, but also of the costs of the suit, for which the decree made the judgment-debtors personally liable.

The Junior Government Pleader (Babu Dwarka Nath Banarji), for the Appellant.

Munshi Hanuman Prasad and Pandit Bishambar Nath, for the Respondents.

Oldfield, J. (After stating the facts, continued):—The appeal must, in my opinion, prevail. The decree-holder's relief under his decree for the recovery of the principal amount of the debt with [452] interest, *viz.*, Rs. 11,583-0-9, was confined to its recovery by sale of the property of the judgment-debtors mortgaged in the bond; but the decree further ordered that the costs of the decree-holder, Rs. 1,034-12-0, were to be recovered from the judgment-debtors, and this sum was recoverable from other property besides the mortgaged

property. The attachment and sale were made in respect of the costs as well as of the principal and interest decreed, and the objections, therefore, that there was no right under the decree to sell the property in suit, and that the sale is void, in consequence, must fail.

I would on this ground decree the appeal, and set aside the decrees of the lower Courts, and dismiss the suit with all costs.

Mahmood, J.—I am of the same opinion, but wish to state briefly the reasons which have brought me to it. The facts have been stated by my learned brother OLDFIELD, and it is unnecessary for me to refer to them further than is unavoidable for the purpose of elucidating my conclusions. The whole question before us, and indeed the only question raised by the learned Junior Government Pleader on behalf of the appellant, is whether the auction-sale of the 15th June 1882, conveyed any such title to the present defendant as would preclude such a suit as this. The first point for consideration is the nature of the suit, and it is obvious from the plaint that it is one for declaration of title, and to set aside the sale of 15th June 1882. Such a suit could only be maintained by showing that the sale was invalid, and hence it is necessary to consider any circumstances rendering the two houses now in suit not subject to the decree in execution of which they were sold. There has been much able argument by the learned Junior Government Pleader upon the question whether the suit is maintainable, and the learned Pandit, on behalf of the respondents, has maintained—what indeed, the Junior Government Pleader conceded—that such a suit would lie under certain circumstances. There are many cases on this subject, referred to in s. 312 of Mr. Justice O’KINEALY’S edition of the Civil Procedure Code, which fully go to maintain this proposition of law; and in particular the Full Bench case of *Abdul Hakeem v. Nawab Raj*, B. L. R., Sup. Vol., 911. I have therefore no doubt that the suit would lie, and is not barred by any plea *in limine*. And then a two-fold question [453] arises. In the first place, what is the meaning of the decree in execution of which the houses were sold? In interpreting this decree, I must refer to the order of this Court, dated the 6th September 1882, upon which the lower Courts have relied for the purpose of holding that the decree was limited to such rights of the defendant-judgment-debtor in that suit as existed in the property hypothecated in the bond upon which the decree was passed. It is clear to me that that adjudication, being one between the judgment-debtor on the one hand and the decree-holder on the other, and having been subsequent not only to the sale, but to the confirmation of the sale, cannot be binding upon the auction-purchaser, the present appellant. In the next place, my learned brother TYRRELL and I, who passed the order of the 6th September 1882, had before us two questions only which were raised in that case on behalf of the appellant-judgment-debtor, and the respondent-decree-holder was wholly unrepresented, and we were not then called upon to decide anything in relation to questions of the nature of the decree as to costs. I am therefore of opinion that that order cannot now be used against the present appellant.

We have now to consider what was the meaning of the decree, and my interpretation of that meaning is the same as that of my learned brother OLDFIELD, namely, that, in regard to costs, it was a decree made personal against the judgment-debtor: in other words, it conferred a right upon the decree-holder to take out execution for the recovery of those costs, not only against the property hypothecated in the bond which was the basis of the suit, but also against the person and the other property of the judgment-debtor. I limit this observation to the order of the Court in regard to costs. What happened was,

that a decree was passed having this double aspect, that it was so executed that not only the hypothecated property but these two houses also were attached, and in execution they were sold for about Rs. 500, the amount of costs being over Rs. 1 000. The question then is, whether such attachment and such proclamation of sale and the sale itself were or were not valid? There can be no doubt that if the decree-holder had taken out execution as to costs against the judgment-debtor in respect of the two houses, that would have been valid; and the only doubtful point is whether, the attachment having been made for the whole amount [454] of the decree and not for costs, and no separate proceedings having taken place in respect of the personal decree against the judgment-debtor, the sale was valid, or *ab initio* void, or voidable, or ineffectual to convey any proprietary rights to the auction-purchaser-appellant. Now I am anxious to say that I am not prepared to lay down that the method adopted by the decree-holder was necessarily regular or proper for the purpose of executing a decree of this nature. But all that is said against the attachment, against the notification of sale, and against the sale itself, constitutes matters falling under s. 312 of the Civil Procedure Code, which enables parties to object to confirmation of sale. And, therefore, even assuming for the purposes of argument that the sale and the confirmation of sale were subject to the objection of "material irregularity in publishing or conducting" the sale, within the meaning of s. 311, I should still say that a suit like the present, upon that ground alone, is prohibited by the last part of s. 312. Upon these grounds—the only grounds that can be taken on behalf of the plaintiff-respondent—I am of opinion that this suit should have been dismissed. I therefore concur in the order proposed by my learned brother OLDFIELD.

Appeal allowed.

NOTES.

[This was followed in (1887) 10 All., 127.]

[7 All. 454]

The 5th March, 1885.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Bari Bahu and another.....Defendants

•
versus

Gulab Chand.....Plaintiff.*

*Mortgage—Annulment of settlement—Fresh settlement—Act XIX of 1873
(Land-Revenue Act), ss. 43, 159, 165.*

A settlement of land belonging to G, and which he had mortgaged, having been annulled under s. 158 of the N.-W. P. Land-Revenue Act (XIX of 1873), the land was farmed by the Collector of the District under s. 159. The revenue having fallen into arrears, the Collector, under the same section, took the land under his own management. Subsequently, under ss. 165 and 43 of the Act, the land was settled with G's wife.

Held that the Court was precluded by the terms of s. 241 (f) of the Revenue Act from entering into the question whether the settlement was legally made by the Collector with

* Second Appeal No. 19 of 1884, from a decree of J. M. C. Steinbelt, Esq., District Judge of Banda, dated the 3rd October 1883, modifying a decree of Munshi Manmohan Lal, Subordinate Judge of Banda, dated the 6th July 1883.

the wife of the mortgagor; that she must therefore be taken to represent such rights and interests as the mortgagor possessed; and that consequently the estate was liable in her hands for the mortgage, and the mortgagee was entitled to claim foreclosure against her.

[455] THE facts of this case are sufficiently stated for the purposes of this report in the judgment of OLDFIELD, J.

Babu Raroda Prasad Ghose, for the Appellant.

The Junior Government Pleader (Babu Dwarka Nath Banarji) and Pandit Ajudhia Nath, for the Respondent.

Oldfield, J.—The plaintiff holds a mortgage with conditional sale from Gurdayal of his one-third share in mauza Dharwan and has brought this suit for foreclosure. It appears that Gurdayal and the shareholders of the other two-thirds of the mauza fell into arrears of revenue, and the Government annulled the settlement under s. 158, Revenue Act, and under s. 159 farmed the mauza to the plaintiff. The plaintiff also appears to have fallen into arrears of revenue, and the Collector, also acting under s. 159, took the mauza under his management. Eventually, as the arrears could not be cleared off by *kham* management, the one-third share of Gurdayal was, under the provisions of ss. 165 and 43, Revenue Act, offered to defendant Bari Bahu, wife of Gurdayal, as representing him. He, it appears, had become a *bairagi*. She satisfied the arrears due, Rs. 908-6-11, and a fresh settlement was made with her. The claim of the plaintiff to foreclose has been resisted by her on the ground that the estate is not liable in her hands for the mortgage made by Gurdayal. Both Courts decreed the claim, and the same plea is now raised in second appeal before us, and is the only ground pressed in appeal.

The plea is invalid. There is no doubt that under s. 159, Revenue Act, so long as a farm or *kham* management continues as to land the settlement of which has been annulled, all contracts made by the persons who immediately before the annulment of the settlement were in possession of the land comprised therein, relating to such lands, are during the term of farm or *kham* management not binding on the Collector of the District, or his agent or lessee; but in the present case the term of farm and *kham* management ceased, and Bari Bahu, the defendant, was put into possession, not as farmer, but as a proprietor with whom a fresh settlement has been made under ss. 165 and 43; and there is nothing in the law by which the contracts made by her predecessor, Gurdayal, are not binding on her, just as they would be on him. The fact that she paid off revenue, or that the original settlement was [456] cancelled and a new one made with her for the period of the current settlement, does not relieve her from the obligations of contracts made by her predecessor in title. In this case, if the plaintiff is responsible for any of the arrears which she has satisfied, she may possibly have a claim against him on that account; but on that point I express no opinion; but she cannot be relieved of the obligation created by the mortgage made by Gurdayal. Whether or not the settlement should have been made with Gurdayal under s. 43 rather than with Bari Bahu does not affect the question before us. She was treated as proprietor, or as representing Gurdayal as his heir, who had by becoming a *bairagi* disassociated himself from affairs, and was treated as civilly dead; and in either case the estate in her hands is liable for the mortgage made by Gurdayal. The appeal is dismissed with costs.

Mahmood, J.—I am of the same opinion; but as in the course of argument I expressed some doubt as to the view which my brother OLDFIELD and I now take, I wish to add a few words. It appears that the whole question now is, whether the plaintiff, as holder of a mortgage from Gurdayal, can enforce it in this suit as against Bari Bahu, who is admittedly in possession

of the property mortgaged through an arrangement made between her and the Collector of the district in which the property is situated. The question seems to depend upon our knowing the exact legal *status* of this lady in regard to this *estate*. Having carefully examined the original record of the proceedings by the Collector, after Gurdayal fell into arrears of Government revenue, I have arrived at the same conclusion as my learned brother OLDFIELD, namely, that his action must be regarded as having been taken in accordance with s. 165 of the Land-Revenue Act (XIX of 1873), read with s. 43 of the same Act. Of course action so taken was one of the measures for which the Legislature provided in s. 150 of the Act, and my difficulty at the hearing was whether the Collector's action, in settling the estate with Bari Bahu, was legal. I still entertain considerable doubt, because I am inclined to think that s. 165 of the Revenue Act, read with s. 43, enables the Collector to settle land only with the *proprietor*, that term being by ordinary rules of construction understood as including those who represent him in title. Of course, the case of a mortgage or conditional vendee [457]—the other persons with whom a settlement may be made,—does not arise here. But this doubt is not a matter with which we are concerned.

It may be that Gurdayal being admittedly still alive, the action of the revenue authorities in treating him as if he was dead and in settling the property with his wife, was illegal. But in this case we are dealing with the matter as a Civil Court, and I therefore agree with my brother OLDFIELD in holding that the question cannot be adjudicated on by us so far as regards the validity of the settlement made by the Collector. By reason of cl. (b) of s. 241 of the Revenue Act, we have no jurisdiction to enter into the merits of the matter, and therefore we must take it that the wife does now represent such rights and interests as Gurdayal possessed, and, in consequence, he is virtually bound by such contracts regarding the property as he made. It is unnecessary for me to remark as to the effect of the circumstance that Gurdayal himself is one of the defendants in the present suit. For these reasons I concur in the order proposed by my brother OLDFIELD.

Appeal dismissed.

[7 All. 457]

The 5th March, 1885.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Ram Bakhsh.....Plaintiff

versus

Panna Lal and another.....Defendants.

Execution of decree—Application of transferee of decree for execution disallowed—Suit by transferee for decretal amount—Declaratory decree—Civil Procedure Code, ss. 232, 244.

The transferee of a decree for costs, associating with him the transferor, made an application under s. 232 of the Civil Procedure Code, to be allowed to execute the decree. The

* Second Appeal No. 1622 of 1883, from a decree of Babu Pramoda Charan Banarji, Judge of the Court of Small Causes at Agra, with powers of a Subordinate Judge, dated the 30th June 1883, reversing a decree of Maulvi Muhammad Fida Husain, Munsif of Agra, dated the 13th December 1882.

application was opposed by the judgment-debtor, and was rejected, and the Court referred the transferee to a regular suit. After taking various proceedings ineffectually, he instituted a suit for the recovery of the sum to which he was entitled as costs under the decree transferred to him.

Held, that the plaintiff, as the holder of the decree by assignment, could only recover the amount under it by executing the decree, and not by a separate suit; but that he was entitled to have a decree declaring that the assignment to him of the decree-holder's rights under the decree was valid, and gave him a right to execute it, and that the Court's order under s. 232, which disallowed the execution was an improper one, a suit for this relief being maintainable, for, there being no appeal from orders under s. 232, there would otherwise be no remedy, and that, looking at the plaint and the issues on which the parties were divided, and the [458] fact that the Court which refused the plaintiff's application for execution, referred him to a regular suit, this relief might properly be given in the present suit.

Per MAHMOOD, J., that the suit was maintainable, inasmuch as the present plaintiff never having been accepted on the record as holder of the decree, the questions which were disposed of by the Court executing the decree, as between the plaintiff and the judgment-debtor, could not be regarded as questions within s. 211 of the Civil Procedure Code.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of OLDFIELD, J.

Mr. T. Conlan and Munshi Kashi Prasad, for the Appellant.

Pandit Ajudhia Nath and Pandit Bishambar Nath, for the Respondents.

Oldfield, J.—It appears that the defendants-respondents instituted a suit against Khatta Mal and Kashi Nath on a bond for recovery of money due. They succeeded in the Court of First Instance and in the Lower Appellate Court, but their decree was set aside in appeal by the High Court on the 8th March 1871, and their suit dismissed, and Khatta Mal and Kashi Nath obtained a decree for their costs. On the 17th March 1879, Kashi Nath, the sole surviving defendant in that suit, assigned to the plaintiff-appellant before us his right under the decree of the High Court to costs. On the 10th July 1879, the assignee (*i.e.*, plaintiff-appellant before us) associating with him Kashi Nath, assignor, put in an application to be allowed to execute the decree for costs. This application was made under s. 232, Civil Procedure Code, and was refused by the Court, and it would appear that the judgment-debtor, that is, Panna Lal, defendant-respondent before us, objected to the prayer in the application, and the Court referred the decree-holder to a regular suit. The plaintiff-appellant took various proceedings ineffectually. He appealed to the Judge, but his appeal was dismissed, as no appeal could lie under the provisions of the Civil Procedure Code. He applied to the High Court to revise the order of the Court on his application for execution, but without success.

He then brought a suit in the Court of Small Causes to recover the amount of costs; but it was held that the suit would not lie in that Court. He has now instituted the present suit in the Court of the Munsif of Agra to recover the sum to which he was entitled as costs under the High Court decree assigned to him by Kashi Nath. The Court below has held that he can only recover the amount by [459] executing the decree, and not by a separate suit. Ram Bakhsh, plaintiff, has appealed against this decree. I am of opinion that the plaintiff, as the holder of the decree by assignment, can only recover the amount under it by executing the decree, and not by a separate suit; and, so far, I concur with the lower Court; but it appears to me that he is entitled to have a decree declaring that the assignment to him by Kashi Nath of his rights under the decree of this Court is a valid assignment, and gives him a right to execute it; and that the Court's order under s. 232, which disallowed the execution, was an improper one. A suit for this relief is certainly maintainable, for there is no appeal

from orders under s, 232, Civil Procedure Code ; and there would be no remedy if a suit was not allowed, and looking at the plaint and the issues on which the parties were divided, and the fact that the Court, which refused his application for execution, referred him to the Civil Court, this relief may, I think, be properly given in this suit, and there is no question as to the fact that the assignment was made by Kashi Nath in favour of the plaintiff. The decree of the Lower Appellate Court will be modified accordingly. The plaintiff will pay Kashi Nath's costs in all Courts. The other parties will pay their own costs.

Mahmood, J—I concur in the order proposed by my learned brother OLDFIELD, and also in the reasons which he has given. I need only add that the reason why this suit is maintainable is, that the present plaintiff never having been accepted on the record as holder of the decree, the questions which were disposed of by the Court executing the decree, as between the plaintiff and the judgment-debtor, cannot be regarded as questions within s. 244 of the Civil Procedure Code. These observations apply to the connected cases also.

NOTES.

[(1895) 20 All., 539 is a similar decision. But see also (1894) 16 All., 483.]

[7 All 459]

APPELLATE CRIMINAL

The 6th March, 1885.

PRESENT

MR JUSTICE BRODHURST.

Queen-Empress

versus

Sheo Dayal.

Act XLV of 1860 (Penal Code), ss 24, 25, 471—Fraudulently using as genuine a forged document—"Dishonestly," "Fraudulently."

In a trial upon a charge, under s. 471 of the Penal Code, of fraudulently or dishonestly using as genuine documents known to be forged, it was found that four forged receipts for the payment of rent, used by the prisoner, had been fabricated in lieu of genuine receipts which had been lost.

[460] *Held* that, with reference to the definitions of the terms "dishonestly" and "fraudulently" in ss 24 and 25 of the Penal Code, the prisoner, upon the facts as found, had not committed the offence punishable under s. 471

THIS was an appeal from an order of Mr. G. J. Nicholls, Officiating Sessions Judge of Azamgarh, dated the 18th November 1884, convicting the appellant of the offence of fraudulently using as genuine a forged document.

The appellant was convicted of fraudulently using as genuine four documents purporting to be receipts for the payment of money, knowing such documents to be forged. It appeared that the appellant, claiming to be the occupancy tenant of certain land applied in the Revenue Court to recover the occupancy of the land, alleging that two of the proprietors of the estate in

which such land was situate, called Faiz Ali and Ramdaur Singh, had wrongfully dispossessed him. In the course of the proceedings he produced four receipts for the payment of rent, which were forged. It was in respect of these documents that the appellant had been convicted of an offence under s. 471 of the Penal Code.

The assessors found as a fact, and the Sessions Judge agreed with them, that the forged receipts had been fabricated in lieu of genuine receipts which had been lost. The assessors were of opinion, on this finding, that the appellant had committed no offence in using them as he did. The Sessions Judge differed with the assessors on this point, observing as follows:—"It amounts to forgery, if the false document be made with intent to support any claim or title. Even if a man has a legal claim or title to property, he will be guilty of forgery if he counterfeits documents in order to support it."

Munshi Kashi Prasad, for the Appellant.

The Junior Government Pleader (Babu Dwarka Nath Banarji), for the Crown.

Brodhurst, J.—The Sessions Judge, differing from the assessors, has convicted Sheo Dayal *alias* Sur Dayal, under s. 471 of the Indian Penal Code, and has sentenced him to two years' rigorous imprisonment. In the appeal it is pointed out that the Judge has in his judgment recorded that the receipts "have been fabricated, it may be granted, in lieu of genuine receipts which have been lost," and that the accused "has to all appearance been cruelly [461] injured, and that he has met the violence and perjury of Faiz Ali and Ramdaur Singh by concocting new receipts to supply the want caused by his losing his genuine ones."

The Judge has observed:—"It amounts to forgery if the false document be made with intent to support any claim or title. Even if a man has a legal claim or title to property, he will be guilty of forgery if he counterfeits documents in order to support it." The Judge, apparently, has overlooked s. 464 of the Penal Code, which shows that the "false document" referred to in s. 463 must, to constitute forgery, have been made "dishonestly or fraudulently." "Dishonestly" and "fraudulently" are defined in ss. 24 and 25 of the Penal Code respectively, and, with reference to those definitions, the accused, on the findings of the Judge, as contained in the extracts above given, did not commit the offence of which he has been convicted. The conviction and sentence are therefore annulled, and the prisoner-appellant will be immediately released.

Conviction set aside.

NOTES.

[See also 5 C. W. N., 897.]

[7 All. 461]
FULL BENCH.

The 7th March, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE
STRAIGHT, MR. JUSTICE OLDFIELD, MR. JUSTICE
BRODHURST, AND MR. JUSTICE MAHMOOD.

Queen-Empress
versus
Ramzan and others.

*Act XLV of 1860 (Penal Code), ss. 79, 296—Disturbing a religious assembly—
Muhammadian Law—Hanafia and Shafia Schools—Right to say 'amin'
loudly during worship—Act VI of 1871 (Bengal Civil Courts Act),
s. 24—Act I of 1872 (Evidence Act), s. 57 (1)—Muhammadian
Ecclesiastical Law—Judicial notice.*

A masjid was used by the members of a sect of Muhammadans called the Hanifis, according to whose tenets the word "amin" should be spoken in a low tone of voice. While the Hanifis were at prayers, R, a Muhammadan of another sect, entered the masjid, and in the course of the prayers, according to the tenets of his sect, called out "amin" in a loud tone of voice. For this act he was convicted of voluntarily disturbing an assembly engaged in religious worship, an offence punishable under s. 296 of the Penal Code.

The Full Bench (MAHMOOD, J., dissenting) ordered the case to be retried, and that in re-trying it, the Magistrate should have regard to the following questions, namely, (1) Was there an assembly lawfully engaged in the performance of religious worship? (2) Was such assembly, in fact, disturbed by the accused? (3) Was such disturbance caused by acts and conduct on the part of the accused by which he intended to cause such disturbance, or which acts and conduct, at the time of such acts and conduct, he knew or believed to be likely to cause disturbance?

[462] *Held*, by MAHMOOD, J., that the discussion occasioned by the act of the accused having, presumably, taken place during the interval when the prayers were not going on, the assembly was not at that time "engaged in the performance of religious worship," and was not "disturbed" within the meaning of s. 296 of the Penal Code; that, in reference to the terms of s. 39 of the Code, the accused did not disturb the assembly "voluntarily;" that he was justified by the Muhammadian Ecclesiastical Law in entering the mosque, and joining the congregation in saying the word "amin" loudly if he thought fit, and his conduct fell within the purview of s. 79* of the Penal Code, and was therefore not an offence under s. 296. *Beatty v. Gillbanks*, L. R., 9 Q. B. D., 308, referred to.

Also *per* MAHMOOD, J., that having regard to the guarantee given by the Legislature in s. 24 of Act VI of 1871 (Bengal Civil Courts Act), that the Muhammadian Law shall be administered in all questions regarding "any religious usage or institution," the Court was bound by s. 57 (1)† of Act I of 1872 (Evidence Act) to take judicial notice of the Muhammadian Ecclesiastical Law, and the rules of that law need not be proved by specific evidence.

Act done by a person justified or by mistake of fact believing himself justified by law.

Facts of which Court just take judicial notice.

*[Sec. 79 :—Nothing is an offence which is done by any person who is justified by law, or who, by reason of a mistake of fact and not by a reason of a mistake of law, in good faith believes himself to be justified by law in doing it.]

†[Sec. 57 (1) :—The Court shall take judicial notice of the following facts :—(1) All laws or rules having the force of law now or heretofore in force or hereafter to be in force in any part of British India.

THIS was an application to the High Court for the exercise of its powers of revision under s. 439 of the Criminal Procedure Code. It appeared that the applicants, Ramzan, Muhammad Husain, and Abdul Rahman, were convicted by the Cantonment Magistrate of Benares, Major R. Annesley, by an order dated the 25th September 1884, of an offence under s. 296, Indian Penal Code. The judgment of the Cantonment Magistrate was as follows:—

"The particulars of this case are as follow:—In muhalla Maddanpura, City Benares, a large *masjid* exists, generally called Allu's *masjid*, after the builder. Abdulla, the complainant, was left in charge of this *masjid* after Allu's death, some years ago, and Ramzan, accused, is a grand-nephew of Allu's, and also his son-in-law. During the month of August 1884, Ramzan, who it seems had not frequented this *masjid* for many years, suddenly returned to it. He was accompanied by Muhammad Husain, accused, and Abdul Rahman, accused, and these three men at once began a series of annoyances to the assembly engaged in prayer in the *masjid*. The men who use the *masjid* nearly all belong to a sect called Hanifis, and Ramzan also formerly belonged to it, but has lately become a Wahabi. It appears the Hanifis use the word '*amin*' in their prayers, but say it so low that only a person standing very close can hear it. The Wahabis, on the contrary, call out '*amin*' at the top of their voices, and, by doing so in the Allu *masjid* the three accused naturally disturbed the Hanifis [463] engaged in prayer. The evidence for the prosecution is perfectly clear; first, as to the fact of the three accused having entered the *masjid* on four successive Fridays during August and September 1884; secondly, as to having by their behaviour disturbed the assembly at prayers; and thirdly, as to police intervention being necessary, on the 22nd August 1884, to quell a disturbance occasioned by the accused, and which threatened to become serious. The witnesses are respectable persons, and most moderate in the views they express when giving evidence. They consider the presence of Ramzan and his companions not desirable in the *masjid*, but raise no objection to their joining the worshippers as long as they cause no disturbance. Ramzan states that there is enmity between him and Abdulla on account of the *masjid* accounts, and that therefore he was turned out of it on pretence of his saying '*amin*' loudly, which is not objectionable to the Hanifis, the real reason being that Abdulla will not give him a statement of the *masjid*'s income, also that he has always prayed at that *masjid*. The other two accused say, that on 22nd August 1884, they saw Ramzan being beaten and interfered with; on which Abdulla and his party have included them in the charge brought against Ramzan. The witnesses for the defence merely state that they consider that calling out "*amin*" loudly does not disturb an assembly at prayers, and yet they all state they only speak the word very low themselves. They also speak to the quarrel having originated in money matters about repairs to the *masjid*, and further, that the three accused have frequented this *masjid* for years. I note, however, that the only independent witness, a Hindu named Harpal, who keeps a shop under the *masjid*, states that he has been there for five years, and that only within the last month has Ramzan come to the *masjid*,—never before. Be that as it may, Ramzan and his companions, the two other accused, had not a shadow of an excuse for disturbing the people in the *masjid*. It is useless to inquire whether it is lawful or not to use the word '*amin*.' As long as by doing so the accused disturbed the assembly, they rendered themselves liable to punishment under s. 296, Indian Penal Code. If it be true that the enmity between Ramzan and Abdulla originated in a quarrel about the income of the *masjid*, his conduct is all the more reprehensible, for he has disturbed a large

number [464] of persons engaged in prayer, merely to gratify his spite against an individual. The Courts of law are the proper places to settle money quarrels in, and not places of religious worship, and it is intolerable that men like the accused should be allowed to cause annoyance to a whole community.

"The Court is of opinion that Ramzan, son of Maddar, Muhammad Husain, son of Allahdin, and Abdul Rahman, son of Abdul Karim, are guilty of the charge preferred against them, viz., that they voluntarily disturbed an assembly engaged in religious worship, thereby committing an offence punishable under s. 296, Indian Penal Code; and the Court directs that the said Ramzan, Muhammad Husain, and Abdul Rahman, pay a fine of twenty-five rupees each, or, in default, be rigorously imprisoned for one month."

The ground of this application for revision was that "to pronounce the word '*amin*' (amen) in a loud tone during the prayers is not an offence punishable under s. 296 of the Indian Penal Code."

The application came for hearing before BRODHURST, J., by whom it was referred to a Divisional Bench. On the application coming before OLDFIELD and MAHMOOD, JJ., those learned Judges referred to the Full Bench the question "whether the facts proved in this case amount to an offence under s. 296 of the Indian Penal Code."

Mr. *Amir-ud-din*, for the Applicants.

The *Public Prosecutor* (Mr. C. H. Hill), for the Crown.

On the 21st February 1885, the following opinions were delivered:—

Petheram, C. J.—Speaking for myself only, the order which I propose to pass in this case is, that the case be re-tried by the Magistrate, and that in re-trying it he should have regard to the following questions:—

1. Was there an assembly lawfully engaged in the performance of religious worship?
2. Was such assembly in fact disturbed by Ramzan?
3. Was such disturbance caused by acts and conduct on the part of Ramzan by which he intended to cause such disturbance, or which acts and conduct, at the time of such acts and conduct, he knew or believed to be likely to cause such disturbance?

[465] **Straight, J.**—I consent to the proposed order, though, speaking for myself alone, I am not prepared to say that there is not upon the record sufficient evidence to justify a conviction.

Oldfield, J.—I am of the same opinion.

Brodhurst, J.—I am of the same opinion.

Mahmood, J.—In this case I regret I am not able to concur in, or dissent from, the proposed order, because I have not yet been able to form any definite opinion. Under such circumstances, and considering that I am one of the Judges constituting this Bench, I should have thought that the judgment or order of the Court would, according to the ordinary judicial usage and practice, be reserved till I had an opportunity of forming an opinion in the case, and of placing my views before my honourable colleagues. But upon this point I have been overruled by the learned Chief Justice and my learned brethren, and I must therefore defer to their view, though I confess—and I say this with profound respect—that the order of the majority of the Court seems to me to be, under the circumstances, one of doubtful legality. In a recent case—*The Ichilkhanda and Kumam Bank v. Row*, I.L.R., 6 All., 468—I had the opportunity of expressing my views, in which the rest of the Bench concurred, to the effect that it is an essential principle of judicial acts, that when a Court,

consisting of several Judges, hears a case, no judgment or order can be legally passed until all those Judges have conferred with each other and made up their minds together. Upon this occasion, however, I must submit to the view of the majority of the Bench; but I regret, as I said before, that I am not in a position to make any order in this case, and must, *ex necessitate*, reserve my judgment or order till the exigencies of the business of the Court leave me time to form a definite opinion on this case, which, considering that none of the accused is undergoing the sentence of imprisonment, does not seem to me to be one of any especially emergent urgency.

On the 14th March, the following opinion was delivered by MAHMOOD, J., on the question referred to the FULL BENCH:—

[466] **Mahmood, J.**—This case originally came on for hearing in the Single Bench before my brother BRODHURST, and, in view of the peculiarities of the question with regard to the right of worshipping in mosques possessed by Muhammadans, my learned brother referred the case to a Division Bench, of which, at his suggestion, and with the approval of the learned Chief Justice, I was to be a member. The case was accordingly heard by a Bench consisting of my brother OLDFIELD and myself; and, in consideration of the fact that the main object of the application for revision obviously was to obtain an authoritative ruling upon the question, and also because the applicant's counsel informed us that the applicants, having paid the fines inflicted upon them were not undergoing the alternative sentence of imprisonment, we referred the case to the Full Bench, before which the case was re-argued by Mr. *Amir-uddin* on behalf of the applicants, and the learned Public Prosecutor on behalf of the Crown. Upon that occasion, after having fully heard the arguments on either side, I was unable to form any opinion such as could be made the basis of any order in the case, and being desirous of consulting the original authorities of Muhammadan Law, I wished to reserve my order to enable me to prepare a judgment in writing, as the question raised by the reference seemed to be far from simple, specially as, in my opinion, it turned upon a very minute point of the Muhammadan Ecclesiastical Law. The learned Chief Justice and my learned brethren, however, were able on that occasion to form an opinion in the case, and made an order remanding the case for re-trial on certain issues. My brother STRAIGHT, whilst consenting to the order of re-trial, was inclined to the opinion that the evidence on the record was sufficient to justify the conviction. I was, however, unfortunately not able to concur in, or dissent from, the order for the simple reason that I had formed no definite opinion in the absence of the authorities of Muhammadan Law, which had not been cited on either side.

Under these circumstances, it has devolved upon me now to deliver my judgment in the case, and I regret that the conclusion at which I have arrived is different from that at which the learned Chief Justice and the rest of the Court have done. In view of this circumstance, and also because facts similar to those that [467] exist in this case have before now been made the subject of criminal prosecutions in cases which have ultimately come up to this Court in revision, I wish to explain my reasons fully.

The facts of the case itself are very simple. The mosque in question in this case is situate in muballa Maddanpura, in the city of Benares, and it was built by one Ali Muhammad *alias* Allu, who is stated by the prosecution to have followed the doctrines of Imam Abu Hanifa, and was therefore a Hanifi. The prosecutor, Abdulla, is a brother-in-law of the founder of the mosque, his sister having been married to Allu, and the principal accused, Ramzan, is the son in-law of Allu, and also otherwise related to him. The other two accused,

Muhammad Husain and Abdul Rahman, are persons holding religious views similar to those held by Ruzan.

It appears that on the 22nd of August 1884, the three accused joined the congregation in the mosque, and during the prayer said the word "*amin*" aloud. This appears to have led to a discussion as to whether it was right to say the word aloud in prayers, and a heated argument took place, resulting in the accused being turned out of the mosque with the help of the Police, and the prosecutor prohibiting them from coming to the mosque again unless they renounced the rite of saying "*amin*" aloud in prayers.

On the 1st of September 1884, Abdullah and some other persons presented an application to the Magistrate, describing the occurrence of the 22nd August, and asking for the interference of the Magisterial authorities, on the ground that breach of the peace was likely to take place by reason of the accused insisting upon saying the word "*amin*" aloud in prayers. No definite action appears to have been taken by the Magisterial authorities on that application beyond sending it for inquiry to the City Inspector of Police, and matters seemed to have stood thus, when, on the 20th of September 1884, Abdullah, by himself filed another petition, complaining of the accused, and charging them with "the offence of insulting the religion of the Hanafi Musalmans" under ss. 297, 298 and 352 of the Indian Penal Code. The Magistrate, after having examined the prosecutor and the witnesses for the prosecution, framed charges against the accused under s. 296 of the [468] Indian Penal Code, and after having taken the evidence on behalf of the defence, convicted them under that section, and sentenced them to pay a fine of Rs. 25 each, and in default to undergo rigorous imprisonment for one month.

The accused have applied for revision to this Court under s. 439 of the Criminal Procedure Code, on the ground that "to pronounce the word '*amin*' in a loud tone during the prayers is not an offence punishable under s. 296 of the Indian Penal Code."

The question so raised seems to me to involve mixed considerations of the meaning of the Indian Penal Code and the Muhammadan Ecclesiastical Law; for, according to my view, the application of the former depends upon the interpretation of the latter in connection with this case. But before discussing this question, I wish to express my views with reference to the observation which was made in the course of the argument that this Court is not bound to consider the Muhammadan Ecclesiastical Law in such cases without having the rules of that law proved by specific evidence like any other fact in a litigation. I am unable to accept this view, because, if it is conceded that the decision of this case depends (as I shall presently endeavour to show it does depend) upon the interpretation of the Muhammadan Ecclesiastical Law, it is to my mind the duty of this Court, and of all Courts subordinate to it, to take judicial notice of such law. I hold that cl. (1) of s. 57 of the Evidence Act (I of 1872) fully covers the Muhammadan Ecclesiastical Law in such cases, because, whenever a question of civil right or the lawfulness of an act arises in a judicial proceeding, even a Criminal Court is bound, *ex necessitate*, to resort to the civil branch of the law; and, in a case like the present, the question being the right of a Muhammadan to pray in a mosque according to his tenets, the question of legality or illegality would fall under the purview of the express guarantee given by the Legislature in s. 24 of the Bengal Civil Courts Act (VI of 1871), that the Muhammadan Law shall be administered with reference to all questions regarding "any religious usage or institution." That the application of some of the sections of the Indian Penal Code depends almost entirely upon the correct interpretation of the rules of civil law, cannot, in my opinion,

he doubted; and if it is so, the present case is only another illustration of this [469] principle. Indeed, I am prepared to go the length of saying that, but for this principle, the rules of the Penal Code would in many cases operate as a great injustice, and acts fully justified by the civil law would constitute offences under that Code. I hold therefore that in a case like the present, the provisions of s. 56 of the Evidence Act fully relieve the parties from the necessity of proving the Muhammadan Ecclesiastical Law upon the subject, that that law is not to be placed upon the same footing with reference to this matter as any foreign law of which judicial notice cannot be taken by the Courts in British India; and it follows that I can refer to the Muhammadan Ecclesiastical Law for the purposes of this case, notwithstanding the absence of any specific evidence on the record regarding its rules.

Now, before going further, I wish to observe that the main allegations on behalf of the prosecution, contained in the petition of the 1st September 1884, and in that of the 20th September 1884, relate to the conduct of the accused in saying the word "*amin*" aloud during prayers in the mosque; that in the evidence for the prosecution itself the loud utterance of that word is the *gravamen* of the accusation; that the Magistrate framed charges under s. 296, Indian Penal Code, with reference to that matter alone, disregarding the other sections of the Indian Penal Code cited on behalf of the prosecution; and that his judgment entirely proceeds upon the view that the loud utterance of the word "*amin*" during prayers constitutes a criminal offence under the circumstances of this case. It is true that in the evidence for the prosecution there were vague allegations as to other facts which might possibly have furnished basis for charging the accused under some other sections of the Indian Penal Code; but, as a matter of fact, the Magistrate did not charge or try the accused under any other section, and at all events we in the Full Bench are not concerned with the whole case.

Holding these views, I feel myself called upon, sitting as a Judge in the Full Bench to which the reference has been made solely as to s. 296 of the Indian Penal Code, to consider the case for the purpose of answering the reference only in that aspect, leaving it to the referring Bench to decide questions which may possibly arise in the case beyond the scope of the question referred.

[470] But before discussing the various elements of the offence described in the section, I think it necessary to consider whether the saying of *amin* aloud in prayers is not an act which falls within the purview of s. 79 of the Indian Penal Code, which lays down the elementary proposition of the criminal law that "nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it."

The word *amin* is of Semitic origin, being used both in Arabic and Hebrew, and has been adopted in prayers by Muhammadans as much as by Christians. The word does not occur in the Kuran, but in conformity with the "*Sunnah*," or the practice of the Prophet, it is regarded by Muhammadans as an essential part of the prayers, as a word representing earnestness in devotion. The word is pronounced at the end of the first chapter of the Kuran, which consists of the following prayers:—"Praise be to God, the Lord of all creatures; the most merciful, the King of the day of judgment. Thee do we worship, and of Thee do we beg assistance. Direct us in the right way, in the way of those to whom Thou hast been gracious; not of those against whom Thou art incensed, nor of those who go astray."

In order to understand the exact difficulty which has arisen in this case with reference to the word *amin*, it is necessary to bear in mind that Muhammadanism, like other religions, is divided into various sects or schools of doctrine,

differing from each other either in matters of principle or in matters of detail as to the minor points of ritual "The Musalmans who assume to themselves the distinction of orthodox, are such as maintain the most obvious interpretation of the Kuran and the obligatory force of the traditions in opposition to the innovations of the sectaries, whence they are termed *Sunnis* or traditionists and it is their opinion alone which is admitted to have any weight in the determinations of jurisprudence." These four schools or sects, of which this concise account has been given by Mr. Hamilton in the Preliminary Discourse of his translation of the Hedaya, were founded by the four *orthodox* Imams, namely, Abu [471] Hanifa, Malik, Shafai, and Hanbal, all of whom flourished within the first two centuries of the Muhammadan era, or the eighth century of the Christian era. To use the language of Mr. Hamilton again:—"The word *orthodox* as here used is confined purely to a justness of thinking in spiritual matters, concerning which the opinions of those four sects perfectly coincide, the differences among them relating solely to their expositions of the temporal law."

I have mentioned all this in order to render intelligible what I am going to say presently regarding the Muhammadan Ecclesiastical Law with reference to pronouncing the word *amin* in prayers. All parties concerned in this case admittedly belong to the *Sunni* persuasion, and the mosque in question belongs also to the *Sunni* section of the Muhammadan population. It is an indisputable matter of the Muhammadan Ecclesiastical Law that the word *amin* should be pronounced in prayers after the *Sura-i-Fateha* or the first chapter of the Kuran, and that the only difference of opinion among the four Imams is, whether it should be pronounced aloud or in a low voice. The Hedaya, which is the most celebrated text-book of the Hanafi school of law, lays down the rule in the following terms:—"When the Imam (leader in prayers) has said 'nor of those who go astray,' he should say *amin*, and so should those who are following him in the prayers; because the Prophet has said that 'when the Imam says *amin*, you must say *amin* too,' and it must be said in a low voice, because such is the tradition stated by Ibu-i-Masud, and also because the word is the prayer, and should therefore be pronounced in a low voice." That this doctrine is the result of weighing the authority of conflicting traditions is apparent from the commentary on the above passage of the Hedaya by Ibu-i-Hunam, a celebrated author of the Hanafi school. These traditions are collected in the celebrated collections of traditions (*Sihah*) of Bukhari and Muslim, both equally acknowledged as accurate traditionists by all the schools of the Sunni Muhammadans. From the same traditions the followers of Imam Shafai have evolved the doctrine that *amin* should be pronounced aloud, and the views of that school are best stated by Nawawi, a commentator on *Sahih Muslim*. The followers of the other two Imams, namely, Malik and Hanbal, also main-[472]tain that the word *amin* should be pronounced aloud. But it is not necessary to cite authorities for this proposition, because their followers do not exist in British India. From what I have already said, it is clear that the doctrines of all the four Imams are regarded by Sunni Muhammadans as orthodox, and that the differences of opinion which exist between them are pure matters of detail. Indeed, in the greatest mosque in the world, namely, the *Kaaba* itself, the followers of all the four Imams are at full liberty to pray according to their own tenets. The Shafais, as is apparent from the texts which I have already quoted, pronounce the word *amin* aloud in prayers, and to this no objection is or can be made on the ground that the practice is heterodox from a Sunni point of view. Indeed, the prosecutor in this very case, in his petition of the 20th

September 1884, after stating that the orthodox Muhammadans are the followers of the four Imams, goes on to say that "if the defendants had been the followers of any one of the four Imams, the complainant, who is a Hanafi, and other Muhammadans, would not have shrunk from associating with them," and the ground of the complaint is stated in the petition to be that the defendants "are not the followers of any of the four Imams," that "they intend to set up a new form of worship for themselves;" that "they are therefore no longer Muhammadans;" and by saying the word *amin* aloud they "have been guilty of the offence of insulting the religion of the Hanafia Muhammadans." Now, unless these allegations are substantiated, I am of opinion that there can be no case against the accused under s. 296 of the Indian Penal Code. The prosecutor states himself and the founder of the mosque to be a Hanafi, that is, the follower of Imam Abu Hanifa's doctrines. One of the highest authorities of that school is the *Diur-i-Mukhtar*, in which the strongest text is to be found against saying *amin* aloud; but the text itself falls far short of substantiating the rule of Ecclesiastical Law, upon establishing which the case for the prosecution in my opinion depends. The text is as follows:—"It is in accord with the practice of the Prophet to say *amin* in a low voice, but the departure from such practice does not necessitate invalidity (of the prayer), nor a mistake, but it is only a detriment." Even this passage only relates to the efficacy or validity of the prayer of the person who says *amin* aloud or in [473] a low tone. There is absolutely no authority in the Hanafia or any other of the three orthodox schools of Muhammadan Ecclesiastical Law which goes to maintain the proposition that if any person in the congregation says the word *amin* aloud at the end of the "*Sura-i-Fateha*," the utterance of the word causes the smallest injury, in the religious sense, to the prayers of any other person in the congregation, who, according to his tenets, does not say that word aloud. It is a matter of notoriety that in all the Muhammadan countries like Turkey, Egypt, and Arabia itself, Hanafis and Shafis go to the same mosque, and form members of the same congregation, and, whilst the Hanafis say the word *amin* in a low voice, the Shafis pronounce it aloud. To say that the utterance of the word *amin* aloud, after the Imam has recited the "*Sura-i-Fateha*" causes a disturbance in the prayers of a congregation, some or many of whom say the word in a low tone, is to contradict the express provisions of the Muhammadan Ecclesiastical Law as explained by all the four orthodox Imams. I now pass to the next step in the case, namely, whether the accused in this case had the legal right to enter into and worship in the mosque with the congregation according to their own tenets. There is absolutely no evidence in the case to substantiate the accusation brought by the prosecutor against them that they are "no longer Muhammadans." They call themselves "Muhammadi," which is the Arabic for "Muhammadan," and although the prosecutor brands them as Wahabis, there is nothing to prove that they belong to any heterodox sect. Indeed, the only tangible ground upon which the prosecutor objects to their worshipping in the mosque and calls them Wahabis is their saying the *amin* aloud—a practice which, as I said before, is commended by three out of the four orthodox Imams of the Sunni persuasion, and which, according to the doctrine of Imam Abu Hanifa himself, does not vitiate the prayers. Now, it is a fundamental principle of the Muhammadan Law of *wakf*, too well known to require the citation of authorities, that when a mosque is built and consecrated by public worship, it ceases to be the property of the builder and vests in God (to use the language of the Hedaya) "in such a manner as subjects it to the rules of Divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God by the advancement [474] of it resulting to his creatures." A mosque once so consecrated cannot in any case

revert to the founder, and every Muhammadan has the legal right to enter it, and perform devotions according to his own tenets so long as the form of worship is in accord with the recognized rules of Muhammadan Ecclesiastical Law. The defendants therefore were fully justified by law in entering the mosque in question and in joining the congregation, and they were strictly within their legal rights, according to the orthodox rule of the Muhammadan Ecclesiastical Law, in saying the word *amin* aloud.

I now proceed to consider whether, under the circumstances of this case, the prosecution have succeeded in substantiating an offence under s. 296 of the Indian Penal Code.

The following seem to me to be the constituents of the *corpus delicti*:—

- (1) That the assembly was lawfully "engaged in the performance of religious worship."
- (2) That the accused caused a "disturbance" to such assembly.
- (3) That they caused such disturbance "voluntarily."

In regard to the first point, there can be no doubt, and indeed there is no question, that the mosque being public, the congregation was lawfully assembled there for the purposes of religious worship.

The second question is not so simple, because the word "*disturbance*" is not defined in the Indian Penal Code. But I think I may adopt the language of SHAW, C.J., in an American case cited by Mr. Bishop in his treatise on *Criminal Law*:—"What shall constitute an interruption and disturbance of a public meeting or assembly cannot easily be brought within a definition applicable to all cases; it must depend somewhat on the nature and character of each particular kind of meeting, and the purposes for which it is held, and much also on the usage and practice governing such meetings. As the law has not defined what shall be deemed an interruption and disturbance, it must be decided as a question of [475] fact in each particular case; and, although it may not be easy to define it before hand, there is commonly no great difficulty in ascertaining what is a wilful disturbance in a given case."—(Bishop on *Criminal Law*, 6th ed., vol. 2, p. 308). In illustrating this, the learned author, after giving some examples of what would cause a disturbance, goes on to say:—"Again, among one class of religionists a solemn *amen* would be permissible, where among another class it would not be" (p. 310). In the present case I have already said enough to show that whilst the Hanafis, who evidently form the majority of the congregation of this mosque, prefer to say *amin* in a low voice, there is nothing in their tenets which would vitiate their prayers if any person among the congregation prefers the other equally orthodox tenet of pronouncing the word aloud. There is no allegation on behalf of the prosecution that the accused either uttered the word irreverently or at an improper juncture of the prayers, or otherwise than in the conscientious performance of their devotions. Nor is there any allegation to the effect that the accused pronounced the word *amin* in a loud tone with any intention of disturbing the assembly. The rest of the evidence for the prosecution only goes to show that the accused, being earnest believers in the doctrine of saying *amin* aloud, entered into a somewhat heated discussion with the other worshippers and employed the word *kafir* (unbeliever) to those who did not accept their doctrine upon the point. Purely as a question of the weight of evidence, I hold that such a discussion could not have taken place during the prayers, because the Muhammadan ritual absolutely prohibits the utterance of any words other than those of the prayers during the *namaz* or divine service. The prosecution itself makes

no such allegation, and if the discussion took place before or after the service, though in the mosque itself, I hold that even if the discussion be regarded as a disturbance, it would not fall under the purview of s. 296, Indian Penal Code. This view of the law is in accord with that adopted by ABBOTT, C.J., in *Williams v. Glenister*, cited in *Russell on Crimes*, vol. I, p. 417. In that case the person accused of having molested a religious assembly in a church had, notwithstanding the prohibition of the minister, stood up in his pew and read a notice "after the Nicene Creed had been read, and whilst the minister was walking from [476] the communion table to the vestry room, and whilst no part of the service was *actually* going on." It was held that such act, having been done during an interval when no part of the service was in the course of being performed, and the party apparently supposing that he had a right to give the notice, he was not criminally liable. The case, however, being based upon a statute is only analogically applicable to the present case, and I cite it simply to put my interpretation upon the phrase "engaged in the performance of religious worship" as used in s. 296 of the Indian Penal Code. As to the merits of the present case itself upon this particular point, I have to observe that a Muhammadan mosque is in many respects different, so far as I know, from an ordinary Christian church; because it is not only a place for divine worship, but also intended for religious and moral teaching and discussion, and it is not unusual that in places where the Muhammadan community is still flourishing, a library and a school form part of the mosque. I cannot therefore hold that to carry on religious discussion in a mosque, even though the majority of the people present at the time do not approve of such discussion, constitutes a criminal offence. There may indeed be circumstances which may render such discussion liable to cause breach of the peace; but in that case the law has provided other remedies, and, concerned as I am in the Full Bench only with s. 296 of the Indian Penal Code, I will simply say that the remedy does not fall under that section. The third point relates to the meaning of the word "voluntarily" as used in s. 296 of the Indian Penal Code, and upon this point s. 39 of the Code provides an explanation in express language. I am of opinion that the evidence in this case does not prove that the accused uttered the word *amin* aloud with the intention of disturbing the rest of the congregation, though after the occurrence of the 22nd August 1884, they might have known that the prosecutor and his friends would object to their saying the word aloud. But the question is not of any great consequence under my view of the case; because the accused being fully entitled by law to enter the mosque, to join the congregation, and to say the word *amin* aloud, they were justified by law to exercise their right of worship within the meaning of s. 79 of the Indian Penal Code.

[477] At the hearing of the case before the Full Bench, the learned Public Prosecutor laid considerable stress upon the argument that to justify a conviction under s. 296, Indian Penal Code, it is of no consequence whether the act which causes the disturbance is in itself lawful or unlawful, that the mere fact of the disturbance being caused to the religious assembly is sufficient to constitute the offence, specially as the accused in this case had reason to believe that saying the word *amin* might be objectionable to the prosecutor and his party, and might cause breach of the peace. I am unable to accept this view of the law, for to use the words of FIELD, J., in *Beatty v. Gillbanks*, L. R., 9 Q. B. D., 308, "it amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition." Not only do I hold that s. 79 of the Code furnishes a full answer

to the argument; but that such a principle would place the minority at the mercy of the majority, and would, in a case like this, deprive them of the right of worship which the law distinctly confers upon them. Indeed if such a view were adopted, it would open the door for wrongful prosecution of innocent persons, who in the exercise of their lawful rights of worship resort to mosques for devotion. Such indeed may be the case here, because there is enough in the evidence for the defence to raise a suspicion that the saying of *amin* aloud has been made a pretext for the prosecution with the object of preventing the accused from resorting to the mosque for worship, and thus to debar them from asking the prosecutor to render accounts of the disbursement of the income of the property belonging to the mosque, of which he states himself to be the *mutawalli* or superintendent. The witnesses for the defence, who are themselves Hanafis, have solemnly deposed that they do not object to *amin* being pronounced aloud in prayers, and their statements deserve weight, being in perfect accord with the doctrines of Imam Abu Hanifa himself.

Having taken this view of the case, I regret I am unable to concur in the order of re-trial passed by the learned Chief Justice and my learned brethren, and I would return the case to the referring Bench with a negative answer to the question referred.

NOTES.

[The difference in the tone adopted in saying 'Amin' in a mosque, unless it is *mala fide* and with intent to cause disturbance, is not an offence nor a ground for civil liability:— (1889) 12 All., 494 F.B.]

See also (1891) 18 Cal., 448 P. C.; (1891) 13 All., 419 F. B.; (1908) 35 Cal., 294 : 7 C. L. J., 433.]

[478] APPELLATE CIVIL.

The 9th March, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT, CHIEF JUSTICE, AND
MR. JUSTICE STRAIGHT.

* Rup Narain.....Plaintiff

versus

Awadh Prasad.....Defendant.*

*Pre-emption—Mortgage by conditional sale—Limitation—Acquiescence—
Equitable estoppel—Wajib-ul-arz—"Nearer
co-sharer."*

The two joint owners of a two annas eight pies share in a village jointly executed two deeds of mortgage by conditional sale, each for a share of one anna four pies, in favour respectively of R and A, co-sharers in the village, and related to the vendors. In 1875, the conditional sale in favour of R became absolute, and he was recorded as proprietor of half the share of the vendors, and obtained possession thereof. In 1882, A foreclosed his mortgage, and obtained possession of the other half share. R thereupon claimed the right to purchase the half share so acquired by A, on the allegation that he had a right of pre-emption in respect thereof, having become the vendee in 1875 of the other half share, and

* Second Appeal No. 567 of 1881, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 21st February 1881, reversing a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 28th June 1883.

therefore being the "nearer co-sharer" of the vendors within the meaning of the *wajib-ul-arz*, and also being nearer in relationship to the vendors than A. The *wajib-ul-arz* provided that each co-sharer was competent to transfer his own share, but that, when making a transfer, it was incumbent on him to notify the same to his near co-sharer, and on his refusal, to other sharers in the village. The Lower Appellate Court held that the plaintiff was estopped from preferring a claim to pre-emption, on the ground that he had acquiesced in the conditional sale in favour of the defendant, and also that he had no right to pre-emption under the *wajib-ul-arz*.

Held that inasmuch as from 1875 to 1882 the only owners of the two annas eight pies share were the plaintiff and the mortgagors, they were the only co-sharers in respect of this particular share, although there were other co-sharers in the village; that the plaintiff must therefore be regarded as a "nearer co-sharer" of the vendors than the defendant within the meaning of the *wajib-ul-arz*, and that, as such, he was entitled to claim pre-emption.

Held also that the right of pre-emption which arose upon the sale was a new right, and not the same as that which arose at the time of the mortgage, inasmuch as the *wajib-ul-arz* distinctly contemplated the right of pre-emption as arising upon the two different events of mortgage and sale; that the alleged acquiescence of the plaintiff pre-emptor therefore occurred at a time when the right claimed by him was not yet in existence; and that consequently the claim was not barred.

THE plaintiff in this suit claimed to enforce a right of pre-emption. It appeared that on the 22nd July 1873, at the same time and place, Dhanbasi and Udit Narain, who were recorded proprietors of a two annas eight pies share in a certain village, in [479] equal shares of one anna four pies each, jointly executed two deeds of mortgage by conditional sale, each for a share of one anna four pies, in favour respectively of the plaintiff in this suit, Rup Narain, and of the defendant in this suit, Awadh Prasad, co-sharers in the village, and related to the vendors, the former in the twelfth degree and the latter in the eleventh. The moneys advanced not being repaid within the stipulated period, both mortgagees, in 1874, instituted proceedings for foreclosure. The conditional sale in favour of Rup Narain became absolute towards the end of 1875, whilst that in favour of Awadh Prasad, owing to an irregularity in the proceedings, did not become so till nearly two years later in 1877. On the conditional sale in favour of Rup Narain becoming absolute, he was recorded as proprietor in respect of half the share of the vendors. In March 1883, Rup Narain instituted the present suit against Awadh Prasad, in which he claimed the right to purchase the half share of the vendors which the latter had acquired by foreclosure of the conditional sale in his favour, on the allegation that he had the right of pre-emption in respect of such half, having become the vendee, in 1875, of the other half, and being therefore the "nearer co-sharer" (*hissadar karibi*) of the vendors, within the meaning of the *wajib-ul-arz* and also being nearer in relationship to the vendors than the defendant. That document provided that each co-sharer was competent to transfer his own share, but that, when making a transfer, it was incumbent on him to notify the same to his near co-sharer, and on his refusal, to other sharers in the village, and to sell or mortgage for a reasonable sum.

The Court of First Instance gave the plaintiff a decree enforcing the right of pre-emption claimed. On appeal the Lower Appellate Court reversed this decree, holding that under the circumstances of the case the plaintiff was equitably estopped from preferring a claim to pre-emption, and that he had no right of pre-emption under the *wajib-ul-arz*. Upon these points the Court observed as follows:—"In the first place, it being freely admitted that the plaintiff consented to the conditional sale in favour of the defendant, it may, I think, be fairly presumed that he acquiesced by anticipation in the possibility of such sale becoming absolute; and secondly, his conduct after the sale had been completed raised

a [480] still stronger presumption of acquiescence, for he made no attempt to question the transfer within the period of limitation which, prior to the decision of the 17th January 1882 (I. L. R., 4 All. 218), had always been recognized as that governing suits for pre-emption, and but for the view taken by the High Court it is obvious that his claim would never have been heard of.

"Apart from these considerations, which, in my opinion, are sufficient to justify me in dismissing the plaintiff's suit, I would point out that his pre-emptive right is at best of a very doubtful character. Blood relationship has no doubt been recognized as one of the constituent elements of the '*karibi his-sadar*,' but I know of no case where such remote affinity as that which exists in the present instance has been taken into account, and I do not believe it was ever intended that as between two co-shares the one related to the vendor in the eleventh degree should have any preference over the other related in the twelfth degree. The only remaining foundation for the plaintiff's claim is, therefore, that which alone the lower Court has noticed, and on which he himself mainly relies, viz., his association with the vendors by virtue of his prior purchase. But a glance at the village-papers will show that such association is purely a paper one, there being no thokes or pattis, and the whole area of the mahal being held jointly in anna-pie shares. It may well be questioned then whether the mere substitution in the record of *B*'s name for half of *A*'s share gives *B* a preferential right to buy the remainder, and in this connection it should be remembered that the substitution of *B* rather than *C* was due to an error in procedure for which *C* was no wise responsible."

The plaintiff appealed to the High Court contending, in his grounds of appeal, *inter alia*, that as the share of the vendors, with the revenue assessed thereon, and the income and profits thereof, was separately recorded and he had associated with the vendors in such share, and was also a nearer relation of the vendors than the defendant, he had a right of pre-emption; and that "his case being that after he had associated with the vendors in the share standing in their names, the rights and interests of the latter in the said share were transferred to the defendant, the vendors not having before such transfer requested the plaintiff to purchase the same, as the contract of the *wajib-ul-arz* required, it was useless to look to any [481] acquiescence on the plaintiff's part of a date prior to the said association of his with the vendors and also prior to the transfer of the vendors' share."

Mr. C. H. Hill, for the Appellant.

Pandit Ajudhia Nath, Pandit Bishambhar Nath, and Babu Jogindro Nath Chaudhri, for the Respondent.

Petheram, C. J.—I have arrived at the conclusion that this appeal must be allowed, and I have done so with some difficulty. The facts, as I understand them, are as follows:—Some years ago a village was divided into shares, which were held by joint owners, and the original shares were two annas eight pies each. One of the shares belonged to two men jointly, and they, requiring money, mortgaged one-half of the share to the plaintiff in the present suit, and the other half to the defendant. The mortgagors continued in possession of the whole share, and accounted for interest to both mortgagees. This state of things continued till 1875, and in that year the plaintiff foreclosed his mortgage, and bought his half share, and obtained physical possession of it, remaining in physical possession as owner from that time. The other mortgagee remained out of possession until 1882, so that from 1875 to 1882 the possession was that of the plaintiff as owner of one-half of the share, and of the mortgagors of the other half, they being joint owners of that share. In 1882

the defendant foreclosed his mortgage, and obtained possession of the other half share. Upon this state of things the plaintiff says:—"I want to buy this share because I am a nearer co-sharer than you are in respect of it, and I am therefore entitled to claim pre-emption." Now, prior to the second foreclosure, the present defendant was not owner of the share; the ownership was in the mortgagors; and therefore, in regard to that share, the owners from 1875 to 1882 were the plaintiff and the mortgagors. During that time therefore they were the only co-sharers, and it follows that the plaintiff must be regarded as a nearer co-sharer than the defendant. This seems to me to be the only reasonable sense which we can attach to the term co sharer, for although there were other co-sharers in the village, these two alone were interested in this particular share. I think, therefore, that we must hold that the plaintiff, as [482] the nearest co-sharer, is entitled to claim pre-emption; unless, indeed, it can be shown that his claim is too late.

Now, if the right of pre-emption which arose upon the sale was a new one, the claim will not be barred; but it will be, if the right which then existed was the same as that which arose at the time of the mortgage. It appears to me that it was a new right, because the *wajib-ul-arz* distinctly contemplates the right of pre-emption arising upon the different events, namely, upon the mortgage and sale. The point as to "standing by" depends on the same question. If the mortgage and the sale gave rise to distinct rights of pre-emption, the alleged standing by occurred when the right was not in existence. I am therefore of opinion that the claim is not barred. The appeal must be allowed with costs, and the judgment of the first Court restored, with this exception, that the money declared by the decree of that Court to be payable by the pre-emptor must be directed to be paid within six weeks from the date of the receipt of our decree by the lower Court.

Straight, J.—I am of the same opinion.

Appeal allowed.

[7 All 482]

FULL BENCH.

The 14th March, 1885.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE STRAIGHT,
MR. JUSTICE OLDFIELD, MR. JUSTICE BRODHURST AND
MR. JUSTICE MAHMOOD.

Janki.....Defendant
versus

Girjadat and anotherPlaintiffs.*

Pre-emption—"Sale"—*Wajib-ul-arz*—Act IV of 1882 (Transfer of Property Act), s. 54—*Fraudulent omission to transfer by registered instrument.*

The *wajib-ul-arz* of a village gave the co-sharers a right of pre-emption in cases where any one of them should wish to "transfer his share wholly or partly by sale or mortgage."

* Second Appeal No. 200 of 1884 from a decree of Babu Mrittonjoy Mukarji, Subordinate Judge of Ghazipur, dated the 19th November 1883, affirming a decree of Maulvi Syed Zainul-Abdin, Munsif of Muhammadabad, Korantadib, dated the 31st July 1883.

One of the co-sharers entered into a transaction by which he transferred the possession of his share to a stranger for Rs 300, and had mutation of names effected in the Revenue Department, but in order to avoid the right of pre-emption, the parties omitted to execute or register a deed of sale in respect of the transfer

• Held by the Full Bench (MAHMOOD J, dissenting), that the transaction gave rise to the right of pre-emption within the meaning of the *wajib-ul-ars*

[483] Per PFTHERAM C. J., that the terms of the *wajib ul arsz* meant that if any co-sharer transferred his right wholly or partly, the right of pre-emption should arise, that, although the legal interest in the share was never transferred, the effect of the transaction in question was to transfer absolutely the whole right of possession from the vendor to the vendee, and that it was therefore such a transfer as to give the right of pre-emption

Per STRAIGHT J. that inasmuch as the defendants deliberately omitted to observe the necessary legal formality of a registered instrument with the object of defeating the pre-emptive right it was very doubtful whether a Court of equity would be justified in allowing them to set up, and in giving effect to a defence based upon their own intentional evasion of the law

Per OLDFIELD and BRODHURST, JJ., that the failure of the parties to the transfer to comply with the requirements of s. 54* of the Transfer of Property Act (IV of 1882), as to the manner in which the transfer should be made, did not alter the nature of the transaction or affect the fact that a sale had been made, and could not affect a pre-emptor's right in respect of it

Per MAHMOOD, J., that a valid and perfected sale was a condition precedent to the exercise of the pre-emptive right, that, in the present case, nothing had happened which could properly be termed a "sale" within the meaning of the *wajib ul-ars*, that the application for mutation of names not having been registered, the provisions of s. 54 of the Transfer of Property Act prevented it from taking effect as a sale, or passing the ownership from the vendor to the vendee, and that therefore, under the *wajib ul arsz*, the right of pre-emption could not arise

THE plaintiffs in this case, alleging that they were co-sharers in a certain village, that on the 15th August 1883, the defendant Rameshar Misr, in contravention of the terms of the *wajib-ul-arsz*, sold a share of two annas and a fraction to the defendant Janki Misr, for Rs 300, and, in order to avoid pre-emption, did not execute a sale-deed, but got mutation of names effected in the Revenue Department, sued for possession of the share in question, on payment of Rs 300, or whatever sum the Court might fix. The *wajib-ul-arsz*, on which the suit was based, provided as follows — "If any one wishes to transfer his share, wholly or partly, by sale or mortgage, he must mortgage it to one of the shareholders of the village, or sell it to him for the fixed price. If they refuse to take it, or to pay a proper price, he is at liberty to sell or mortgage it to any one he likes, should he transfer his share to a stranger without giving information to the shareholders of the village, the transfer shall be invalid." Both the lower Courts found that the share in question had been sold

* Sec 54 — "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part promised.
"Sale" defined.

Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property

A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties

It does not, of itself, create any interest in or charge on such property.]

by the defendant Rameshar to the defendant Janki, a "stranger," for Rs. 300, and [484] that a sale-deed had not been executed in order to avoid pre-emption.

It was urged before the Lower Appellate Court that under s. 54, of the Transfer of Property Act a sale of immoveable property of the value of Rs. 100 and upwards could be made only by a registered instrument, and that there being in this case no registered instrument, there was no "sale," and therefore the right of pre-emption did not arise. Upon this point the Court observed as follows:—"This contention cannot, in my opinion, hold water, because, otherwise, it would be easy for a vendor and vendee to enter into a combination successfully to defeat claimants for pre-emption. The fact that the vendor and vendee fraudulently omitted to evidence the *de facto* transfer by sale by a registered instrument cannot deprive the plaintiffs of their claim for pre-emption."

In second appeal the defendant Janki again contended that there was no "sale," and therefore no right of pre-emption had accrued. The Divisional Bench (PETTERAM, C.J., and MAHMOOD, J.) hearing the appeal referred the case for decision to the Full Bench.

The Senior Government Pleader (Lala Juala Prasad), for the Appellant.

Mr. G. T. Spankie, for the Respondents.

The following judgments were delivered by the Full Bench:—

Mahmood, J.—I regret that in this case I am unable to take the same view as the learned Chief Justice and the other members of the Court. The suit was instituted to enforce the right of pre-emption founded upon the specific terms of the *wajib-ul-arz* of the village in which the property in dispute is situate; and it was based on the ground that the effect of an application dated the 15th August 1882 was to transfer the ownership of the property to a person whom, for the sake of convenience, I shall call the "vendee." This application was made in the Revenue Court for mutation of *pan os*, and its object was to substitute the name of the so-called vendee for that of the so-called vendor as owner of the share, on the allegation that the latter being a member of the same family had an original share in this property, though his [485] name was not recorded. The question now before us is, whether this transaction was of such a nature as to afford a cause of action upon which a suit to enforce pre-emption may be brought?

I take it to be a fundamental principle relating to the exercise of the pre-emptive right that it cannot be enforced upon a sale which is invalid and can take no effect, but that it can be enforced when, under a valid sale, and according to the rules of law, the owner has been divested of the proprietary title and the purchaser invested with it. This rule might be amply supported by authorities upon the Muhammadan Law of pre-emption which, as I have frequently said, must, by equitable analogy, be followed in cases like the present. It appears to me that in the present case nothing has happened which can properly be termed a "sale" within the meaning of the *wajib-ul-arz*. Mr. Spankie has argued that inasmuch as the *wajib-ul-arz* was framed in 1848, it must be construed with reference to the law then in force, and not with reference to s. 54 of the Transfer of Property Act, which came into force on the 1st July 1882. It is a recognised rule of construction that the words used in any document must be understood in their ordinary sense, unless there are words suggesting a different meaning; and although in 1848 neither the Transfer of Property Act nor the Registration Act was in existence, it appears to me that the word "sale" could not at any time have borne a different meaning from that which has now been assigned to it by the Legislature—that is to say, "a transfer of ownership in exchange for a price paid or promised or

part paid or part promised." This is not any new definition: it is merely a repetition of what has long been the law. Now it may well be that in 1848 this "transfer of ownership in exchange for a price" might have been effected orally, or by other means than that now provided; but I confidently assert that the conception of "sale" and the meaning of the word has not altered. The law says that such a transfer, in order to take effect, must be executed by a written document registered according to the law for the time being in force. Section 17 of the Registration Act (III of 1877), read with s. 49 of the same Act, leaves no doubt that if such a transaction as that now in question were effected by a written document, the value of the property exceeding Rs. 100, the document must, in order to affect [486] immovable property, be registered; because s. 49 provides that "no document required by s. 17 to be registered shall affect any immovable property comprised therein, or be received as evidence of any transaction affecting such property, unless it has been registered in accordance with the provisions of this Act."

Now, if the application of the 15th August 1882 amounted to a "sale," if it is obvious that, not having been registered, it could, not, as a matter of law, affect the property in suit. If the transaction were a mere oral matter, and the application a mere repetition of it, then s. 54 of the Transfer of Property Act prevents it from taking effect as a sale, or from passing the ownership from the vendor to the vendee, and therefore, under the *wajib-ul-arz*, the right of pre-emption cannot arise. Mr. Spaulke argued that the proper interpretation of the *wajib-ul-arz* is, that it gives a right of pre-emption upon transfers of all kinds, including even a transfer not of the whole of the incidents constituting ownership, but of some of those incidents only. I cannot agree with this view, because the interpretation of this *wajib-ul-arz* must be limited to the words used therein, and the only transactions there mentioned are "sale" and "mortgage." The transaction now in question is neither the one nor the other.

There appears to be nothing in the Transfer of Property Act which prevents any one from entering into a contract for sale of the nature mentioned in the penultimate paragraph of s. 54 by parol or by an unregistered document. It has been said that such a contract might be made the basis of a suit for specific performance by the present vendee against the vendor; and that a decree for specific performance having been obtained, it would then operate in derogation of the pre-emptor's right. Now, in the first place, such a contract may never be enforced, and if it is enforced, then such a decree could only result in a sale-deed properly executed in reference to s. 54, and whenever that was done, and a valid sale and consequent transfer of ownership were effected, then, and not till then, this right of pre-emption would come into force. "Contract for sale" is defined in the last part of s. 54 of the Transfer of Property Act, which clearly lays down that such a contract "does not of itself, create any interest in or charge on such pro-[487] perty," and in my opinion it falls under the category of "obligation arising out of contract and annexed to the ownership of immovable property" within the meaning of the last two paragraphs (*vide* Illustration) of s. 40 of that Act—an obligation which cannot be enforced against a transferee for value without notice.

If a valid and perfected sale were not a condition precedent to the exercise of the pre-emptive right, consequences would follow which the law of pre-emption does not contemplate or provide for. In this very case, supposing the so-called vendor, notwithstanding the application of the 15th August 1882, (which cannot amount to an estoppel under the circumstances), continues or re-enters into possession of the property, it is clear that the so-called vendee

would have no title under the so-called sale, to enable him to recover possession—the transaction being, by reason of s 54 of the Transfer of Property Act, ineffectual as transfer of ownership. The right of pre-emption being only a right of substitution, the successful pre-emptor's title is necessarily the same as that of the vendee, and if the vendee took nothing under the sale, the pre-emptor can take nothing either; and it follows that if the vendee could not oust the vendor, the pre-emptor could not do so either, because in both cases the question would necessarily arise whether the sale was valid in the sense of transferring ownership. Again, if notwithstanding a pre-emptive suit such as this, the so-called vendor, who has executed an invalid sale which does not in law divest him of the proprietary right, subsequently executes a valid and registered sale-deed in favour of a co-sharer other than the pre-emptor, or in favour of a purchaser for value without notice of the so-called contract for sale, it is difficult to conceive how the pre-emptor, who has succeeded in a suit like the present, could resist the claim of such purchaser for possession of the property. And the anomaly would become further prominent if such purchaser is a "stranger," for in that case the only way in which the successful pre-emptor like the present could obtain the property would be by bringing another suit, with respect to the *valid* sale, for pre-empting property which *ex hypothesi* belongs to himself. In my opinion, in cases like the present the turning point of the decision depends upon the answer to the question whether the proprietary title has validly passed from the vendor to the vendee, and [488] the pre-emptive suit will lie or not lie according as the answer is in the affirmative or the negative. In the present case there is no doubt in my mind that the proprietary title still vests in the so-called vendor, and he may still deal with it as he likes, by sale, or mortgage, or otherwise; and it follows therefore that no cause of action has arisen for a pre-emptive suit under the *wajib-ul-arz*, the transaction of the 15th August 1882 being neither a *sale* nor a *mortgage* within the meaning of that document. On the other hand, even if that transaction is to be treated as a contract for sale, I should say that the suit was premature.

For these reasons I would decree the appeal, and, reversing the decision of both the lower Courts, dismiss the suit with costs to be borne in all Courts by the respondents.

Petheram, C.J.—I think that in this case the right of pre-emption does arise, and that the judgments of the lower Courts were right. The facts of the case are very simple. A co-sharer in a village entered into a transaction for the sale of his share in consideration of Rs. 300, and in pursuance of this transaction the Rs. 300 were paid, and the vendee obtained possession, but no transfer under the Transfer of Property Act was executed or registered, and consequently the legal interest was never transferred from the vendor to the vendee. But the vendee paid the purchase-money and got possession; he was entitled to possession and to bring an action against the vendor for specific performance of the contract for sale, and to obtain an actual transfer of the legal estate, which could then be registered. These rights he might enforce either at once, or, if attacked by the vendor, by way of defence and counter-claim. The effect of the transaction was therefore that a co-sharer transferred the right to possession, and gave possession to the vendee. The question then is—Does such transfer let in the right of pre-emption? The *wajib-ul-arz* provides as follows:—"If any one of us wishes to transfer his share wholly or partly, by sale or mortgage, he must mortgage it to one of the shareholders of the village, or sell it to him for the fixed price. If they refuse to take it or to pay a proper price, he is at liberty to sell or mortgage it to any one he likes; should he transfer his share to a stranger without giving information to the shareholders

[489] of the village, the transfer shall be invalid." Now, it will be observed that after "partly," the words "by sale or mortgage" occur; and these words were obviously meant to extend the effect of the preceding words, and they appear to me to mean that if any co-sharer transfers his right wholly or partly, the right of pre-emption is to arise. The effect of the transaction now in question was to transfer absolutely the whole right of possession to the vendee, and therefore it appears to me to come within the meaning of the *wajib-ul-arz*, and to give rise to the right of pre-emption.

Straight, J.—I am of the same opinion, and have only a few words to add. It has been found as a fact by both the lower Courts that the defendants in this case, the vendor and the vendee, intended the transaction between them to be a transaction of sale, that consideration passed, and that the vendee was put into possession. From these facts, it seems to me, the inference is irresistible that they deliberately omitted to observe the necessary legal formality of a registered instrument with the object of defeating the pre-emptive right of the plaintiff. This being the case, I entertain very grave doubts whether this Court, as a Court of equity, would be justified in allowing them to set up, and in giving effect to, a defence based upon their own intentional evasion of the law, and, speaking for myself, I should hesitate long before countenancing it. In reference to the observations made by my brother MAHMOOD in the course of the argument, I fail to see how, if the vendor were to sue to recover possession of the share upon the basis that no written instrument had been executed, he could succeed, because consideration having been paid and possession obtained, the vendee would have a good answer. As I said before, however, I concur with the reasoning and conclusion of the learned Chief Justice, and would dismiss the appeal with costs.

Oldfield, J.—I am of the same opinion. The Courts below have found as a fact that Rameshar was the owner of the property and transferred it to Janki Misr, appellant, for valuable consideration. This transaction amounts to a sale in fact, on which the right of pre-emption comes into operation. Section 54, Transfer of Property Act, no doubt requires that a sale of this kind shall be made by registered instrument, which has not been done in this [490] case, but the failure of the parties to the sale to comply with the requirement of the Act as to the manner in which the transfer shall be made by the parties does not alter the nature of the transaction, or affect the fact that a sale has been made, and cannot defeat a pre-emptor's right in respect to it. I would therefore dismiss the appeal.

Brodhurst, J.—On the findings of fact arrived at in the concurrent judgments of the lower Courts, it is established that Rameshar Misr sold and transferred the share in suit to Janki Misr for Rs. 300, and though, with the object of defeating the right of pre-emption, a deed of sale was not executed in accordance with the provisions of s. 54 of the Transfer of Property Act, there nevertheless was a transfer by sale, and under the *wajib-ul-arz* the plaintiffs have a right of pre-emption, and consequently I would dismiss the appeal with costs.

Appeal dismissed.

NOTES

[In (1891) 14 All., 333, it was held that no right of pre-emption arises where land is assigned without consideration as *shankalp*.

In (1894) 16 All., 344, the transaction amounted to a sale and so pre-emption was held to exist.

This case was distinguished, on facts, in (1892) 16 Mad., 464.]

[7 All. 491]

The 16th August, 1884.

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, MR. JUSTICE OLDFIELD,
MR. JUSTICE BRODHURST, MR. JUSTICE MAHMOOD AND
MR. JUSTICE DUTHOIT.

Rohilkhand and Kumaun Bank, Limited.....Plaintiff

versus

Row.....Defendant.†

Minor, suit against—Civil Procedure Code, s. 443—Majority, age of—European British subject not domiciled in India—Act IX of 1875 (Majority Act)—Contract—Lex loci—Act IX of 1872 (Contract Act), s. 11—Cheque—Liability of indorser—Act XXVI of 1881 (Negotiable Instruments Act), ss. 35, 43.

A cheque was indorsed in blank by a European British subject who, at that time, was under twenty years of age, and was temporarily residing, and not domiciled, in British India. It was subsequently dishonoured, and a suit was then brought by the Bank which had cashed the cheque, to recover the amount from the indorser and the drawer. The former alleged that the drawer had requested him to sign his name to the cheque, saying that it was a mere matter of form, and he would not be liable for the amount, and that the bank would only cash the cheque when indorsed by him, and in consequence he consented to indorse it, but that he did so without any intention of incurring liability as indorser, that he received no consideration, and that his indorsement was in blank, and not in favour of the Bank, and was converted into a special indorsement without his knowledge and consent. The Court held that, at the time of indorsement, the indorser was a minor under English law, and dismissed the suit on the ground of minority.

Held, that, if the Court was satisfied of the fact of the defendant's minority, it should have complied with the provisions of s. 443 † of the Civil Procedure Code.

[491] *Held*, that, assuming the indorser to have been *sui juris*, the indorsement, taken in conjunction with the facts proved, established a contract by which the indorser was bound to pay the cheque.

Per STRAIGHT, OFFG. C. J., and DUTHOIT, J., that it was by no means clear or certain that there was any rule of international law recognizing the *lex loci contractus* as governing the capacity of the person to contract, but that, assuming such a rule to be established, the specific limitation of the Indian Majority Act (IX of 1875) to "domiciled persons" necessarily excluded its application to European British subjects not domiciled in British India; that s. 11 † of the Contract Act must be interpreted as declaring that the capacity of a person in point of age to enter into a binding contract was to be determined by his own personal law wherever such law was to be found; that this rule was not affected by the Majority Act so

* First Appeal No. 60 of 1883 from a decree of T. B. Tracy, Esq., District Judge of Bareilly, dated the 27th February 1883.

† [Sec. 443 :—Where the defendant to a suit is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor, to put in the defence for such minor, and generally to act on his behalf in the conduct of the case.

A guardian for the suit is not a guardian of person or property within the meaning of the Indian Majority Act, 1875, Section 3.]

‡ [Sec. 11 :—Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.]

Who are competent to contract.

far as concerned persons temporarily residing but not domiciled in British India, whose contractual capacity was still left to be governed by the personal law of their personal domicile; and that such law in the case of European British subjects was the common law of England, which recognized twenty-one as the age of majority.

Per OLDFIELD, J., that by the rule of the *jus gentium* as hitherto understood and recognized in England, the *lex loci* would govern in respect to the capacity to contract, but that in framing the Indian Majority Act, which was the *lex loci* on the subject in India, the Legislature would appear not to have adopted that rule, but by limiting the operation of the Act to persons domiciled in British India, to have intentionally excluded from its operation persons not domiciled there, and to have left such persons to be governed by the law of their domicile.

Per BRODHURST, J., that Act IX of 1875 was intended by the Legislature to be applicable, and in fact was applicable, only to European British subjects domiciled in those parts of India referred to in s. 1, and that to any other European British subject whose domicile was in England, but who was temporarily residing in any part of India above alluded to, the privileges and disabilities of minority attached until he had attained the age of twenty-one years.

THIS was an appeal which was first heard by OLDFIELD and BRODHURST, JJ., and which in consequence of a difference of opinion between those learned Judges on a point of law was subsequently referred to STRAIGHT, Offg. C. J., and DUTHOIT and MAHMOOD, JJ., and the Judges who first heard it. The facts of the case are fully stated in the first judgment of OLDFIELD, J.

The JUDGMENTS of the Judges who first heard the case were as follows:—

OLDFIELD, J.—This is a suit by the Rohilkhand and Kumaun Bank against Lieutenant Row and Lieutenant Fraser, to recover the amount of a cheque with interest.

[492] The cheque was drawn on the 29th April 1882, by Lieutenant Fraser upon Messrs. Cox and Company, in favour of Lieutenant Row or bearer, and indorsed in blank by Lieutenant Row, and delivered by him to Lieutenant Fraser, who transferred it to the Rohilkhand and Kumaun Bank, and the blank indorsement was converted into a special one by superscribing above the indorsement the words "Pay to Rohilkhand and Kumaun Bank, Limited, or order." The cheque was cashed by the Bank, and the money paid to Lieutenant Fraser. It was subsequently dishonoured, and notice given to defendants.

Lieutenant Fraser did not appear to defend the suit, and a decree was made against him *ex parte*. Lieutenant Row pleaded that he did not indorse the cheque with the intention of incurring liability as indorser, that he received no consideration, and that his indorsement was in blank, and not in favour of the Bank, and converted into a special indorsement without his knowledge and consent.

There was no plea that Lieutenant Row was a minor at the time he indorsed the cheque, but the Judge has found that he was at that time under twenty, and has held him to be a minor under English Law, and that he also was a minor by that law at the time the suit was proceeding, and the Judge considered it incumbent on him to consider the fact of minority in deciding on his liability, and, so far as I understand his judgment, he has dismissed the suit on the ground of his minority, and because no consideration was received by Lieutenant Row.

The appeal is instituted on the part of the Bank against the decree dismissing the suit against Lieutenant Row. Before proceeding further I must observe that if the Judge was satisfied that the respondent was a minor when the suit was instituted, he should not have allowed it to proceed without steps being taken to have the respondent properly represented.

The first point which I have to consider is the question of minority ; for although this plea was not taken in the Court below, it has been a material ground for the Judge's decision, and it becomes necessary for me to decide it, both as having regard to the question of the respondent's capacity to defend the suit, and the regularity of [493] the trial, and his capacity to incur obligation by indorsing the cheque.

I am of opinion that the age of majority must be determined by Act IX of 1875, and that as the respondent was eighteen when he indorsed the cheque and when the suit was instituted, he had obtained the age of majority. Act IX of 1875 is the Indian Majority Act, and by its provisions the age of majority of British subjects domiciled in British India is eighteen years, except in cases where a guardian of a minor's person and property has been or shall be appointed by any Court of Justice, or where the minor is under the jurisdiction of any Court of Wards—exceptions which do not apply to the respondent.

Act IX of 1875 is the *lex loci* on the subject for British India, and was expressly introduced to remedy the uncertainty then existing as to the age at which majority was obtained, and at which persons could contract and incur responsibilities, and to relieve persons contracting with foreigners from the necessity of looking further than the Act to ascertain the age of majority. The Act in terms applies to all British subjects domiciled in India, but it is unnecessary for us to consider whether or not the respondent's domicile is in British India ; for, if it be not, he is made subject to that law by the *jus gentium*, by which, on grounds of mutual convenience, the age of majority is to be determined by the *lex loci contractus aut actus*. The rule is stated in *Story's Conflict of Laws*, 7th ed., s. 101 (1) :—"The capacity, state, and condition of persons, according to the law of their domicile, will generally be regarded as to acts done, rights acquired, and contracts made, in the place of their domicile touching property situate therein. If these acts, rights, and contracts have validity there, they will be held equally valid everywhere. If invalid there, they will be held invalid everywhere. Section 102 (2) :—"As to acts done, and rights acquired, and contracts made in other countries, touching property therein, the law of the country where the acts are done, the rights are acquired, or the contracts are made, will generally govern in respect to the capacity, state, and condition of persons." And s. 103 (3) :—"Hence we may deduce, as a corollary, that in regard to questions of minority or [494] majority, competency or incompetency to marry, incapacities incident to coverture, guardianship, emancipation, and other personal qualities and disabilities, the law of the domicile of birth, or the law of any other acquired and fixed domicile, is not generally to govern, but the *lex loci contractus aut actus*, the law of the place where the contract is made or the act done." See also *Tudor's Leading Cases on Mercantile Law*, p. 228—*Don v. Lippman*. The respondent was of age by the *lex loci*, and neither the contract nor the proceedings in the lower Court are vitiated.

It remains for me to determine the liability of the respondent. The cheque has admittedly been dishonoured, but liability as indorser to the Bank, the holder of the cheque, is denied on the ground that the respondent did not indorse the cheque with the intention to take the liability as an indorser, and received no consideration for it. The pleas are, however, not maintainable.

By s. 35 of the Negotiable Instruments Act, in the absence of any contract to the contrary, whoever indorses or delivers a negotiable instrument before maturity without in such indorsement expressly excluding or making conditional his own liability, is bound thereby to every subsequent holder, in

case of dishonour by the drawee, acceptor, or maker, to compensate such holder for any loss or damage caused to him by such dishonour, and the respondent's liability is clear from his own statement of the circumstances under which he indorsed the cheque. He states that Lieutenant Fraser brought him the cheque and asked him to sign his name to it, saying that it was a mere matter of form, and he would not be liable for the amount, and explaining that the Bank would not cash his cheque unless it was made payable to some other officer, and in consequence he consented to indorse it. On his own showing, therefore, he indorsed the cheque with the intention of benefiting or accommodating Lieutenant Fraser, by enabling him to raise money on it by means of the indorsement, and he cannot escape liability to the plaintiff. It is immaterial that he received no consideration; he indorsed the cheque in blank and delivered it to Lieutenant Fraser, and the Bank paid the amount to Lieutenant Fraser. The respondent put his name without consideration for the purpose of accommodating Lieuten-**[495]**ant Fraser, and his not receiving consideration affords no defence as against the Bank which gave value for the cheque—see s. 43, Negotiable Instruments Act. Nor does the conversion of the blank indorsement into a special one in favour of the Bank affect the liability of the respondent Lieutenant Row.

The decree of the lower Court should therefore be modified and the appeal be decreed, and the claim be decreed against the respondent with all costs and interest at six per cent. from the date of the institution of the suit to realization.

BRODHURST, J.—The facts of this case are contained in the judgment of the lower Court; they are also fully stated in the judgment of my colleague Mr. Justice OLDFIELD, and they are not disputed, and I therefore shall not repeat them.

Lieutenant Row at the time he indorsed the cheque was within two months of his 20th birthday, and in June 1883, or four months after he gave his evidence in this case, he became 21 years of age. He admits that Lieutenant Fraser had informed him "that the Bank would not cash his cheque unless it was made payable to some other officer," and that he nevertheless indorsed the cheque. He ought to have known that if the Bank would only cash the cheque when made payable to him and indorsed by him, his indorsing it could not be a mere matter of form, and the result of his act was, that the cheque was cashed, and the Bank has been compelled to institute this suit to recover the amount thus paid, together with interest and costs.

If Lieutenant Row had attained majority at the time he indorsed the cheque, he by that indorsement rendered himself liable for payment of the amount; and if he objected to plead minority, he should, I think, have defrayed the claim.

I agree with Mr. Justice OLDFIELD, that if the Judge was satisfied that Lieutenant Row was a minor, he should not have allowed the suit to proceed without having the minor properly represented. In fact, the Judge should, I think, have complied with the provisions of s. 443 of the Civil Procedure Code.

The Indian Majority Act No. IX of 1875 is, I am inclined to think, inapplicable to this case. It was not enacted to reduce the period of nonage of any persons—European British subjects or **[496]** others—residing in British India, but on the contrary it was enacted "to prolong the period of nonage of persons domiciled in British India, and to attain more uniformity and certainty respecting the age of majority than now exists."

A very large proportion of the European British subjects in India, and forming by far the most important section of that class are those who are not domiciled in the country but are only temporarily residing in it.

Act IX of 1875 obviously applies merely to such European British subjects as are domiciled in British India, or in the states and dominions referred to in s. 1 of the Act, and the age of majority of European British subjects temporarily residing in British India, but whose domicile is in England, would not, in my opinion, be attained until the age of 21 years, and that this was believed by the plaintiffs-appellants to be the case appears clear from the evidence of their agent, who deposed:—"We were not aware that Lieutenant Row was a minor. We should not have accepted his name had we known."

It is often the case that British officers, shortly after they are 18 years of age, leave England to join British Regiments in India, and they may, and probably often do, return to England with or without their regiments when they are still under 21 years of age. That such officers should be considered in India to have attained majority, and should subsequently, on arrival in England, be regarded as minors would be anomalous and inconvenient.

I consider, then, that Act IX of 1875 was intended by the Legislature to be applicable, and in fact is applicable, only to European British subjects domiciled in those parts of India referred to in s. 1, and that to any other European British subject whose domicile is in England, but who is temporarily residing in any part of India above alluded to, the privileges and disabilities of minority attach until he has attained the age of 21 years.

The law of domicile as applicable to British India is contained in Part II of the Indian Succession Act, No. X of 1865.

As Act IX of 1875 is, in my opinion, inapplicable to this case, unless Lieutenant Row is domiciled in British India, I would re-[497]mand the case to the lower Court for a finding as to the domicile of Lieutenant Row, and when he attained the age of majority.

On the hearing of the case before the Full Court,

Mr. C. H. Hill, for the Appellant.

Mr. A. S. Reid, for the Respondent.

The following judgments were delivered by the Court:—

Straight, Offg. C. J., and Duthoit, J.—We understand it to be admitted that the defendant Row, at the time he indorsed the cheque and when the present suit was heard and decided, had not attained the age of 21 years. It therefore follows as a necessary consequence that if he was incapable of making a valid and binding contract when he wrote the indorsement on the cheque, no suit was maintainable against him in his own person, and the proceedings of the Court below, in treating him as a competent party thereto, were contrary to law. If the Judge was satisfied, as he appears to have been, of the fact of his minority, it was obligatory upon him to follow the directions laid down in s. 443 of the Civil Procedure Code. Not having done so, the defendant Row was "*coram non iudice*," and the trial was, so far as it concerned him, abortive. The whole case is before us under the order of reference, and there is a question involved in it of how far, assuming the defendant Row to have been *sui juris*, the indorsement itself, taken in conjunction with the facts proved, established a contract by which he was bound to pay the cheque. As to this, we think it sufficient to say that we concur in the views expressed by OLDFIELD and BRODHURST, JJ., that a liability in law was created. But it seems to us that the primary and crucial point which must be determined is, was the defendant Row, on the 29th of April 1882, when he indorsed the cheque as surety for

...ly competent and capable of entering into a binding obligation on his own behalf, which could be enforced in a Court of Law? If he was not, then the Bank had no right to proceed against him. Now, it will, we think, be conceded, that prior to the passing of the Contract Act in 1872, save for the purposes of special Acts declaring to the contrary, the Indian subjects of the Crown were, as regards their age of majority as affecting legal liability, governed by their own personal law, that is to say, [498] Hindus by the Hindu Law, Muhammadans by the Muhammadan Law. So European British subjects, except in so far as had been affected by legislation, were, if we may accept the dictum of TURNER and SPANKIE, JJ., in *Hearsey v. Girdharee Lai*, N.-W. P. H. C. Rep., 1871, p. 338, held not only in the Presidency Towns, but in the Mufassal, to continue minors until attaining the age of 21 years. The following are the remarks upon the subject used by those two learned Judges:—"There being no express enactment determining the age at which a European British subject is to be held to have attained majority in this country, so as to be capable of making a contract, we feel ourselves bound to follow the established rule of the Courts, and to hold that the privileges and disabilities of minority (so far as they are not removed by express enactment) attach to a European British subject until he has attained the age of 21 years." Such appears to have been the state of the law when s. 11 of the Contract Act was passed, and it is therein provided that "every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject." This was no more than a reduction into terms in the body of the statute of the unwritten rules which had theretofore guided and governed the action of the Courts. And it was admitted by the learned counsel for the appellant, that up to the enactment of the Indian Majority Act, 1875, twenty-one was the age which governed the *status* of majority of European British subjects domiciled in India. By the Indian Majority Act, 1875, it was declared that "every person," save as therein otherwise provided, "domiciled in British India, shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before." This act, therefore, not only fixed the majority of Hindus and Muhammadans alike at eighteen, but applied the same rule to all other subjects of the Crown who were domiciled in British India. The words are clear and specific, and the preamble of the Act in terms confines its operation to "the case of persons domiciled" in British India. It was also conceded by the learned counsel for the appellant Bank, that the defendant Row, whatever his domicile was, had not a domicile in this country. It is, therefore, clear that, [499] standing by itself and without the aid of any rule of international law, the last mentioned Act cannot apply to him.

As the argument that the *lex loci contractus* must determine the contractual capacity, it is to be observed that, though American and English authorities have expressed opinions on the question at variance with those of "foreign jurists, who generally hold that the law of the domicile ought to govern in regard to the capacity of persons to contract" (*Story's Conflict of Laws*, 7th ed., s. 241), two of the latest English writers on the subject seem to speak with uncertain sound as to whether such a rule can be unreservedly laid down (*Dicey On Domicile*, p. 177; *Westlake's International Law*, p. 46). In *Udny v. Udny* decided by the House of Lords in 1869, L. R., 1 H. L., S. & D., 441, Lord WESTBURY remarks:—"The political *status* may depend on different laws in different countries; whereas the civil *status* is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil *status*. For it is on this basis that the personal rights of the party, that is to say, the law which determines his

majority, or minority, his marriage, succession, testacy, or intestacy, must depend." And a like view was expressed by COTTON, C.J., in *Sottomayor v. De Barros*, L. R., 3 P. D., 1. It is therefore by no means so clear or certain that there is any rule of international law which recognises the *lex loci contractus* as governing the capacity of the person to contract; but conceding for the moment it does, it nevertheless seems to us that the specific limitation of the provisions of the Act of 1875 to "domiciled persons" necessarily excludes its application to European British subjects generally. For it will not, we think, be denied, that the Legislature of this country, had it been so minded, might have extended the operation of the Majority Act to all European British subjects indiscriminately, and irrespective of any question of domicile, upon the same principle as it had framed and passed Act XIII of 1874, relating to European British minors in certain parts of India. But it did not do so. On the contrary, from the introduction of the Bill in the first instance, to the time of its passing into law, the obvious aim and object of the measure was to secure greater uniformity in the age of majority of persons domiciled in British India, and to raise it in [500] those cases where it was too low. It did not, however, profess or attempt to deal with a continually fluctuating and frequently changing body of persons, namely, European British subjects temporarily residing in the country, who, to use the terms employed in s. 10 of the Indian Succession Act, have no "fixed habitation" here. It seems to us, therefore, as regards such last mentioned persons, still conceding the *lex loci contractus* to be applicable to them, that the only other provision of Indian Law which is germane to the matter, is the provision contained in s. 11 of the Contract Act already adverted to—"Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject." Applying to language its ordinary meaning, we can only interpret this section as declaring that the capacity of a person in point of age to enter into a binding contract was to be determined by his own personal law, whether such law was to be found in the Shastras, the Shara, the Acts of the Indian Legislature, or any other law, according as each particular case called for its application. The rule thus laid down was likely to be, and possibly proved, an inconvenient one in practice, and so far as persons domiciled in British India are concerned, it has now been corrected by Act IX of 1875. But, as we have before pointed out, such last mentioned Act did not touch persons temporarily residing, but not domiciled, in British India, and we think that it must therefore be taken that their *status* to contract was still left to be governed by the law to which they were subject,—i. e., the personal law of their personal domicile. Such law in the case of European British subjects is the common law of England, which recognizes twenty-one as the age of majority, and in our opinion such is the law which in the case before us, if the defendant Row's domicile, or rather that of his father, was in England when he was born, must govern its decision. Although it is admitted that the defendant Row was not domiciled in British India, it is not admitted that his father, at the time of his birth, had his domicile in England, and we cannot finally dispose of the matter without a distinct finding upon this point.

We therefore remand the following issue under s. 566 of the Civil Procedure Code for a finding by the lower Court:—"What [501] was the domicile of the father of the defendant Row at the date of his birth?"

Oldfield, J.—On further consideration, I am induced to alter the opinion which I formed when this case came before the Divisional Bench, that the capacity to contract with reference to age of persons not domiciled in British India should be governed by the Indian Majority Act as the *lex loci* on the subject.

By the rule of the *jus gentium* as hitherto understood and recognized in England, the *lex loci* would govern in respect to the capacity to contract (*Story's Conflict of Laws*, 7th ed., ss. 100 to 103, and 241), and I was disposed to assume that the Indian Legislature had intended the same rule to have force in British India; but in framing the Indian Majority Act (Act IX of 1875) which is the *lex loci* on the subject in this country, the Legislature would appear not to have adopted that rule, but by limiting the operation of the Act to persons domiciled in British India, to have intentionally excluded from its operation persons not domiciled there, and to have left such persons to be governed by the law of their domicile. On this view, the Act will not affect such persons. I concur in the order of remand proposed by my colleagues.

Brodhurst, J.—At present I see no reason to doubt that the conclusions arrived at in my judgment of the 14th March last were correct, and I do not wish to add anything further than that I concur with my learned colleagues in remanding the case to the lower Court for a finding on the proposed issue.

Mahmood, J.—I agree with my honourable colleagues in the view that if the defendant respondent Row be taken to have been *sui juris* when he indorsed the cheque, the facts proved in this case render him liable to the claim.

Reserving, however, for the present my opinion as to the law which would govern his age of majority for contractual capacity within the meaning of s. 11 of the Indian Contract Act (IX of 1872), I concur with my honorable colleagues in remanding the case to ascertain the exact domicile of the defendant-respondent Row.

Cause remanded.

[502] PRIVY COUNCIL.

The 11th December, 1884.

PRESENT:

LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER,
SIR R. COUCH AND SIR A. HOBHOUSE.

Ram Din.....Plaintiff

versus

Kalka Prasad... ..Defendant.

[On appeal from the High Court for the North-Western Provinces.]

Limitation—Act IX of 1871 (Limitation Act), sch. ii., arts. 65 and 132—Periods respectively applicable to personal demands, and to claims charged on immoveable property.

That there is a personal liability upon an instrument charging a debt upon immoveable property, does not carry with it the effect that the period of limitation fixed for personal

demands by Act IX of 1871 is extended; by reason of this demand being, thereby, brought within the meaning of art. 132* of sch. ii of that Act, which applies to claims "for money charged upon immoveable property."

A mortgagee of lands sought, after the lapse of more than six years from the date when the mortgage-money was payable, to enforce two distinct remedies, the one against the property mortgaged, and the other against the mortgagor personally, on the contract to repay the mortgage-money.

Held, that art. 132, above-mentioned, applied only to suits to raise money charged on immoveable property out of that property; and that the twelve years' bar did not apply to the personal remedy, as to which the shorter period prescribed in art. 65† of the same schedule applied.

APPEALS consolidated and heard as one, from decrees (4th August 1881) of the High Court reversing decrees (2nd December 1880) of the District Judge of Farukhabad, which reversed decrees, (24th September 1880) of the Subordinate Judge of Farukhabad, and restoring the latter.

The appellant, Ram Din, together with one Ganesh Singh, who died during the pendency of these appeals, jointly instituted two suits in the Court of the Subordinate Judge of Farukhabad against the respondent, Kalka Prasad, upon two several mortgage-bonds to recover the amounts due thereon, for principal and interest, out of the immoveable property thereby mortgaged, and also to recover the same from the mortgagor personally.

The respondent by the first mortgage, dated the 25th January 1870, mortgaged to Ram Din and Ganesh Singh, his interest in a mauza in pargana Kanaui to secure repayment of Rs. 1,300, with interest at one per cent. per mensem, on the 13th June, in that year. By the second mortgage he charged his pakka house in Makrannagar, pargana Kanaui, with Rs. 900, repayable in a [503] year, at the same interest. By both the mortgage instruments the mortgagor agreed that in default of payment at due date, the mortgagees should be at liberty to sue for their whole money in a lump sum, from the mortgagor personally, as well as to realize it from the mortgaged property. Neither bonds having been paid, these suits were brought on the 21st and 23rd August 1880, respectively. Besides other defences not now material, the defendant, in each of the suits, contended that no decree could be made against him personally, more than six years having elapsed from the date of execution of the bonds.

The Subordinate Judge in his judgment remarked that the suit contained two distinct claims; the one, a claim against the immoveable property

* [Art. 132 :—

Description of suit.	Period of limitation.	Time when period begins to run.
For money charged upon immoveable property. <i>Explanation.</i> —The allowance and fees called <i>malikana</i> and <i>haqq</i> s shall, for the purposes of this clause, be deemed to be money charged upon immoveable property.	Twelve years.	When the money sued for becomes due.]

† [Art. 65 :—

On a single bond where a day is specified for payment.	Three years.	The day so specified.]
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mortgaged, to which claim twelve years' limitation applied; the other a claim against the defendant personally, to which the limitation of six years was applicable. He held that the latter claim was barred. The money was due in 1870, and the suit was brought in 1880. The decree must, therefore, be limited to money to be obtained by the sale of the property mortgaged; the defendant's estate, not mortgaged, being exempted.

On appeal, the District Judge of Farukhabad reversed this decision, holding that in the case of a bond stipulating, not merely for the personal security of the debtor, but also charging the immoveable property mentioned therein, the period of limitation was twelve years under art. 132; and that therefore the decree could be not only against the mortgaged property, but also to enforce the personal liability.

The High Court (SIR R. STUART, C.J., and TYRRELL, J.) held, on a second appeal, that in this suit the plaintiff could enforce the debt against the immoveable property upon which it was charged, but not against the defendant personally. Accordingly, the decree of the first Court was restored.

On this appeal,

Mr. *R. V. Dwyne*, appeared for the Appellant, Ram Din, who proceeded as surviving joint plaintiff.

The Respondent did not appear.

For the appellant the question,—were the decrees, and consequently execution, to be limited to the mortgaged property, or to [504] extend to the personal estate of the defendant—was argued. The period fixed in art. 132 applied to the remedy, which was two-fold, the borrower having chosen to give a security which could only have one period of limitation, viz., the 12 years' bar. There was but one cause of action, and to this but one rule of limitation could apply. Reference was made to *Mannu Lal v. Pigue*, 9 B. L. R., 175, in note: 10 W. R., 379.

After the argument for the appellant had been heard, their Lordships' judgment was delivered by

Lord Fitzgerald.—This is a suit instituted by the mortgagee against the mortgagor. He seeks to enforce a mortgage not under seal dated 25th January 1870, by which certain property was pledged to him for a mortgage debt; he alleges that the defendant has failed to pay both principal and interest, and prays that the principal and interest may be enforced against the mortgaged property, and also by rendering the person of the defendant and his other property liable. Therefore, although it is a mortgage suit, there are two distinct remedies sought, one against the mortgaged property, and the other by rendering the other property and the person of the defendant liable. The defendant does not dispute the mortgage. He raises no question as to the right of the plaintiff to have the mortgaged property sold, but he says that the remedy sought against him personally, and against his other property, is barred by the operation of the Limitation Act of 1871.

Their Lordships turn then to see what the mortgage transaction was. It is very plain and very simple. The instrument recites the mortgage of certain property for Rs. 1,300 to the present plaintiff, that the interest should be at the rate of one per cent. per mensem, and the principal and interest to be repaid at the end of Jaith Sambat 1927. The instrument then says.—“I have received the mortgage money in full. I therefore covenant that if I fail to pay the principal with interest on the promised date, the mortgagees will be at liberty to recover through Court their whole money in a lump sum from me or the mortgaged property.” The mortgagor thus gives the mortgagee a pledge of certain fixed immoveable property, and also gives as a further security his personal

[505] bond or covenant. A period of nearly ten years elapsed from the time at which the mortgage-money with interest became payable before the suit was instituted. The question submitted for their Lordships' consideration is, whether the lesser period of limitation, three or six years as the case may be, has barred the personal remedy against the mortgagee, even though the mortgage remains in full force, as against the mortgaged property.

Their Lordships are of opinion that the judgment of the High Court is correct. The Judge of the primary Court held that the personal demand was barred. The Judge of the District Court held the contrary—that there could be but one period of limitation, and that was a period of 12 years, applicable to the mortgage of fixed property, which carried with it and gave the same 12 years for the enforcement of the personal security. Their Lordships are of opinion that the District Judge is wrong in point of law. There are two remedies distinctly sought in the plaintiff's petition, the one against the mortgaged property, the other against the person and against the other property of the defendant. As to the mortgaged property there is now no question. Their Lordships are of opinion that the Law of Limitation, which says a bond for money must be enforced within a certain date, applies to the specific demand here for a personal remedy against the defendant. The plaintiff can have no personal remedy—his remedy against the person of mortgagor is barred, but his right remains to enforce his demand against the mortgaged property. As far as personal demands, including simple bonds, are concerned, the language of the Act is plain and clear. Section 4 of the Act of 1871 directs that every suit instituted after the period prescribed therefor in the second schedule shall be dismissed. The second schedule places simple money demands generally under the three years' limitation, and under No. 65 the same limitation applied to a single bond, and under the same limitation are placed bills of exchange, arrears of rent, and suits by mortgagors to recover surplus from mortgagee. The six years' limit embraces suits on foreign judgments and some compound registered securities. The 12 years' period is made applicable principally to suits in respect of immoveable property, though it also applies to judgments and recognizances in India. But the counsel for the ap-[506]pellant relied upon the language of the 132nd article of the second schedule, "For money charged upon immoveable property, 12 years." His contention was that that period of 12 years applied to every remedy which the instrument carried with it, and gave 12 years for the personal remedy against the mortgagor as well as against the mortgaged property.

Looking at the previous language with reference to personal suits, and at the language of art. 132, their Lordships think great inconveniences and inconsistencies would arise if they did not read the latter as having reference only to suits for money charged on immoveable property to raise it out of that property. That seems to their Lordships what the Legislature intended, and they are therefore of opinion that the decision of the High Court was right.

That being so, their Lordships will humbly advise Her Majesty to affirm the decree appealed from. There being no appearance for the respondent here, there will be no costs.

Their Lordships desire to add that their opinion on this appeal also applies to the separate appeal on the mortgage-bond of the 10th June 1871.

Decree affirmed.

Solicitor for the Appellant :—Mr. T. L. Wilson.

NOTES.

[" So far as money actually charged upon immoveable property is concerned, it is now settled by the decision of the Privy Council in *Ramdin v. Kalka Prasad* (I.L. R. 7 All., 502), that Art. 132 of Act IX of 1871 applies only to claims to raise the money out of the property on which it is charged. The language of art. 132 of Act XV (of 1877) is more in favour of this restricted construction. It does not extend to the personal remedy on covenant for a debt charged on land. (Compare *Sutton v. Sutton*, L. R. 22 Ch. D. 511 and note the observations of Ayyangar, J., in *Rajah v. Rajah*, I. L. R. (1902) 26 Mad., 636 at p. 714). It has accordingly been held that under Act XV the personal liability upon an instrument charging a debt upon immoveable property, must be enforced within three or six years according as the instrument is unregistered or registered, and that the claim to realise the money by a sale of the property upon which it is charged is governed by art. 132." *Mitra on Limitation*, Vol. 2 p. 1099.

See also (1885) 12 Cal., 389; (1886) 10 Bom., 519; (1886) 10 Mad., 100; (1887) 11 Mad., 56; (1895) 19 Mad., 100; (1889) 14 Bom., 377 (where the limitation for personal remedy was held to be only *three* years, evidently overlooking the fact that the bond was registered.)

See also (1886) 9 All., 158; (1899) 21 All., 454; (1911) 14 I. C. 505; 34 All., 264; (1887) 14 Cal., 730 F.B.; (1888) 15 Cal., 542; (1895) 23 Cal., 397; (1896) 24 Cal., 281; (1899) 27 Cal., 180; (1904) 3 C. O. L. J. 52; (1905) 33 Cal., 998; (1897) 22 Bom., 686; 846; (1907) 30 Mad., 426 P.C.]

[7 All. 506]

The 12th December, 1884.

PRESENT :

LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER,
SIR R. COUCH AND SIR A. HOBHOUSE.

Ram Dayal.....Plaintiff

versus

Mahtab Singh and others.....Defendants.

[On appeal from the High Court for the North-Western Provinces.]

*Irregularity in warrant of attachment preceding execution-sale—
Act VIII of 1859, s. 222.*

An execution-sale of the right, title, and interest in land was set aside by the Court, on the ground that the warrant for the execution of the decree and order of attachment of the property sold had not been signed by the Judge, but by the Munsarim of the Court; and at a second sale the property was sold to other purchasers, who, as well as the judgment-debtor, were sued by the purchaser at the first sale for a declaration of his right to have the first sale confirmed.

The High Court having held that, with reference to s. 222 of Act VIII of 1859, the first sale had been rightly set aside, an appeal to the Judicial Committee was dismissed with costs.

[507] APPEAL from a decree (27th April 1881) of the High Court, I. L. R., 3 All., 701, affirming a decree (30th June 1879) of the Subordinate Judge of Aligarh, whereby the appellant's suit was dismissed. The object of this suit was to have effect given to a purchase made by the appellant, on the 21st August 1876, of a portion of villages Raipur and Manipur, in the Aligarh district, at a sale in execution of a decree obtained by a third party against the first respondent, Mahtab Singh. This involved the setting aside an order of the District Judge of Aligarh (20th April 1877), allowing an objection of the judgment-debtor to the confirmation of the sale.

On the 14th September 1876, Mahtab applied to the Subordinate Judge, in whose Court the execution had taken place, for cancellation of the sale. The District Judge, to whom the application was transferred for hearing, gave judgment upon it on the 20th April 1877, setting aside the sale, and permitting application to be made for another sale of the property. His judgment was the following:—

"The first contention on the applicant's part is, that no sale, properly so called, took place, that is, that all proceedings were vitiated *ab initio* by the irregularity of the warrant of execution, which ought not only to bear the seal of the Court, but also 'shall be signed by the Judge.' On examination, I find that the document in question was signed by the Munsarim and not by the Judge: an exactly similar irregularity in a notice of foreclosure, was held by the High Court in the case* *Seth Har Lal versus Manik Pat and others*, marginally noted, to vitiate all subsequent proceedings July 13th, 1873, No. 69. in the case. In the face of such a clear ruling, I do not see that it is possible to reject the application to set aside the sale. The application is, therefore, admitted, and the sale is set aside, with permission to the decree-holder to move for a new sale. Each party to bear his own costs."

At another sale, held on the 27th June 1877, certain of the respondents purchased the property in dispute as being that of Mahtab Singh, judgment-debtor; and, thereupon, on the 15th April 1878, the appellant sued both Mahtab Singh and the purchasers at the second sale, to obtain a declaration of his right to have the sale [508] to him confirmed, notwithstanding the order of the 20th April 1877.

The Subordinate Judge dismissed the suit, holding that the Judge in making the order of 20th April 1877, was acting in accordance with the provisions of s. 256 of Act VIII of 1859. The dismissal of the suit was held to be correct by the High Court (OLDFIELD and STRAIGHT, JJ.), who dismissed an appeal, for the reasons appearing in their judgments which were the following: OLDFIELD, J., said—

"The decision of the majority of this Court in *Diwan Singh v. Bharat Singh*, I.L.R., 3 All., 206, has been pressed upon us as an authority for holding that the present suit is not barred by the terms of s. 257, Act VIII of 1859. I myself dissented from the view taken by the majority of the Court in that case, but I feel myself bound to accept the ruling so far as it is applicable to the case before us. Assuming, however, that it is an authority for holding that the present suit is maintainable, and we are at liberty to determine if the Judge's order setting aside the sale was properly made or not, and if not, to set it aside and declare plaintiffs' right to have the sale confirmed to him, I am not disposed to do so, with reference to some of the grounds on which the Subordinate Judge proceeds.

The fact that the order of attachment and notices of sale were not issued under the signature of the Judge, but of the Munsarim, as though emanating from him, constituted serious illegalities of procedure: orders so issued could, properly speaking, have no legal effect, since s. 222, Act VIII of 1859 requires that the warrants for execution shall be signed by the Judge, and the Munsarim had no power to sign them, having regard to his duties as declared in s. 24, Act III of 1873 (Civil Courts Act), and the orders of this Court made in pursuance of the provisions of s. 24.—(C. O. No. 9, 1867, No. 11, 19th August 1870).

Moreover the sale could not now be confirmed in plaintiff's favour without serious injustice to the respondents who have purchased the property from Mahtab Singh *bona fide* and for value, and to whom at the time of the sale Mahtab Singh was able to [509] confer a good title, since the sale at which plaintiff bid could not become absolute without confirmation.

Since the date of the auction-sale also the liabilities on the property have been satisfied, and the state of things has materially changed, and it would be inequitable to allow plaintiff, after standing by for a year and permitting dealings to be made with the property, to come in and take advantage of the change

of circumstances, and obtain a property become much more valuable at the price he originally offered.

I refuse, therefore, to give a declaration of his right to have the sale confirmed to him, and I would dismiss the appeal with costs."

STRAIGHT, J., said :—" I concur with my honourable colleague, that the plaintiff's claim should be disallowed and this appeal dismissed. I am of opinion that the sale in execution at which the plaintiff bought was wholly void, and that the absence of the signature of the Judge from the warrant and attachment vitiated the proceedings in execution *ab initio*. The language of s. 222 of Act VIII of 1859 is plain and positive, and it seems to me impossible to hold that the order directing attachment is not a warrant within the meaning of that section, whether it was directed to the nazir or other person to seize the moveable property of a judgment-debtor, or to the judgment-debtor himself, prohibiting him from alienating his immoveable property : it was an order essentially in the nature of a warrant, and as such required the Judge's signature under the old law. It was contended for the appellant at the hearing that this objection was not taken by the judgment-debtor in the grounds upon which he asked for cancelment of the sale, and that the Judge had no right to entertain it of his own motion. I am by no means sure that this plea has any foundation in fact ; for I find that the Judge remarks in his judgment that the first contention on the appellant's part is, that no sale, properly so called, took place, that is, that all proceedings were vitiated *ab initio* by the irregularity of the warrant of execution. which ought not only to bear the seal of the Court, but also ' shall be signed by the Judge.' "

" Even if this point had not been started by the judgment-debtor, I think it would have been competent for the Judge himself [510] to take notice of it, going as it does to the very root of the proceedings ; but, under any circumstances, we, in a suit like the present, which practically invites us to confirm a sale by declaring the plaintiff's right to have it confirmed, are in my opinion not only entitled, but bound to closely scrutinise all the proceedings in execution, to ascertain whether such sale was a valid and binding one. This I have already said it was not, and the foundation of the plaintiff's claim therefore falls away. I say nothing as to his conduct in holding back until almost the very last moment from instituting his suit, though I am glad to think that, from the point of view from which I regard the case, the subsequent innocent purchasers from the judgment-debtor will retain the property they have not only bought and paid for, but the incumbrances upon which they have discharged "

The plaintiff appealed to Her Majesty in Council.

For the Appellant, Mr. J. F. Leith, Q.C., and Mr. R. V. Doyne.

For the Respondent, Mr. H. Cowell.

The case for the appellant having been opened, and argument heard to the effect, generally, that the irregularity must be dealt with as waived by an application for the postponement of the first sale made by the judgment-debtor, and that other matters had rendered it immaterial.

SIR B. PEACOCK, referred to s. 222 of Act VIII of 1859.

Their Lordships concurred in an intimation that the judgment of the High Court was correct, and the appeal proceeded no further.

Appeal dismissed with costs.

Solicitors for the Appellant : Messrs. Ford, Ranken Ford & Ford.

Solicitor for the Respondents : Mr. T. L. Wilson.

[511] APPELLATE CIVIL.

The 22nd December, 1885.

PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Durga and another.....Defendants
versus
Jhinguri and others.....Plaintiffs.*

Act XVIII of 1873 (N.-W. P. Rent Act), s. 9—Sale of occupancy-rights with zamindar's consent—Acceptance of rent by zamindar from vendees—Act IX of 1872 (Contract Act), ss. 2, 23—Estoppel—Act I of 1872 (Evidence Act), ss. 115, 116.

Under a deed dated in 1879 the occupancy-tenants of land in a village sold their occupancy-rights, and the zamindars instituted a suit for a declaration that the sale-deed was invalid under s. 9 of Act XVIII of 1873 (the N.-W. P. Rent Act in force in 1879), and for ejectment of the vendees, who had obtained possession of the land. It was found that the zamindars had consented to the sale to the vendees, and received from them arrears of rent due on the holding by the vendors, and had recognized them as tenants.

Held, by OLDFIELD, J., that sales of occupancy rights were not void under s. 9 of Act XVIII of 1873, when made with the consent of the landlord, that the sale which the zamindars had consented to was valid, and that, under any circumstances, they were estopped by their conduct from bringing a suit to set aside the sale. *Unrao Begam v. The Land Mortgage Bank of India*, I. L. R., 1 All., 547, referred to.

Per MAHMOOD, J.—That the sale-deed was invalid with reference to the provisions of ss. 2 and 23 of the Contract Act, inasmuch as its object was the transfer of occupancy-rights, which was prohibited by s. 9 of Act XVIII of 1873. *Unrao Begam v. The Land Mortgage Bank of India*, I. L. R., 1 All., 547, distinguished.

Also *per* MAHMOOD, J.—That s. 115 † of the Evidence Act implies that no declaration, act or omission will amount to an estoppel, unless it has caused the person whom it concerns to alter his position, and to do this he must both believe in the facts stated or suggested by it, and must act upon such belief; that in the present case it could not be said that the vendee was misled by the fact that the zamindars were consenting parties to the sale-deed; that he could not plead ignorance that the deed was unlawful and void; that it had not been shown that he acted upon the zamindars' agreement to take no action, so as to alter his position with reference to the land; and that, under these circumstances, the zamindars were not estopped from maintaining that the sale-deed was invalid.

Also *per* MAHMOOD, J.—That the zamindars having accepted the vendees as tenants and taken rent from them, a tenancy was thereby constituted under the Rent Law; that the vendees were therefore not trespassers; and that therefore the question as to ejectment did not fall within the jurisdiction of the Civil Court.

UNDER a deed dated the 5th July 1879, Gopal and Jai Ram, the occupancy-tenants of certain land in a village called Shikaripur, sold their rights in the land to Durga and Mahadeo the de-[512]fendants in this suit, for Rs. 700. The

* Second Appeal No. 1741 of 1883, from a decree of D. M. Gardner, Esq., District Judge of Benares, dated the 15th August 1883, reversing a decree of Shah Ahmad Ullah, Munsif of Benares, dated the 22nd March 1883.

† [Sec. 115:—When one person has, by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.]

present suit was brought by the zamindars of the village, in July 1883, for a declaration that the sale-deed was invalid under s. 9 of Act XVIII of 1873, (the N.-W. P. Rent Act in force in 1879), and for ejectment of the vendees, who had obtained possession of the land.

The Court of First Instance (Munsif of Benares) dismissed the suit, on the ground that the plaintiffs had consented to the sale, and had recognized the vendees as tenants by accepting rent from them, and that Act XVIII of 1873 did not prohibit a sale of occupancy-rights made with the consent of the landlord. On appeal by the plaintiffs the District Judge of Benares reversed the Munsif's decision, and decreed the claim. He did not, however, record any definite finding as to whether or not the plaintiffs had consented to or acquiesced in the sale. The defendants appealed to the High Court.

The Court (OLDFIELD and MAHMOOD, JJ.) remitted the following issues for trial by the Lower Appellate Court:—

"Whether the plaintiffs gave their consent, expressly or impliedly, to the alienation.

"Whether they have recognized the defendants as tenants."

Upon both these issues the Lower Appellate Court returned findings in the affirmative.

On the case coming again before the Court,

Lala Lalta Prasad, for the Appellants.

The Senior Government Pleader (Lala Juala Prasad), and Munshi Hanuman Prasad, for the Respondents.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgments:—

Mahmood, J.—I regret to say that in this case my brother OLDFIELD and I are unable to agree upon the questions of law involved. The zamindars contend that the sale-deed of the 5th July 1879 was void *ab initio*, and that in consequence of its being void the present defendants possess no rights as occupancy-tenants. The prayer in the plaint is for possession of the land in dispute, and for the ejectment therefrom of the defendants as trespassers. The main question in the case is that raised by the [513] second plea in appeal:—
"As the plaintiffs were consenting parties to the sale, and realized rent from the appellants, they cannot now sue to set aside the sale."

In dealing with this question, we must first read the second paragraph of s. 9 of the Rent Act (XVIII of 1873), the effect of which was considered by a Divisional Bench of this Court in *Umrao Begam v. The Land Mortgage Bank of India*, I. L. R., 1 All., 547, and again by a Full Bench in the same case, I. L. R., 2 All., 451, but the question did not arise in that case in precisely the same shape as now. The ruling of the Court was, that s. 9 did not prevent a landholder from causing the sale in execution of his own decree of the occupancy-right of his own judgment-debtor in land belonging to himself. The judgment did not relate to a private transfer, but to the question whether or not the zamindar could sell the property through the Court. SPANKIE, J., was of opinion that, even in the execution of a decree, the zamindar's consent could not make valid a transfer prohibited by s. 9. He held—and I agree with him—that no order of the Court could make valid a transaction which the parties themselves could not privately effect; for what can be sold in execution of a decree is only the rights and interests of the judgment-debtor. That case, however, is distinguishable from the present, and although the judgment may contain *dicta* which seem to apply here, nothing in it is binding on us which was not essential to the point actually determined. There is here no question as to the

execution of a decree, but only as to the validity of a private transfer. The question is, whether or not the sale-deed of the 5th July 1879, is contrary to law, and therefore void. I may here refer to s. 2 of the Contract Act, and in particular to clause (g) of that section :—"An agreement not enforceable by law is said to be void," and clause (h)—"An agreement enforceable by law is a contract." "Contract," therefore, means a valid agreement enforceable by law. Clause (d) of the same section defines "consideration," and s. 23 specifies what considerations are lawful and what are not :—"The consideration or object of an agreement is lawful unless it is forbidden by law ; or is of such a nature that, if permitted, it would defeat the provisions of any law ; or is fraudulent ; or involves or [514] implies injury to the person or property of another ; or the Court regards it as immoral or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void." Lastly, s. 24 provides that "if any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object is unlawful, the agreement is void."

Now, the sale-deed of the 5th July 1879, was undoubtedly a contract entered into at a time when Act XVIII of 1873 was in force. There can be no doubt that its object was such as to bring it within the terms of s. 23 of the Contract Act, which makes the consideration of an agreement unlawful when it is of such a nature that, if permitted, it would defeat the provisions of the law. In the Full Bench case of *Gopal Pandey v. Parsotam Das*, I.L.R., 5 All., 121, I explained my own conception of the rights of an occupancy-tenant in these Provinces, and I expressed the opinion that this prohibition of transfer contained in s. 9 of the Rent Act was designed by the Legislature to prevent the rights of agriculturists from being shifted, and was intended for the benefit, not only of the zamindars, but also of the tenants referred to in the section. If this sale-deed is held to be valid, then the transfer will take place, and will enable the defendants to claim all the rights which the occupancy-tenants possessed.

The second point before us relates to estoppel. It is said that whatever may be the object of the contract contained in the deed, and however illegal it may be, the zamindars consented to it, and cannot now maintain that it is void. The fundamental principle of estoppel is given effect to by s. 115 of the Evidence Act in the following terms :—"When one person has, by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true, and to act upon such a belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing." This implies that no declaration, act, or omission will amount to an estoppel unless it has caused the person whom it concerns to alter his position ; and to do this he must [515] both believe in the facts stated or suggested by it, and must act upon such belief. The altering of his position by the person pleading estoppel is an essential part of the rule. In this case at most it can be said that the zamindars were consenting parties to the execution of the sale-deed. But how was the vendee misled by this ? He cannot plead ignorance that the deed was unlawful and void, because ignorance of law cannot be accepted as a plea in any case. But it is said that the plaintiff is estopped because he agreed to take no action. Here also I think it has not been shown that the vendee acted upon such an agreement so as to alter his position with reference to the land. Payment of rent may of course be evidence of tenancy, and tenancy once established would estop the tenant from disputing the landlord's title. The rule

is codified in s. 116 of the Evidence Act; but I am unaware of any rule of law by which the *landlord*, under the circumstances of this case, would be estopped by reason of having received rent from saying that the tenant has derived his title under a conveyance opposed to the express terms of the law. What then should be our decree in this case? The first Court dismissed the claim, the Lower Appellate Court, has decreed it *in toto*. My judgment, however, is only in part in the plaintiffs' favour, namely, that they are competent to maintain that the sale-deed is void and gives no occupancy-rights to the vendee. But the finding of the Lower Appellate Court upon the second issue is, that the plaintiff accepted the defendants as tenants, and took rent from them. Now, the taking of rent under such circumstances constitutes a tenancy under the Rent Law, and therefore the plaintiff is wrong in saying that the defendants are trespassers; and hence the question as to ejectment does not fall within the jurisdiction of the Civil Court. My own conclusion is, therefore, that the decree of the Lower Appellate Court should be upheld so far as it declares the sale-deed to be void, and that the suit should be dismissed so far as the claim for ejectment is concerned, leaving the plaintiff to his proper remedy in the Revenue Court.

Oldfield, J.—I would accept the findings of the Judge to the effect that the plaintiffs consented to the sale in favour of the appellants, and received arrears of rent due on the holding by the vendors from them, and recognized them as tenants.

[516] The sale was made at the time Act XVIII of 1873 was in force, and sales of rights of occupancy were not void under s. 9 when made with the consent of the landlord. This principle was affirmed by the Full Bench of this Court in the case of *Umrao Begam v. The Land Mortgage Bank of India*, I. L. R., 1 All., 547, and the sale the plaintiffs have consented to will be valid, but under any circumstances they are estopped by their conduct from bringing this suit to set aside the sale.

I would reverse the decree of the Lower Appellate Court, and restore that of the first Court dismissing the suit with all costs.

[7 All. 516]

The 23rd December, 1884.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Bhairo and others.....Plaintiffs

versus

Parmeshri Dayal and others.....Defendants.*

*Transfer of property—Condition restraining alienation—Inheritance—
Act IV of 1882 (Transfer of Property Act), ss. 2, 10—Act VI of 1871
(Bengal Civil Courts Act), s. 24.*

In a suit for possession of certain shares in certain villages, a compromise was effected between the plaintiffs and B the defendant. The terms of the compromise were

* Second Appeal No. 1609 of 1883, from a decree of R. T. Leeds, Esq., District Judge of Gorakhpur, dated the 12th May 1883, affirming a decree of Hakim Shah Rahat Ali, Subordinate Judge of Gorakhpur, dated the 23rd March 1882.

embodied in a deed, the terms of which were (*inter alia*) as follows :—“The said *B* will hold possession as a proprietor, generation by generation, without the power of transferring in any shape . . . The following shares recorded in *B*'s name shall not be transferred or sold in auction in payment of any debt payable by the said *B*, and in the event of their being transferred or sold, such transfer will be invalid, and the plaintiffs will then be entitled to set aside* that transfer, and to obtain possession.” *B* obtained possession of the shares allotted to him by the compromise. Subsequently, certain creditors of *B* attached the shares referred to in the deed in execution of a decree obtained against the heirs of *B* for money lent to *B* on a bond, which he had executed while in possession of the shares, and in which he made a simple mortgage of them. The representatives of the plaintiffs in the suit in which the compromise was made objected to the attachment.

Held by OLDFIELD, J., that the deed of compromise passed an absolute estate to *B* and his heirs to which the law annexed a power of transfer, and that, in reference to s. 10 * of the Transfer of Property Act, the stipulation against alienation on *B*'s part, or against sale by auction in execution of decrees against him, was void.

[517] *Per* MAHMOOD, J.—That the rule contained in s. 10 of the Transfer of Property Act was not binding upon the Court in this case, inasmuch as the question was one of succession or inheritance, to be governed by s. 24 of the Bengal Civil Courts Act; that it was for those objecting to the attachment to show that, under the Hindu Law, the rights of *B* in the property ceased to exist at his death, or that his estate devolved upon them free of his debts; that, the Hindu Law being silent on this subject, the principles of justice, equity and good conscience must be applied, to which, so far as transfer was concerned, effect was given by s. 10 of the Transfer of Property Act; that the restrictions imposed by the deed of compromise upon *B*'s powers of alienating the absolute estate which it conferred upon him were opposed to the policy of the law and could not be recognized; and that *B* must be held to have had an absolute estate which would devolve upon his heirs, and which could be sold in execution of decrees for his debts.

The *Tagore Case*, 9 B. L. R., 377, referred to.

THE defendants in this suit represented one Sahib Dayal and certain other persons, who, in 1863, brought a suit for possession of certain shares in certain villages against a lady named Raghubans Kuari and Bishan Lal, who was the manager of her estate. On the 7th October 1863, the parties to that suit executed a deed of compromise of which the part material to the purposes of this report was as follows :—“In the suit instituted by Sahib Dayal Singh and others, plaintiffs, against Raghubans Kuari and Bishan Lal, defendants, pending in this Court, to obtain possession of the shares in mauza Ahrauli, etc., situate in pargana Dhuriapur, the plaintiffs have actually the proprietary and hereditary rights in the shares in dispute; and we have settled the matter as follows.” [The deed then proceeded to direct a division of the property among the parties in certain proportions, and continued thus] :—“That the said Bishan Lal shall hold possession over the under-mentioned shares as a proprietor, generation by generation, without the power of transferring in any shape, such as mortgaging the property by taking an advance, and he is bound to pay the Government revenue; but in the case of his doing any act against the said conditions, it will be invalid, and the other sharers will have no concern with the shares so allotted to the said defendant Bishan Lal; and according to the division the names are to be recorded in the *khewat*, and the right of the

*[Sec. 10 :—Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him : provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.]

shares so vested shall not fall to the plaintiffs or any other than the male heirs of the said Bishan Lal. The following shares recorded in Bishan Lal's [518] name shall not be transferred or sold in auction in payment of any debt payable by the said Bishan Lal; and in the event of their being transferred or sold, such transfer will be invalid, and the plaintiffs will then be entitled to set aside that transfer, and to obtain possession."

Upon this compromise, the Court passed a decree in favour of the plaintiffs to that suit for the shares allotted to them by the compromise, and dismissed the rest of their claim. Bishan Lal obtained possession of the shares allotted to him by the compromise, and while in possession of them he, on the 27th February 1865, gave a bond to the plaintiffs in the present suit, in which he made a simple mortgage of the shares. This bond was for more than Rs. 100 and was not registered. The obligees of the bond brought a suit against the heirs of Bishan Lal on the bond, and obtained a decree. In execution of this decree the shares allotted to Bishan Lal by the compromise were attached. The defendants in the present suit, as the representatives of the plaintiffs in the suit in which the compromise was made, objected to the attachment. Their objection was allowed, and in consequence the present suit was brought by the plaintiffs to establish that the shares were the property of Bishan Lal and liable for his debts. The main question raised by the suit was as to the interest which Bishan Lal took under the compromise in the shares, and whether the shares were liable for his debts. Both the lower Courts dismissed the suit. The Lower Appellate Court held that the compromise transferred to Bishan Lal a life-interest in the shares only, and that as such an interest was not alienable, the condition in the compromise as to forfeiture on breach of the covenant against alienation was a perfectly valid one. The Court therefore held that the shares were not liable for the debt of the plaintiff.

In second appeal, the plaintiffs contended that the Lower Appellate Court had placed a wrong construction on the compromise, and that document conveyed to Bishan Lal an absolute proprietary interest in the shares allotted to him, and those shares were liable to be sold in execution of the decree of the plaintiffs as the property of Bishan Lal.

[519] Mr. T. Conlan and Munshi Sukh Ram, for the Appellants.

Pandit Ajudhia Nath and Munshi Kashi Prasad, for the Respondents.

Oldfield, J.—The plaintiff obtained a decree for money lent to one Bishan Lal on a bond. The decree was against the heirs of Bishan Lal. He sought to bring to sale in satisfaction of it the property in suit, and the respondents objected to the sale, and the objection was allowed. The object of this suit is to have it declared that the property was the property of Bishan Lal, and liable to be sold in satisfaction of his debt.

It appears that this property and other property was the subject of litigation some years ago between Bishan Lal and the respondents, and they came to a compromise by which this property was transferred to Bishan Lal. The respondents, however, allege that the terms of the arrangement placed restrictions on Bishan Lal's power of transfer. I have examined the copy of the deed of compromise filed on which the respondents reply, and I find that it passes an absolute estate to Bishan Lal and his heirs. The terms are:—"The said Bishan Lal will hold possession as proprietor, generation by generation, (*naslan bad naslan*)."

These words show that he obtained an estate heritable according to law, to which the law annexes a power of transfer, and the stipulation against alienation on his part, or against sale by auction in execution of decrees against Bishan Lal, must be held void. I may refer to *Ashutosh Dutt v. Doorga Churn Chatterjee*, I. L. R., 5 Cal., 438, and the *Tagore Case*,

9 B. L. R., 377, and s. 10, Transfer of Property Act. The decree of the Lower Appellate Court is set aside, and the case remanded for disposal on the merits.

Mahmood, J.—The question raised by the facts of the present case is whether the property in suit is or is not liable to sale in execution of the decree obtained by the plaintiffs against the heirs of Bishan Lal for debts due by him.

In the first place, we have to consider in what way the interest of Bishan Lal in the property was created. To answer this question it is necessary to refer to the deed of compromise which ended the litigation of 1863. This deed is a fact of the greatest [520] importance in the case. It begins with the words:—“In the suit instituted by Sahib Dayal Singh and others, plaintiffs, against Musammatt Raghubaus Kuari and Bishan Lal, defendants, pending in the Court, to obtain possession of the shares in mauza Ahrauli..... the plaintiffs have actually the proprietary and hereditary rights in the shares in dispute, and have settled the matter as follows.” That is, the first sentence in the deed admits, on behalf of all the parties to the suit, that the plaintiffs are full proprietors of the disputed property, but have entered into an agreement in the form of a *suleh-nama* as follows. The deed goes on to provide the manner in which the property is to be divided among the parties, and the last portion of it says that certain properties are, with the consent of the plaintiffs, to be allotted to Bishan Lal. But then comes the most important clause in the *suleh-nama*:—“That the said Bishan Lal hold possession over the under-mentioned shares as a proprietor, generation by generation, without the power of transferring in any shape, such as mortgaging the property by taking an advance sum, and he is bound to pay the Government revenue; but in the case of his doing anything against the said terms, it will be invalid, and the other sharers will have no concern with the shares so allotted to the defendant Bishan Lal, and according to this decision the names are to be recorded in the *khewat*, and the right of the shares so invested would not fall to the plaintiff or any other than the male heir of the said Bishan Lal. The following shares recorded in Bishan Lal's name shall not be transferred or sold in auction in payment of any debt payable by the said Bishan Lal, and in the event of their being transferred or sold, such transfer will be invalid, and the plaintiffs will then be entitled to set aside such transfer and to obtain possession.” Now, this deed of compromise was presented to the Court with an application for a decree in accordance with its terms. But the Court to which the application was made passed the following decree:—“According to the compromise, out of the property a four-pies share in each of the mauzas” (names of mauzas set out) “and a two-pies share in” (name of mauza set out) “and a two-annas and eight-pies share in each of the mauzas” (names of mauzas set out) “be decreed in favour of the plaintiffs, and the rest of the claim be dismissed. [521] As the parties have not written anything about costs they shall bear the costs in proportion to the claim decreed and dismissed.” In other words, the suit of the plaintiffs in 1863 was decreed to the extent of the claim less the property given by the compromise to Bishan Lal. Then the decree went on to say:—“Such passages in the compromise as are unnecessary and irrelevant in this case may be regarded as void and unnecessary; and having regard to the fact that the said passages are irrelevant to the present case, they have not been attested by the parties, and they are at liberty to be bound by the said passages or not; the Court has nothing to do with them.”

Now this point occurred to me during the argument. This compromise was simply a petition to the Court for a decree according to its terms. The decretal order was one declining to grant the petition, and declaring the

compromise ineffectual so far as concerned the estate conferred by it on Bishan Lal. I am inclined to think that this circumstance might be sufficient to justify the plaintiffs' claim. But I do not wish to base my judgment on that ground. Even if the compromise simply represented the terms of a previous oral agreement, I should still hold that the present appeal must prevail. Giving the greatest benefit to the position of the defendants-respondents, we have to consider whether this is a question of succession or inheritance within the meaning of s. 24 of the Bengal Civil Courts Act (VI of 1871). I think that it is, because the question is, on the death of Bishan Lal, what estate devolved on the present respondents. The law which governs such a question as this is contained in s. 24 of the Bengal Civil Courts Act. I think that it was for the respondents to show that, under the Hindu Law of succession and inheritance, the rights of Bishan Lal in the property in dispute ceased to exist at his death, or that his estate devolved upon them free of liabilities for his debts.

No authority was cited in support of this opinion, and therefore, this being a question of succession, and the Hindu Law being silent on the subject, we must decide in accordance with the principles of justice, equity, and good conscience referred to in s. 24 of the Bengal Civil Courts Act. In order to ascertain what is the rule of justice, equity, and good conscience in the pre-[522]sent case, the principles of jurisprudence are the best guide that we can have. These principles, so far as transfer is concerned, have received effect in the Transfer of Property Act, to which therefore it may be useful to refer. My brother OLDFIELD has called attention to s. 10 of that Act. It is a section which forms part of Chapter II—"Of transfers of property by act of parties." Now s. 2 (d) provides that nothing in the Act shall be deemed to affect, "save as provided by s. 57 and Chapter IV of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction; and nothing in this Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist law." The rule contained in s. 10 is, therefore, not binding upon us in this case. Still I do not think that there is any rule of Hindu Law which is inconsistent with the object of the Legislature as expressed in s. 10. The leading cases on the subject are those which have been referred to by my brother OLDFIELD. The exact point decided in those cases does not arise here, but the *ratio decidendi* is applicable. In the first place, I have no doubt that the deed of compromise of the 7th October 1863, begins by declaring Bishan Lal to have an estate which is heritable, going to his heirs "generation by generation," and in fact to be the proprietor. Then come restrictions of his right and of his heir's right to alienate the property. The reason of the rule disallowing such restrictions, that is, the reason of s. 10 of the Transfer of Property Act, is best expressed in the judgment of the Privy Council in the *Tagore Case*, 9 B. L. R., 377. Their Lordships say:—"The power of parting with property once acquired, so as to confer the same property upon another, must take effect either by inheritance or transfer, each according to law. Inheritance does not depend upon the will of the individual owner; transfer does. Inheritance is a rule laid down (or in the case of custom recognized) by the State, not merely for the benefit of individuals, but for reasons of public policy—*Domat*, 2413. It follows directly from this that a private individual who attempts by gift or will to make property inheritable otherwise than the law directs is assuming to legislate, and that the gift must fail, and the inheritance take place as the law directs. This was well expressed by Lord [523] Justice TURNER in *Soorjeemoney v. Denobundoo Mullick*, 6 Moo. I. A., 555. A man cannot create a new form of estate, or alter the line of succession

allowed by law, for the purpose of carrying out his own wishes of views of policy."

There is also another passage in the same judgment which applies in principle to the question raised in this case:—"If, again, the gift were in terms of an estate inheritable according to law, with superadded words restricting the power of transfer which the law annexes to that estate, the restriction would be rejected as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate, which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognize."

These principles appear to me to be equally applicable to the circumstances of England and of India, and in the absence of any provision of Hindu Law by which their application is negatived, I think that the present case falls within their scope. The deed of compromise first gave an absolute estate to Bishan Lal, and then proceeded to impose restrictions upon his powers of alienation. These restrictions are opposed to the policy of the law, they cannot be recognised, and therefore Bishan Lal must be held to have had an absolute estate which would devolve upon his heirs and which could be sold in execution of decrees for his debts. I concur therefore in the order which my brother OLDFIELD has proposed.

Appeal allowed.

NOTES.

[See also 3 A.L.J., 621.]

[7 All. 523]

The 14th January, 1885.

PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Nand Ram and another.....Plaintiffs
versus
Fakir Chand.....Defendant.*

*Arbitration—Remand under Civil Procedure Code, s. 566 for trial of issues—
Reference by first Court of whole case to arbitration—Refusal of
arbitrator to act—Award by remaining arbitrators—Illegality
of award—Civil Procedure Code, s. 510.*

A Court of First Instance to which issues have been remitted under s. 566† of the Civil Procedure Code by the Appellate Court has only jurisdiction to try the issues remitted, and is *functus officio* in other respects, and cannot make a reference [524] of the case to arbitration,

* Second Appeal No. 54 of 1884, from a decree of H. A. Harrison, Esq., District Judge of Meerut, dated the 12th March 1883, affirming a decree of Rai Bakhtawar Singh, Subordinate Judge of Meerut, dated the 27th January 1882.

† [Sec. 566:—If the Court against whose decree the appeal is made has omitted to frame

When Appellate Court may frame issues and refer them for trial to Court whose decree is appealed against.

or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, and the evidence upon the record is not sufficient to enable the Appellate Court to determine such issue or question, the Appellate Court may frame issues for trial, and may refer the same for trial to the Court against

whose decree the appeal is made, and in such case shall direct such Court to take the additional evidence required,

and such Court shall proceed to try such issues, and shall return to the Appellate Court its finding thereon together with the evidence.]

which is only within the jurisdiction of the Appellate Court. *Gossain Dowlut Geer v. Bissessur Geer*, 22 W. R., 207, referred to.

When a case has been referred to arbitration, the presence of all the arbitrators at all meetings, and above all at the last meeting when the final act of arbitration is done, is essential to the validity of the award.

Where a case was referred by a Court to the arbitration of three persons, and the parties to the reference agreed to be bound as to the matters in dispute by the decision of a majority of the arbitrators, and one of the arbitrators subsequently refused to act, and withdrew from the arbitration,—held that the Court could not pass a decree on the award of the remaining arbitrators, and could only, under s. 510* of the Civil Procedure Code, appoint a new arbitrator or supersede the arbitration and proceed with the suit. *Kazee Syud Naser Ali v. Musammat Tinoo Dossia*, 6 W. R., 95, and *Rohilkhand and Kumaon Bank v. Row*, I. L. R., 6 All., 468, referred to.

THE plaintiffs in this case claimed the money due on a promissory note. The Court of First Instance (Subordinate Judge of Meerut) dismissed the claim. The Lower Appellate Court remanded the case to the Subordinate Judge for the trial of certain issues under s. 566 of the Civil Procedure Code. At the end of the order of remand, the Court made the following observations:—“I should hope that this case may be settled out of Court. Otherwise this Court will proceed to judgment on the expiry of seven days after the return of the lower Court’s finding on the above issues. After the case had gone back to the lower Court for the trial of the issues remitted, the parties on the 20th April 1882, applied to the Subordinate Judge that the matters in dispute might be referred to arbitration, and accordingly an order of reference was passed on the same day. Each of the parties appointed an arbitrator, and an umpire was also appointed, and it was agreed that the parties should be bound as to the defendant’s liability upon the promissory note by the decision of a majority of the arbitrators. On the 22nd May 1882, the three arbitrators held their first meeting. On the 23rd, the arbitrator appointed by the plaintiffs, one Nainsukh, filed an application in Court stating that he withdrew from the arbitration, and refused to take any further part in it. The next meeting took place on the 27th May 1882, Nainsukh being absent, and at that meeting the award was prepared and signed by the arbitrator appointed by the defendant and the umpire. Objections were made by the plaintiffs to the validity of the award, thus made, [525] but the Subordinate Judge overruled these objections, and sent up the award to the Lower Appellate Court, which passed a decree in accordance with its terms.

From this decision the plaintiffs now appealed to the High Court.

Mr. C. H. Hill for the Appellant.—The Court of First Instance had no authority to refer the case to arbitration after issues had been remitted under s. 566. *Gossain Dowlut Geer v. Bissessur Geer*, 22 W. R., 207, is in point, and shows that the effect of remitting issues is not to remand the case for retrial, and that the first Court could not refer to arbitration so much of the matter as it had already dealt with. After the first Court had passed its decree it became *functus officio*, and when the appeal was preferred, the Lower Appellate Court was seized of the case, and continued to be so after it had remitted issues. The functions of the lower Court when issues were remitted to it were purely

* [Sec. 510:—If the arbitrator, or, where there are more arbitrators than one, any of the arbitrators, or the umpire, dies, or refuses, or neglects, or becomes Death, incapacity, &c., of arbitrators or umpire. incapable to act, or leaves British India under circumstances showing that he will probably not return at an early date, the Court may in its discretion either appoint a new arbitrator or umpire in the place of the person so dying, or refusing, or neglecting, or becoming incapable to act, or leaving British India, or make an order superseding the arbitration, and in such case shall proceed with the suit.]

ministerial. They extended merely to the return of findings upon these issues. But a reference to arbitration is a delegation of power to decide the whole case, and such a delegation cannot be made where the Court itself has no such power. Section 508 of the Civil Procedure Code enacts that when once a matter is referred to arbitration, the Court shall not deal with it in the same suit, except as thereafter provided. Section 522 provides that "if the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration, and if no application has been made to set aside the award, or if the Court has refused such application, the Court shall.....proceed to give judgment according to the award." This clearly shows that what the Legislature contemplated was that no Court should have power to refer a case for arbitration, which could not make a decree according to the award. That could not have been done by a Court which was only authorized to return findings upon certain issues remitted to it by an Appellate Court. My second point is that when one of the arbitrators refused to act, the other arbitrators had no authority to proceed to make an award in his absence and to which he was not a party, even though the parties had agreed to be bound by the decision of a majority. [He was stopped.]

[526] *Babu Baroda Prasad Ghose*, for the Respondents.—The appellants themselves moved the Court of First Instance to refer the case to arbitration. It does not lie in their mouths, therefore, to say now that the Court was not competent to make the reference. [MAHMOOD, J.—In India there can be no waiver of pleas to jurisdiction. The fact that the appellants applied for the reference to arbitration does not stop them from disputing the legality of the Court's action.] In reference to the second point raised by the other side, the Subordinate Judge found that the arbitrator, in refusing to proceed with the arbitration, acted in collusion with the plaintiffs, and in order to prevent an unfavourable award. [MAHMOOD, J.—That is a two-edged argument, for it practically amounts to saying that one of the arbitrators acted corruptly, and that would be a good objection to the award.]

Mr. Hill, for the Appellant, was not called upon to reply.

Oldfield, J.—Both pleas are good. The Court of First Instance had only jurisdiction to try the issues remitted to it by the Appellate Court, and was *functus officio* in other respects, and could not make a reference to arbitration, which was only within the jurisdiction of the Appellate Court—see *Gossain Dowlut Geer v. Bissessur Geer*, 22 W. R., 207. Further, it is clear that one of the arbitrators refused to act, and the only course open to the Court was, under s. 510, to appoint a new arbitrator, or supersede the arbitration, and proceed with the suit. The Court could not pass a decree on the award of the remaining arbitrators.

The decree of the lower Court is reversed, and the case remanded for trial. Costs to follow the result.

Mahmood, J.—I am of the same opinion. Two pleas in appeal have been raised in this case. The first is, that the order of reference, dated the 20th April 1882, was illegal, and the second that the absence of one of the arbitrators vitiated the award, and that the decree carrying out the terms of the award was therefore wrong. I am of opinion that when a Court has disposed of a case and passed a decree upon it, the jurisdiction assigned to the Court ceases, so far as that case is concerned, and can be revived only in the manner and to the extent which the law prescribes. In the [527] present case, when the Subordinate Judge had passed his decree, he had no power to interfere with it except by review or in consequence of the direction of a superior Court. And as soon as the appeal was filed in the Court of the District Judge, that Judge only was competent to deal finally with the case.

What I mean by "dealing finally" with it is the power to say yes or no to the plaintiff's claim. Now, an order passed by the District Judge under s. 566 of the Civil Procedure Code has not for its object the transfer of the Appellate Court's jurisdiction—its power to say yes or no to the claim—to the Court of First Instance. It amounts to nothing more than a delegation to that Court of authority to take evidence upon certain issues which it is necessary to determine, and which may be dealt with either by the Appellate Court under s. 568, or by the Court of First Instance on remand under s. 566, at the discretion of the Appellate Court.

The only tribunals which really have power to dispose of disputes are those which the State has established. Those tribunals can only delegate the powers conferred on them by the Legislature if, and in so far as, the Legislature expressly authorizes them to do so. It is obvious that if a Court has jurisdiction to deal with a particular suit, it may delegate that power, but it cannot delegate a case which it cannot itself try. I think that the principle of the maxim *delegatus delegari non potest* applies here, and that the Subordinate Judge being, in this sense, himself a delegate in the case from the District Judge, could not himself delegate it to another tribunal, that his order of reference was therefore *ultra vires*, and that everything done in consequence of it was invalid.

In regard to the second point I agree with my brother OLDFIELD that the presence of all the arbitrators at all meetings, and above all at the last meeting, when the final act of arbitration is done, is essential to the validity of the award. The learned pleader for the respondent has cited two decisions of the Calcutta High Court to the contrary effect. One of these is *Kazee Syud Naser Ali v. Musummat Tinoo Dossia*, 6 W. R., 95, in which it was held that the absence of one arbitrator out of three who have been appointed does not vitiate the award, if the parties agreed to be bound by the decision of a majority. I confess that I am unable to agree in this view of the law. What the parties to a reference to arbitration intended is that the persons to whom the reference is made should meet and discuss together all the matters referred, and that the award should be the result of their united deliberations. This conference and deliberation in the presence of all the arbitrators is the very essence of the arbitration, and the sole reason why the award is made binding. In a case recently decided by this Court—*Rohilkhand and Kumaon Bank v. Row*, I. L. R., 6 All., 468, I took occasion to express my views upon a cognate subject, holding that no judgment can be given in a Court consisting of several Judges, unless those Judges have conferred together, heard evidence and arguments together, and formed their opinions upon the entire arguments and evidence so heard. I held that the only proper decree was that of the majority after such conference. Here the same principle should be applied. Whatever may have been the arbitrator's motive for withdrawing, his non-participation in the deliberations of the others makes their award *ultra vires* and of no effect.

I therefore concur with my brother OLDFIELD that the appeal should be decreed and the case remanded to the Lower Appellate Court under s. 562 of the Civil Procedure Code. Costs to follow the result.

Appeal allowed.

NOTES.

[It is essential for the validity of the award that all the arbitrators must be present at all the meetings :—(1885) 7 All., 523; (1888) 12 Mad., 113. See also the elaborate and full Judgment of Mookerjee, J. in (1911) 13 I.O. 161.]

The 15th January, 1885.

PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Mahadei..... ..Plaintiff

versus

Ram Kishen Das and others.Defendants.*

Court-fees—Act VII of 1870 (Court-Fees Act), ss. 6, 12, 28—Order requiring additional court-fee on claim, passed subsequent to decree—Decree prepared so as to give effect to subsequent order—Civil Procedure Code, ss. 54, 55, 584.

A Judge, after disposing of an appeal on the 1st March 1883, again took it up, and on the 21st March 1883, directed the appellant to pay additional court-fees on her memorandum of appeal. On the 2nd May 1883, the appellant paid the additional court-fees under protest, and a decree was then prepared, bearing date the 1st March 1883, but it referred to and carried into effect the subsequent order of the 21st March and the 2nd May.

Per MAHMOOD, J., that as soon as the Judge had passed the decree of the 1st March 1883, he ceased to have any power over it, and was not competent to [529] introduce new matters not dealt with by the judgment; that the order of the 21st March and the deposit of the 2nd May, whether right or wrong, were not proceedings to which effect could be given in the antecedent decree of the 1st March 1883; and that the decree was *ultra vires* to that extent, and was therefore liable to correction in second appeal under s. 584 of the Civil Procedure Code.

The powers conferred by ss. 54 (a) and (c) and 55, read with s. 582 of the Civil Procedure Code, or by s. 12 of the Court-Fees Act (VII of 1870), read with clause (ii) of s. 10, are intended to be exercised before the disposal of the case, and not after it has been decided finally so far as the Court is concerned.

The powers conferred by s. 237 of the Court Fees Act cannot be exercised by an order passed after the decision of the case to which the question of the payment of court-fees relates, and even assuming that they can be so exercised, such an order, though it may be subject to such rules as to appeal or revision as the law may provide, cannot be given effect by making insertions in an antecedent decree.

Per OLDFIELD, J.—That the Court had power to make the order it did, inasmuch as the collection of court-fees was no part of a Judge's functions in the trial of a suit which could be said to have ceased with its determination; and the provisions of the Court-Fees Act fixed no time within which the presiding Judge could exercise his power of ordering documents to be stamped, and seemed, on the other hand, to contemplate the exercise of that power at any time subsequent to the receipt, filing or use of a document, and to make the validity of the document and the proceedings relative thereto dependent on the document being properly stamped.

* Second Appeal No. 71 of 1884, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 1st March 1883, affirming a decree of Hakim Shah Rahat Ali, Subordinate Judge of Gorakhpur, dated the 21st March 1872.

Stamping documents inadvertently received. [Sec. 28:—No document which ought to bear a stamp under this Act shall be of any validity, unless and until it is properly stamped.

But if any such document is through mistake or inadvertence received, filed or used in any Court or office without being properly stamped, the presiding Judge or the head of the office, as the case may be, or, in the case of a High Court, any Judge of such Court, may, if he thinks fit, order that such document be stamped as he may direct; and on such document being stamped accordingly, the same and every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance.]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of MAHMOOD, J.

Mr. T. Conlan and Mr. A. Reid, for the Appellant.

Mr. C. H. Hill, for the Respondents.

Mahmood, J.—(After disposing of the first five grounds of appeal against the appellant, continued):—But on the sixth and last ground, I think that the appeal is good. It is necessary to bear in mind the following facts:—The appeal was heard by the District Judge, and finally dismissed by him on the 1st March 1883. After he had thus disposed of it, he again took it up (it is not very apparent how), and on the 21st March 1883, he directed the appellant to value the relief sought by her within a week from that date. The appellant, on the 31st March, filed an application, in which she objected to the case being re-opened in this manner by the District Judge, and maintained that the valuation which she, on behalf of her minor son, had made in the Court of First Instance, and also in the District Judge's Court, was correct. Upon [530] this application the District Judge, on the 3rd April, passed the following order:—"All the questions raised in this petition have been determined by my order of the 21st March 1883, and the petitioner is required to value the relief sought in accordance with s. 7, cl. iv. of Act VII of 1870." The appellant, Musamnat Mahadei, on the 7th April, made another application, in which she reiterated her objections to the re-opening of the case, and reasserted the correctness of the valuation previously made by her, and at the same time, under protest, valued the relief sought by her at Rs. 2,000. On the 18th April, the District Judge passed an order peremptorily requiring the appellant to deposit within two weeks court fees calculated on the valuation of Rs. 2,000. Then, on the 2nd May 1883, the appellant filed a court-fee stamp of Rs. 109-4, with an application, which was consigned to the records. A decree was then prepared, bearing date the 1st March 1883, but it referred to and carried into effect the subsequent order of the 21st March and the deposit of the 2nd May, that is, the court-fee stamp which was calculated in accordance with the views of the District Judge as expressed in his order of the 21st March. That decree has now come before us in second appeal, and it is impeached in the sixth ground of appeal in the following terms:—"That the lower Court was wrong in its estimation of the amount of court-fees payable by the appellant, and it erred in compelling the appellant to pay an additional sum on this account after the decision of the case."

We have therefore to consider the question whether, under s. 584 of the Civil Procedure Code, so much of the Judge's decree as goes beyond his judgment of the 1st March 1883, ought to be set aside. I think that this question should be answered in the affirmative.

By s. 6 of the Court-Fees Act, it is provided that fees are to be levied on certain documents, and that no such document shall be receivable in Court without payment of the prescribed fee. If any difficulty should arise regarding the amount of fee to be paid on any document, s. 12 provides that "every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of [531] appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit: but whenever any such suit comes before a Court of appeal, reference, or revision, if such Court considers that the said question has been wrongly decided, to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions

of s. 10, paragraph ii, shall apply." Then s. 28 says:—"No document which ought to bear a stamp under this Act shall be of any validity unless and until it is properly stamped. But if any such document is, through mistake or inadvertence, received, filed, or used in any Court or office without being properly stamped, the presiding Judge or the head of the office, as the case may be, or, in the case of a High Court, any Judge of such Court may, if he thinks fit, order that such document be stamped as he may direct; and on such document being stamped accordingly, the same and every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance."

These are the only sections of the Court-Fees Act which appear to bear on the present matter. The question is:—Do they give jurisdiction to a Court to introduce into a decree matters lying outside its judgment, or to exercise any powers in connection with a decretal order after the Court passing it has become *functus officio* by having disposed of the case? I think that the proper answer is No. As soon as the Judge had passed the decree of the 1st March 1883, he ceased to have any power over it, and was not competent to introduce new matters not dealt with by the judgment. The orders of the 21st March and the 18th April, and the deposit of the 2nd May, may very possibly have been correct so far as the calculation of the amount of court-fees is concerned; but upon that point I express no opinion, because according to my view they were not proceedings to which effect could be given in the antecedent decree of the 1st March 1883. That decree seems to me, therefore, *ultra vires* to that extent. My reasons for this conclusion are that the learned District Judge could exercise such powers, either under the Civil Procedure Code, s. 54, clauses [582] (a) and (b) and s. 55, read with s. 582, or under s. 12 of the Court-Fees Act which must be read with clause (ii) of s. 10, to which it expressly refers. Reading these provisions of the law, it seems to me clear that the powers thereby conferred are intended to be exercised *before* the disposal of the case, and not after it has been decided finally, so far as the Court is concerned. In the one case *rejection* and in the other *dismissal* are the penalties provided by the law if the deficiency in court-fees is not supplied in proper time, and it is obvious that neither of these powers can be exercised after the case has been decided and the Court has become *functus officio*.

But it is contended that s. 28 of the Court-Fees Act confers a power which the other sections to which I have referred do not, and that such power may be exercised at any time after the decision of the case without any limitation, because the matter of realizing court-fees is not a part of the trial or adjudication of the case, the result of which is incorporated in the decree. The point is not free from doubt, as the language of the statute is not sufficiently explicit; but even if the contention be accepted, it would go to show that that which is not the result of such trial or adjudication should not be included in the decree which can give effect only to such adjudication. That the decision as to payment of court-fees by parties to the litigation is an adjudication cannot, I think, be doubted, for in some cases it may be made the subject of appeal, as was held in *Chunia v. Ram Dial*, I. L. R., 1 All. 360, and again in *Gulzari Mal v. Jadaun Rai*, I. L. R., 2 All., 63. And when such adjudication takes place long after the case has been disposed of by the Court, I confess I am unable to see how effect can be given to it by inserting anything in a decree which represents only the result of an antecedent adjudication. I am, however, unable to accept the contention, because the Court-Fees Act does not separately provide any means for recovery of the additional court-fees, and the only penalties for failure to supply the deficiency are those to which I have already referred, and which consist in the powers of the Court exercisable only

antecedently to the final decision of the case. Nor am I aware of any rule of law which would vitiate or annul a decree obtained by a party who, subse-
[533] quent to such decree, having been ordered to pay additional court-fees under s. 28 of the Act, fails to do so. The only interpretation, therefore, (so far as the present question is concerned), that I can put upon that section is, that the powers thereby conferred are to be exercised only before the final decision of the case to which the question of the payment of the court-fees relates, and that the provision as to the retrospective effect of the validity of such documents relates only to those documents which, being defectively stamped, have been wrongly received and used in the course of the trial of a case which has not yet been finally adjudicated upon. If I held otherwise, and decided that under s. 28 of the Court-Fees Act the Judge had power to make his decree of the 1st March different from what it would have been if the subsequent orders had not been passed, I should practically be deciding that, even after the dismissal of the appeal, the District Judge retained some kind of jurisdiction to be exercised *suo motu* in the case, and that he could at any time take up the oldest decree of his Court and modify it seriously as to costs in connection with the amount of court-fees.

But even if it be conceded that the powers conferred by s. 28 of the Court-Fees Act could be exercised by an order passed after the decision of the case, it seems to me that such an order must be regarded as a separate proceeding, to which effect could not be given by making insertions in an antecedent decree. The order may be subject to such rules as to appeal or revision as the law may or may not provide, but it could not, in my opinion, be dealt with in the decree, which represents only the result of a previous adjudication. It appears to me, therefore, that the course which the learned Judge adopted in this case amounted to exceeding his powers under the law, and that constitutes a substantial error which ought to be corrected by us in second appeal under s. 584 of the Civil Procedure Code. I would therefore modify the decree of the Lower Appellate Court so far as it gives effect to the order as to court-fees passed subsequent to the decree. But considering that the substantial part of the appeal has failed, I would make costs in all the Courts payable by the appellant.

Oldfield, J. —(After disposing of the first five grounds of appeal against the appellant continued):—The last plea refers to [534] the Judge's order directing the plaintiff to pay additional court-fees on his memorandum of appeal. It appears that it was after the decision of the appeal that the Judge passed his order, and it is contended he could not do so after decision. I am not prepared to say that the Judge had no jurisdiction to make such an order after decision of the suit, and it is only in respect of his order so far as it compelled the appellant to pay court-fees that objection is made. The collection of court-fees is no part of a Judge's functions in the trial of a suit which can be said to have ceased with its determination.

These fees are levied under the provisions of the Court-Fees Act. Section 6 provides that no document in which a fee is chargeable shall be received in a Court of Justice unless the proper fee be paid in respect of it, and such fees are collected by stamps, and by s. 28 no document which ought to have a stamp under the Act shall be of any validity unless and until it is properly stamped, and if such document is through mistake or inadvertence received, filed, or used in any Court without being properly stamped, the presiding Judge may, if he thinks fit, order such document to be stamped as he may direct, and on such document being stamped accordingly, the same and every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance.

These sections fix no time within which the presiding Judge can exercise his power of ordering documents to be stamped, and seem, on the other hand, to contemplate the exercise of this power at any time subsequent to the receipt, filing or use of a document, and to make the validity of the document and the proceedings relative thereto dependent on the document being properly stamped.

I am of opinion, therefore, that the Court had the power to make the order it did, and we are precluded from entertaining an objection on the question of valuation of the memorandum of appeal, to which the other objection of the appellant relates, by the provisions of s. 12 (1) of the Act.

The appeal is dismissed with costs

Appeal dismissed.

NOTES

[See the following cases as to the stage upto which an objection as to deficiency of Court-fees may be taken — Madras holding that even in Second Appeal, it was competent to the High Court to direct payment of the deficient Court-fee, (1900) 21 Mad., 331, (1901) 25 Mad., 380, Allahabad holding a contrary view, (1896) 19 All., 165, while in (1885) 7 All., 528 the Court was equally divided

In (1907) 6 C. L. J., 651 this question was raised but not decided. See also (1890) 12 All., 129 F. B.]

[535] FULL BENCH.

The 24th January, 1885.

PRESENT

SIR W. COMER PETHERAM, KT, CHIEF JUSTICE, MR. JUSTICE OLDFIELD,
MR. JUSTICE BRODHURST, MR. JUSTICE MAHMOOD AND
MR JUSTICE DUTHOIT.

Sheo Narain..... ..Plaintiff

versus

HiraDefendant

*Pre-emption--Wajib ul-arz—Purchase of share subsequent to
sale—Purchaser's right of pre-emption.*

Where there is a right of pre-emption under the *wajib-ul-arz*, which a share holder could claim and enforce in respect of a sale of property, a person purchasing the said shareholder's interest in the village subsequently to the sale cannot claim and enforce pre-emption as his vendor might have done.

THE plaintiff in this case, subsequently to the 5th August 1881, became a co-sharer in a village called Rasulpur, by purchase at a sale in execution of a decree of the share of a certain co-sharer in that village. He obtained a sale-certificate bearing date the 20th August 1881. In the present suit he claimed to enforce the right of pre-emption, under the terms of the *wajib-ul-arz*, in respect of a sale by certain other co-sharers in the village of their share to the defendant Hira Panday, by a deed bearing date the 5th August 1881. He alleged that this deed was really executed on the 26th November 1881, the day on which it had been registered; and contended that, that being so, the transfer was made on the latter date. The defendant-vendee set up as a defence to the suit that the deed was executed on the 5th August 1881, and the plaintiff was not entitled to claim pre-emption, not being at that date a co-sharer in the village. The

* Second Appeal No. 281 of 1884, from a decree of R. J. Leeds Esq. District Judge of Gorakhpur, dated the 26th November 1883, reversing a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 23rd February 1883.

Court of First Instance found that the deed was executed on the 26th November 1881, and gave the plaintiff a decree. On appeal by the defendant-vendee, the Lower Appellate Court found that the deed was executed on the 5th August 1881, and dismissed the suit.

In second appeal the plaintiff contended that, assuming the deed was executed on the 5th August 1881, he was nevertheless entitled to claim pre-emption, inasmuch as he had purchased all the rights and interests of the judgment-debtor whose share he had purchased, and, among them, the right of pre-emption.

[536] The Divisional Bench (OLDFIELD and BRODHURST, JJ.) hearing the appeal referred to the Full Bench the following question :—

"Where there is a right of pre-emption under the *wajib-ul-arz*, which a shareholder could claim and enforce in respect of a sale of property, can a person purchasing the said shareholder's interest in the village subsequently to the sale claim and enforce pre-emption just as his vendor might have done?"

Mr. R. C. Saunders, for the Appellant.

The Senior Government Pleader (Lala Juala Prasad) and Munshi Kashi Prasad, for the Respondent.

The following judgments were delivered by the Full Bench :—

Petheram, C. J.—In my opinion, the question referred should be answered in the negative.

Oldfield, Brodhurst, and Duthoit, JJ., concurred.

Mahmood, J.—I have arrived at the same conclusion, but I am anxious to explain my reasons for taking this view. I take it as a fundamental principle of the right of pre-emption, that it is based on the inconvenience to co-sharers arising from the introduction of a stranger into the co-parcenary. I have on previous occasions explained that, in cases like the present, where, even though the right is not claimed under the Muhammadan Law, but under a custom recognized in the *wajib-ul-arz*, the rules of the Muhammadan Law must be applied by analogy, because equity follows the law, and the only system of the law of pre-emption to which we can look for equity to follow is the Muhammadan Law. Under that law, when the ownership of the pre-emptive tenement is transferred or devolves by act of parties, or by operation of law, the transfer or devolution passes pre-emption to the person in whose favour the transfer or devolution takes place, but the rule is essentially subject to the proviso that such person cannot enforce pre-emption in respect of any sale which took place before such transfer or devolution. This rule must also be applied to the present case. The reason why, although the right of pre-emption runs with the land, the plaintiff in this case cannot be allowed to enforce it, is that, to rule otherwise, would in effect be to allow a "stranger" to oust one who was not a "stranger" at the time of the sale. It is found in this [537] case that the sale respecting which pre-emption is claimed occurred on the 5th August 1881. At that time the plaintiff was not a co-sharer, and his title did not come into existence till the 20th August 1881. The reason why pre-emption in respect of the former sale does not go with the subsequent sale is that, while it may be that the plaintiff's vendor had no objection to the sale of 5th August 1881, the plaintiff-purchaser may have objections.

Now, if at the time of the sale of the 5th August, the person who at that time owned the share purchased by the plaintiff had no objection to the sale, that sale gave rise to no cause of action, and nothing which happened afterwards could create one. In other words, a sale not open to any pre-emptive objection at the time it was made, cannot by a retrospective effect be subjected

to objection on account of a subsequent event, namely, the sale of a share in the village to the plaintiff. To hold any other view would be to recognize absurdities which the law of pre-emption cannot possibly have contemplated. If the purchaser at the later sale (and this is the position of the plaintiff here) were to be allowed to pre-empt in respect of the previous sale, the consequence would be that, whilst the purchaser in the earlier sale could maintain a suit to enforce pre-emption in respect of the later sale, the purchaser at such later sale could maintain a pre-emptive suit in respect of the earlier sale. There would thus be two suits equally maintainable but wholly inconsistent with each other, for each plaintiff would call the other a "stranger," and the object of each suit would be to preclude the plaintiff in the other suit from the coparcenary. If both suits were dismissed, the state of things would remain exactly as it was before the suits were instituted: if both suits were decreed the result would simply be to introduce a kind of exchange—the one plaintiff taking the share purchased by the other plaintiff—a result which of course means that neither could exclude the other from the coparcenary. This would be a *reductio ad absurdum* of the rule of pre-emption, for it would defeat the sole object of the right, namely, the exclusion of strangers. The only possible way to administer the rule of pre-emption would be to decide which of such two inconsistent suits was maintainable. And the answer is simple. The purchaser in the earlier sale was a co-sharer and not a stranger when the later sale took place, [538] whilst the purchaser at such later sale was a stranger liable to be excluded from the coparcenary by the pre-emptive claim of any co-sharer for the time being. And it follows naturally that the suit of the purchaser in the earlier sale would be maintainable in respect of the later sale, and the later purchaser would have no right of pre-emption in respect of the earlier sale. To allow the later purchaser to maintain a pre-emptive suit in respect of the earlier sale would be to reverse the course which the rule of pre-emption contemplates.

For these reasons I am of opinion that the plaintiff in this case never had any right of pre-emption on the ground of the sale of 5th August 1881, and my answer to the question referred is therefore in the negative.

NOTES.

[Pre-emption—

I. The heir of a pre-emptor is not a *stranger* and he is entitled to claim pre-emption in respect of a sale which his ancestor could have claimed but did not, during his life :—(1909) 31 All., 623 F. B.

II. So also when right in the property is got by relinquishment* subsequent to the sale, pre-emption in respect of such sale can be claimed by the transferee in interest :—(1897) 20 All., 148.

III. Thus, it was held that the right to pre-emption decided in a previously instituted suit can be set up as a defence in a subsequent suit, even though the right to it might have been established subsequent to the filing of the second suit :—(1904) 26 All., 389.

See also (1912) 15 I. C., 570 (Nagpur).]

The 29th January, 1885.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD

Hira Dai.....Defendant

versus

Hira Lal and others.....Plaintiffs.*

Ex parte decree—"Appearance" of defendant under Civil Procedure

Code, s. 101—Civil Procedure Code, ss. 64, 100, 108, 157.

The first hearing of a suit was fixed for the 12th December 1883, on which day the defendant did not appear, and the case was adjourned to the 18th December, and, as the defendant did not then appear, a decree was passed in favour of the plaintiff. A *vakalat-nama* had been previously filed on the defendant's part, and he had also objected to an application filed by the plaintiff for attachment of the defendant's property before judgment.

Held that these acts on the defendant's part did not constitute an "appearance" by him within the meaning of s. 100 of the Civil Procedure Code, which referred to an appearance in answer to a summons to appear and answer the claim on a day specified, issued under s. 64; that the decree was therefore *ex parte* within the meaning of ss. 100 and 108,† and an appeal consequently lay to the High Court under s. 588, clause (9), from an order rejecting an application to set the decree aside. *Zain-ul-abdin Khan v. Ahmad Raza Khan*, I. L. R., 2 All., 67; L. R., 5 Ind. Ap., 233, distinguished. *The Administrator-General of Bengal v. Dyaram Das*, 6 B. L. R., 688, *Bhimacharya v. Fakirappa*, 4 Bom. H. C. Rep., 206, and *Bibee Haloo v. Atwari*, 7 W. R., 81, referred to.

Per MAHMOOD, J.—That the Court on the 18th December seemed to have acted under s. 157 of the Civil Procedure Code, and, choosing the first of the alternative [539] courses allowed by that section, acted under Chapter VII of the Code, and passed an *ex parte* decree under the provisions of s. 100 of that Chapter.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of OLDFIELD, J.

Pandit Nand Lal, for the Appellant.

Mr. W. M. Colvin, the Junior Government Pleader (Babu Dwarka Nath Banarji), and Munshi Hanuman Prasad, for the Respondents.

Oldfield, J.—This is an appeal from an order refusing an application to set aside an *ex parte* decree under s. 108 of the Civil Procedure Code. A preliminary objection has been made by the respondents' pleader, that although the Court below has dealt with the application under s. 180, there was in fact no *ex parte* decree in the case within the meaning of ss. 100 and 108, as the defendant appeared in the suit, and in consequence there was no jurisdiction

* First Appeal No. 69 of 1884, from an order of Maulvi Zain-ul-abdin, Subordinate Judge of Agra, dated the 14th April 1884.

Setting aside decree *ex parte* against defendant. †[Sec. 108:—In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was made for an order to set it aside;

and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the decree upon such terms as to costs, payment into Court or otherwise, as it thinks fit, and shall appoint a day for proceeding with the suit.]

to entertain the application under s. 108, and the remedy for the appellant was by appeal from the decree.

It appears that the first hearing of the suit was fixed for December 12th 1883, on which day the defendant did not appear, and the case was adjourned to the 18th December, and, as the defendant did not appear, a decree was made in favour of the plaintiff. A *vakalat-nama*, however, had been filed on the defendant's part previously, and the plaintiff had filed an application for the attachment of the defendant's property before judgment, to which the defendant had objected, and it is contended that these acts on the defendant's part amount to an appearance, so that the decree cannot be considered an *ex parte* decree, and the decision of the Privy Council in *Zain-ul-abdin Khan v. Ahmad Raza Khan*, 1 L. R., 2 All., 67 : L. R., 5 Ind. Ap., 233, is relied on.

That was a case decided under Act VIII of 1859, and all their Lordships decided was, that where the defendant had appeared on the day fixed for the first hearing, and had failed to appear at any date subsequent thereto to which the hearing of the suit may have been adjourned, he could not be held not to have appeared within the meaning of s. 111 of the Act, so as to make the hearing of the [540] suit an *ex parte* hearing, and the judgment an *ex parte* judgment within the meaning of s. 119.

They had not before them nor did they decide the question now before us whether, where the defendant had not appeared at the first hearing or at any subsequent day to which the hearing had been postponed, but had taken some steps for other purposes, the proceedings would cease to be *ex parte*. Indeed, their meaning seems to be otherwise, for they observe :—"Sections 109—111 taken by themselves clearly relate to the appearance of parties and to their non-appearance at the first hearing of the suit." The latter section provides for disposal of the suit if the defendant does not appear, and placing on it the meaning placed by their Lordships, the inference is, that they meant to say that where the defendant does not appear at the first hearing, the proceedings will be taken *ex parte*. Further on they observe :—"Looking at all the sections together, their Lordships are of opinion that the words 'who has not appeared,' as used in s. 111, mean who has not appeared at all, and do not apply to the case of a defendant who has once appeared, but who fails to appear on a day to which the cause has been adjourned." The words "who has not appeared at all," read with what immediately follows, and the other passage above quoted, seem to refer to appearance on the day fixed for hearing, or other day to which the hearing has been adjourned ; that is, to a case where a defendant has not appeared at all on any day fixed for hearing, in answer to a summons to appear and answer the claim, and in that case the judgment will be *ex parte*, although the defendant may have appeared for other purposes.

In *The Administrator-General of Bengal v. Dyaram Das*, 6 B. L. R., 688, where a defendant filed a written statement, and when the case was called on for final disposal, an application was made by counsel on his behalf for an adjournment, but the application was refused, and, no one appearing for him, the case was proceeded with and judgment obtained for the plaintiff, the decree was held to be *ex parte*. It was pointed out that under Act VIII of 1859 there is no appearance other than that referred to in Schedule (B) of that Act, which is either for the first hearing of the suit [541] where the issues are to be fixed, or for the final disposal of the suit.

So in *Bhimacharya v. Fakirappa*, 4 Bom. H. C. Rep., 206, it was held that the hearing of a suit in which a pleader was duly appointed on behalf of the defendant, but not instructed to answer or instructed not to answer at all, was an *ex parte* hearing. And it has been held that merely filing a

vakalat-nama, and when the case comes on not appearing in person or by pleader, is not an appearance—*Bibee Haloo v. Atwaro*, 7 W. R., 81.

The appearance referred to in s. 100 of the present Code is, in my opinion, appearance in answer to a summons to appear and answer the claim on a day therein specified, issued under s. 64 of the Code. Section 100 is part of Chapter VII—"On the appearance of the parties, and consequence of non-appearance," and refers, as is shown by s. 96 and other sections in this chapter, to their appearance or non-appearance on the day fixed in the summons for the defendant to appear and answer.

In this case, there has been no appearance of the defendant in answer to the summons to appear and answer the claim, and in consequence the hearing was *ex parte* under s. 100, and the objection on this score fails.

On the merits of this appeal, I am of opinion that the appellant has made out a case for setting aside the *ex parte* decree under s. 108. Her husband was the principal defendant, and the one who would have defended the suit; he died not long before the day fixed for the hearing; and the non-appearance of his widow is attributable to the position in which she was placed by his death, and her difficulty on a short notice to take the necessary steps to defend the suit.

The appeal is allowed, and the order of the lower Court and the decree are set aside. The case will be retried. Costs to follow the result.

Mahmood, J.—I concur in the order proposed by my brother OLDFIELD, and I only wish to add that there having been no appearance of the defendant-appellant on the 12th December 1883, the case appears to have been adjourned by the Court *suo motu* to [542] the 18th December, and that at the next hearing the Court seems to have acted under s. 157 of the Civil Procedure Code, which allows two alternative courses, the first of which is proceeding to dispose of the suit under Chapter VII of the Code, and the second, making such other order as the Court thinks fit. I am of opinion that the Court chose the first of these alternatives, and acted under Chapter VII, and passed an *ex parte* decree under the provisions of s. 100 of that chapter. My brother OLDFIELD has explained the ground upon which the decree should be considered as passed *ex parte*, and the application being made under s. 108, an appeal lay to this Court under cl. (9), s. 588, from the order rejecting the application to set the decree aside.

Appeal allowed.

NOTES.

[APPEARANCE—WHAT IS—

On the principle of this case, it was held in the following cases, that there was no appearance of the party in the suit:—

In (1886) 8 All., 140, the party instructed the pleader only to apply for an adjournment and there were no instructions about the case.

In (1896) 18 All., 241, the pleader applied for an adjournment under instructions from a third party who purported to act on behalf of the defendant in the case.

In (1895) 23 Cal., 991, the facts were exactly similar to those in 8 All., 140, but the party himself was present in Court and on refusal of the request for adjournment, the party took no further steps.

See the observations on this case by *Mookerjee, J.*, in (1907) 34 Cal., 403 F. B., at pp. 410, 411.

In (1898) 23 Bom., 414, the facts were exactly similar to the 8 All., case. The judgment of *Strachey, J.*, contains a full exposition of the law on the subject and is worth a careful study.

In (1907) 34 Cal., 403 F. B. : 5 C. L. J., 247, the previous decision in (1899) 4 C. W. N. 287 was overruled and the later one in (1904) 8 C. W. N., 621 was approved.]

[7 All. 542]

The 19th February, 1885.*

PRESENT :

MR. JUSTICE MAHMOOD.

Lakhmi Chand.....Plaintiff

versus

Gatto Bai.....Defendant.*

Practice—Appeal—Security for costs—Civil Procedure Code, s. 549—Application that appellant be required to give security—Order directing appellant to show cause—Absence of counsel to support application—Dismissal of application—Application to restore case to register—Civil Procedure Code, ss. 9899, 647.

A petition was made under s. 549 of the Civil Procedure Code, praying that an appellant might be required to give security for the costs of the appeal. The ground upon which the petition was based was that the appellant was not pecuniarily in a position to pay the costs of the appeal if it should be dismissed. An order was passed directing the appellant to show cause why the prayer of the petitioner should not be granted. When the petition came on for hearing, no one appeared to support it or to show cause against it, and it was accordingly rejected. An application was subsequently made on behalf of the petitioner praying that the case might be restored to the register, on the ground that counsel for the petitioner was absent on the occasion of the hearing for fifteen minutes only, and that, as no one on behalf of the appellant had appeared to show cause, the petition should have been granted, and the absence of petitioner's counsel was immaterial.

Held that the matter was dealt with by s. 98 † of the Civil Procedure Code, and that s. 647 of the Code, prescribing that the procedure laid down for suits should be followed as far as it could be made applicable in proceedings other than suits, made s. 99 the rule by which the Court was to be guided.

Help also that although no general rule could be laid down that the absence of counsel, when a case has been called on, should be treated as by itself a sufficient reason for restoring to the register either a regular suit, or an appeal, or a miscellaneous application, but each case of the kind must be dealt with according to its own particular circumstances ; in the present case, taking the circumstances into consideration, an absence of counsel for fifteen minutes was not enough to preclude the Court from restoring the petition to the register.

Section 549 of the Civil Procedure Code was never intended by the Legislature to derogate from the right of appeal given by the law to every person who is defeated in a suit in the Court of First Instance, and an application should not be granted under that section of which the only ground is a statement that the appellant is not pecuniarily in a position to pay the costs of the appeal, if it should be dismissed. *Maneckji Limji Muncherji v. Goolbai*, I. L. R., 3 Bom., 241, followed. *Ross v. Jaques*, 8 M. & W., 13, *Seshayyanger v. Jainulavadin*, I. L. R., 3 Mad., 66, and *Jogendro Deb Roykut v. Funindro Deb Roykut*, 18 W. R., 102, referred to.

THE facts of this case are sufficiently stated for the purpose of this report in the judgment of the Court.

* First Appeal No. 134 of 1884, from a decree of Maulvi Muhammad Sami-ul-lah Khan, Subordinate Judge of Aligarh, dated the 27th June 1884.

† [Sec. 98 :—If on the day fixed for the defendant to appear and answer, or on any other

subsequent day to which the hearing of the suit is adjourned, neither party appears, the suit shall be dismissed, unless the Judge, for reasons to be recorded under his hand, otherwise directs.]

Mr. G. E. A. Ross, for the Applicant (respondent in F. A. No. 134 of 1884).
Mr. C. H. Hill, for the Opposite Party (appellant in F. A. No. 134 of 1884).

Mahmood, J.—The facts of this case, so far as it is necessary to state them for the purpose of disposing of the present application, are the following:—On the 12th January 1885, the respondent in F. A. No. 134 of 1884, an appeal pending before this Court, made an application under s. 549 of the Civil Procedure Code, praying that the appellant might be ordered to furnish security for the petitioner's costs both in this Court and in the Courts below. The application came before DUTHOIT, J., who so far granted it as to pass the following order:—"Let the office report the amount of the costs, and let notice issue to the other side." Upon this order, notices in Hindustani were issued by the office, which were examined by me, and which appeared to me to amount to notices directing the appellant to show cause why the prayer of the petitioner should not be granted. In the usual course of the business of this Court, the application came before me sitting in single Bench, on the 17th instant, and I passed the following order:—"No one appears to support the application, or to show cause against it. Rejected." This being the state of things, an application was made to me yesterday by Mr. Ross, who represents the respondent in the appeal, stating that the reason why neither he nor his colleague appeared when the case was called on, was as [544] stated in the petition. This application practically asks me to restore the case to the register. It was my intention before granting it to hear the other side, and to issue notice to the appellant to show cause why the prayer of the respondent should not be granted. But Mr. Hill, who represents the appellant, and who has received notice of the present application, has now appeared to show cause against it. I have heard counsel on both sides, and I should have felt myself bound to reject the application if I could have accepted the subtle argument of Mr. Hill, that there is no provision in the Civil Procedure Code under which an order granting it could be made. In my opinion, the Civil Procedure Code, which, in its first part treats of all matters arising in regular suits, deals with the present matter in s. 98. Here we have an applicant, an application, and a person representing the opposite party, and what happened was analogous to the case of a suit coming on for hearing, in which neither party appears, and in which the order of the Court is that the suit shall be dismissed without any order as to costs. Under these circumstances, I am of opinion that s. 647 of the Civil Procedure Code, which prescribes that the procedure laid down by the Code for suits shall be followed, as far as it can be made applicable, in proceedings other than suits, makes s. 99 the rule by which the Court is to be guided in the present matter. Section 99 provides that "whenever a suit is dismissed under s. 97 or s. 98, the plaintiff may (subject to the law of limitation) bring a fresh suit; or if, within the period of thirty days from the date of the order dismissing the suit, he satisfies the Court that there was a sufficient excuse for his not paying the Court-fees required within the time allowed for the service of the summons, or for his non-appearance, as the case may be, the Court shall pass an order to set aside the dismissal, and appoint a day for proceeding with the suit." Here the allegations contained in the petition are not contradicted by Mr. Hill. They are to the following effect:—"That your petitioner applied for an order that the aforesaid appellant do furnish security for the costs of the respondent. That notice to show cause was issued and served on the appellant, and the said application was on for hearing to-day before Mr. Justice MAHMOOD. That your petitioner's counsel was in attendance at about quarter to 12 o'clock, the Court having [545] sat barely half an hour. That the said application was called on about

half-past 11 o'clock and rejected on account of the absence of your petitioner's counsel, although no person for the appellant appeared to show cause. That your petitioner's counsel applied verbally, but the same was refused. That as no one on behalf of appellant appeared to show cause, the petition should have been granted, and the absence of your petitioner's counsel was quite immaterial."

Now, I am far from laying it down as a general rule that the absence of counsel, when a case has been called on, should be treated as by itself a sufficient reason for restoring to the register either a regular suit, or an appeal, or a miscellaneous application. But in the present case, taking into consideration the fact that counsel on the other side was also absent, and that if Mr. Ross' view of the case is correct, my own order might possibly have been the reverse of what it now is, I hold that a difference of, say, fifteen minutes is not enough to preclude me from restoring the original application to the register. Each question of this kind must be dealt with, not according to any hard-and-fast general rule, but according to its own particular circumstances, especially as the practice of this Court is not yet settled as to the action which should be taken in case of the absence of counsel. My order will, therefore, be that my former order of the 17th instant be set aside, and that the original application be restored. I make no order as to costs of this proceeding because that matter will be more conveniently dealt with by the Judge disposing of the original application.

On the 20th February, the original application came on for hearing before MAHMOOD, J.

Mr. G. E. A. Ross, for the Applicant (Respondent).

Mr. C. H. Hill, for the Opposite Party (Appellant).

Mahmood, J.—I do not think it necessary to ask Mr. Hill to reply, because in my opinion the application must be dismissed with costs. My reasons for this conclusion are that the only ground upon which the application has been made consists of a statement to the effect that the appellant was not pecuniarily in a position to pay the costs of the appeal in this Court, if the appeal should be dismissed. I have already recently expressed [546] my reasons for thinking that s. 549 of the Civil Procedure Code was never intended by the Legislature to derogate from the right of appeal given by the law to every person who is defeated in a suit in the Court of First Instance. At that time I was not aware of the rulings which Mr. Hill has cited to-day, but having now studied those rulings I consider that they go almost further in the same direction than I went on the occasion to which I have referred. One of these rulings is *Maneckji Limji Mancherji v. Goolbar*, 1 L. R., 3 Bom., 241, in which WESTROPP, C. J., laid down the rule that the mere poverty of an appellant is by itself no sufficient ground for requiring him to give security for the costs of the appeal. This case is, I think, on all fours with the present, and the decision seems to me the same in principle as that which was passed in *Ross v. Jaques*, 8 M. & W., 13, although the point there apparently arose in a suit and not in appeal. Some authorities were also cited by Mr. Ross, the most recent being *Seshayyengar v. Jainulavadin*, 1 L. R., 3 Mad., 66, in which the Madras High Court, consisting of the Chief Justice, Sir CHARLES TURNER, and Mr. Justice MUTTUSAMI AYYAR held that s. 549 of the Civil Procedure Code, though not necessarily inapplicable to pauper appeals, should not be applied to such appeals except on special grounds. This decision only supports Mr. Ross' contention to a partial extent, and it appears to me that the *ratio decidendi* favours the argument of Mr. Hill. Mr. Ross also cited an older case—*Jogendro Deb Roykut v. Funindro Deb Roykut*, 18 W. R., 102—which again only supports

him to a limited extent. The main point decided there was that "where the appellant was, according to his own statement, a pauper, and it appeared that others presumably able to furnish the necessary security were interested in the matter, the case was considered a proper one in which security should be given." I do not desire to express any opinion upon the rule here laid down, for although Mr. Ross touched on circumstances indicating that in the present case also "others presumably able to furnish the necessary security were interested in the matter," the application itself is silent on the point, and, as Mr. Hill has said, he is not called on to answer matters not appearing in the application. I dismiss the application with costs.

Application dismissed.

NOTES.

[See also 10 I. C., 705.]

[547] *The 24th February, 1885.*

PRESENT : •

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Ram Ghulam and others.....Defendants

versus

Hazaru Kuar and another.....Plaintiffs.*

Civil Procedure Code, s. 244—Question for Court executing decree—Party to suit—Representative.

Where certain property was attached in execution of a decree passed upon a bond against the legal representatives of the obligor, and the judgment-debtors objected to the attachment on the ground that the property was not part of the obligor's estate and liable to be taken in execution of the decree, but was property which they could claim in their own right,—*held*, that the matter in dispute was one between the parties to the suit in which the decree was passed, and relating to the execution, discharge or satisfaction of the decree within the meaning of s. 244 of the Civil Procedure Code, and was therefore to be determined in the execution department and not by regular suit. *Chowdry Wahed Ali v. Musammatt Jumae*, 11 B. L. R., 155 ; *Shankar Dial v. Amir Haidar*, I. L. R., 2 All., 75 2, and *Nath Mal Das v. Tajammul Husain*, *supra*, p. 36, referred to.

Per MAHMOOD, J.—That the turning-point upon which the application of the rule contained in s. 244 of the Civil Procedure Code barring adjudication in a regular suit depends is whether the judgment-debtor, in raising objections to execution of decree against any property, pleads what may analogically be called a *jus tertii*, or a right which, although he represents it, belongs to a title totally separate from that which he personally holds in such property.

Kanai Lal Khan v. Sashi Bhuson Biswas, I. L. R., 6 Cal., 777, dissented from.

THE defendants in this suit, the obligees of a bond executed in their favour by one Imrit Kuar, after her death sued the plaintiffs in this suit, her daughters, on the bond, as representing their mother and being in possession of her estate. They obtained a decree, which directed that its amount should be realized by the sale of the property of Imrit Kuar, and exempting the persons and property of the plaintiffs from liability, and took out execution of it against

* Second Appeal No. 331 of 1884, from a decree of Maulvi Farid-ud-din, Subordinate, Judge of Cawnpore, dated the 18th December 1883, reversing a decree of Rai Kishen Lal, Munsif of Cawnpore, dated the 23rd December 1882.

certain property in the possession of the plaintiffs, alleging it to be the property of Imrit Kuar and liable under the decree. The plaintiffs objected to the attachment of the property, claiming it as their own, and their objections were disallowed. They thereupon instituted the present suit against the defendants to have it declared that the property did not form part of the estate of Imrit Kuar; that it formed part of the estate of their father; [548] that Imrit Kuar's interest in it was only a life interest; that they had inherited it from their father; and that it was not liable to satisfy the decree against Imrit Kuar; and they sought to have the attachment removed.

The Court of First Instance dismissed the suit, holding that the claim was one which should be determined under s. 244 of the Civil Procedure Code in the execution of the decree and not by a suit. On appeal by the plaintiffs the Lower Appellate Court held that the suit was maintainable, and gave the plaintiffs a decree. The defendants appealed to the High Court.

Pandit *Ajudhia Nath* and *Munshi Ram Prasad*, for the Appellants.

Pandit *Bishambar Nath* and *Munshi Hanuman Prasad*, for the Respondents.

Oldfield, J.—The first plea taken in second appeal is that no suit will lie, with reference to the provisions of s. 244 of the Civil Procedure Code. The plea is valid. The matter in dispute is one between the parties to the suit in which the decree was passed, and relates to the execution, discharge or satisfaction of the decree. The decree was a decree against the estate of Imrit Kuar, and the question is substantially whether the property is part of that estate and liable to be taken in execution of the decree, or is property which the defendants can claim in their own right and something apart from Imrit Kuar's estate.

The decision of the Privy Council in *Chowdry Wahed Ali v. Musammat Jumae*, 11 B. L. R., 155, is an authority for holding that a question of this nature is one to be determined in the execution of the decree. Their Lordships remark :—"It is obvious that a party in a representative character is so distinctly a party to the suit that under certain conditions his own private property may be attached and sold. It is true that to fix him with this liability it must be shown that he has received property of the deceased, of which he has failed to prove a proper disposition. But these things are all cognizable and proper to be ascertained in the suit in which the decree is made during the progress of the execution proceedings founded upon such decree."

[549] The case of *Shankar Dial v. Amir Haidar*, I. L. R., 2 All., 752, is distinguishable. In that case the judgment-debtor objected to the attachment of certain property on the ground that such property was in his possession as trustee for an endowment, and not in his own right, and it was held that the objection, although made by the judgment-debtor, was one properly falling under ss. 278-283, Civil Procedure Code, and the order upon it was one not appealable, but that the remedy was by suit under s. 283. The case of *Nath Mal Das v. Tajammul Husain* (*supra*, p. 36) is also similarly distinguishable. The dispute in the case before us is not one of the nature to be dealt with under those sections of the Civil Procedure Code; but purely a question between parties to the suit and relating to its execution. The appeal is decreed, the Lower Appellate Court's decree set aside, and the suit is dismissed with costs.

* **Mahmood, J.**—I concur entirely, not only in the conclusion at which my learned brother OLDFIELD has arrived, but also in the reasoning which leads up to that conclusion. I, however, wish to add that the only case of importance cited against the view taken by us is *Kanai Lall Khan v. Sashi Bhuson Biswas*, I. L. R., 6 Cal., 777. That case is not on all fours with the present, but there

are a great many *dicta* in the earlier part of the judgment which have a bearing upon this case, and go to contradict the principle laid down by my brother OLDFIELD to-day. I have studied the judgment, and reading the Privy Council case cited therein, I confess, with due deference, I cannot place the same interpretation as that adopted by the Calcutta Court. It seems to me that the turning point upon which the application of the rule contained in s. 244 of the Civil Procedure Code barring adjudication in a regular suit depends, is whether the judgment-debtor in raising objections of execution of decree against any property pleads what may analogically be called a *jus tertii*, or a right which, although he represents it, belongs to a title totally separate from that which he personally holds in such property. If in the future regular suit he can plead no title other than that which he himself personally held *in his own right* at the time when execution was sought against the property, the bar provided by s. 244 of the Civil Procedure Code would operate, because [550] such questions could be adjudicated upon in proceedings relating to the execution of the decree within the meaning of cl. (c) of the section read in the light of the Privy Council ruling to which reference has already been made. On the other hand, if the judgment-debtor pleads a title which he does not hold in his own right, but merely as a trustee of an interest totally different from his own, the mere identity of the person of the judgment-debtor would not bar the adjudication upon a right which could not be adjudicated upon in the execution proceedings, and for this reason, that the judgment-debtor *as such* had no interest in saving the property from the consequences of the execution. This I understand to be the *ratio decidendi* adopted by my brother OLDFIELD in *Shankar Dial v. Amir Haidar*, I. L. R., 2 All., 752; which I followed in *Nath Mal Das v. Tajanmul Husain* (*supra*, p. 36). I still adhere to that view, and therefore concur in the order proposed by my learned brother.

Appeal allowed.

NOTES.

[The following are similar decisions when an independent title in themselves was set up by the legal representatives in execution proceedings:—(1883) 7 Mad., 255; (1885) 7 All., 733; (1887) 9 All., 605; (1889) 12 All., 73; (1888) 16 Cal., 1; 603.

But when the objection raises questions of title in third parties, it was held that it was a matter for a separate suit and not for the executing Court:—(1889) 12 All., 313 F. B.; (1898) 23 Mad., 195. See also (1888) 15 Cal., 437.]

[7 All. 550]

The 27th February, 1885.

PRESENT :

MR. JUSTICE STRAIGHT AND MR. JUSTICE BRODHURST.

Amolak Ram and another.....Decree-holders

versus

Sahib Singh.....Judgment-debtor. *

Temporary injunction—Stay of sale in execution of decree—Practice—

*Notice to opposite party—Civil Procedure Code, ss. 492, 494. **

Where a Court made an order granting a temporary injunction under s.492† of the Civil Procedure Code, without directing notice of the application for injunction to be issued to the other side, and its order directing stay of sale of property in execution was passed *ex parte*, without the other side being given an opportunity to show cause, *held* that the order was irregular.

Where ancestral property was attached in execution of a decree, and a son of the judgment-debtor instituted a suit to establish his right to the property and made an application for a temporary injunction directing stay of sale pending the decision of the suit, *held* that, inasmuch as what was advertised to be sold was the rights and interests of the plaintiff's father in the property, and it could not be said that the property was being "wrongfully sold in execution of a decree" and the application on the face of it disclosed no sufficient ground to warrant an order under s. 492 of the Civil Procedure Code being made as prayed, the temporary injunction ought not to have been granted.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

[551] Mr. G. E. A. Ross, Mr. T. Conlan, and Babu Ratan Chand, for the Appellant.

The Respondent did not appear.

Straight and Brodhurst, JJ.—This is an appeal from an order of the Subordinate Judge of Aligarh, dated the 15th November 1884, granting a temporary injunction to stay the sale of certain property under s. 492 of the Civil Procedure Code. Before disposing of this appeal, it is necessary to refer to a few facts mentioned to us by the learned counsel for the appellant, and which we must take to be correct, as the respondent has not appeared either in person or by counsel to contradict them. It appears that on the 8th June 1880, Amolak Ram and Phul Chand advanced to Naubat and others a sum of Rs. 50,000. On the 20th September 1881, the appellant obtained a decree for Rs. 58,513. On application being made for the sale of this property against which this sum was secured by execution of the decree, the property being ancestral, the decree was transferred for execution in due course to the Collector, and the 7th January 1882 was fixed for the sale of the property. An

* First Appeal No. 163 of 1884, from an order of Lala Cheda Lal, Offg. Subordinate Judge of Aligarh, dated the 15th November 1884.

Cases in which temporary ↑ [Sec. 492 :—If in any suit it is proved by affidavit or injunction may be granted. otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or is about, to remove or dispose of his property with intent to defraud his creditors,

the Court may by order grant a temporary injunction to restrain such act, or give such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, or refuse such injunction or other order.

application was made for the postponement of the sale which was granted and the 20th April 1882 was fixed for the sale of the property. On the 19th April 1882, another application was made for the postponement of the sale, which was again postponed, and the 20th June 1882 was fixed for the sale of the property.

Lakhan Singh, one of the sons of the Judgment-debtor, instituted a suit, and on his application the sale was again postponed. On the 11th December 1882, Lakhan Singh's plaint was rejected as insufficiently stamped. On the 19th February 1883, Lakhan Singh again sued, paying the proper amount of Court-fees, and again applied for the postponement of the sale, which was again postponed. This suit was also thrown out, and Lakhan Singh appealed to this Court, and applied for postponement of the sale. This appeal was rejected, and the sale was ordered to be proceeded with.

At this stage, the second son of the judgment-debtor instituted a suit, and on the 15th November 1884, he made the following application:—"The suit was instituted to recover possession of [552] two-thirds of 5 biswas in mauza Jalesar, 10 biswas in mauza Ismailpur, and two-thirds of mauza Kutra and to protect the same from the decrees of judgment-creditors. The 2nd December 1884 was fixed for laying down the issues. The rights in all the three above-mentioned villages have been advertised for sale on the 20th November 1884, in execution of a decree held by Amolak Ram and Phul Chand, defendants. Hence it is hereby prayed that the auction-sale of the rights in the three villages may be postponed pending the decision of the case." The order passed by the Subordinate Judge is as follows:—"A reference to the record of the case of the regular suit shows that a regular suit regarding these properties is pending. Ordered that the auction-sale fixed for the 20th November 1884 be postponed."

It is clear that, in waiting up to the 15th November 1884, in making this application, there was an unnecessary delay on the part of the plaintiff. But, apart from this, by s. 494 of Act XIV of 1882, before granting an injunction under that section, it is directed that "the Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by delay, direct notice of the application for the same to be given to the opposite party."

Now the Subordinate Judge in this case did not direct notice to be issued to the other side of this application, and his order directing the stay of sale was made *ex parte*, without the other side being given an opportunity to show cause. On this ground alone the order is open to exception.

Again, before an order under s. 492 can be made, it must be shown that the property was about to be "wrongfully sold in execution of a decree." Now in this case what was advertized to be sold was the rights and interests of the plaintiff's father in this property, and it cannot be said that the property was being "wrongfully sold in execution of a decree." Besides, the application on the face of it discloses no sufficient ground to warrant an order under s. 492 being made as prayed. The appellant could have moved the Subordinate Judge to discharge the injunction under s. 496 of the Code, but he has not done so, and has come up directly in appeal before us. Under the circumstances of the [553] case, the only order that we think proper to make is, that the order of the Subordinate Judge directing stay of sale of the property be set aside, and that execution should proceed, subject to any proper application that the respondent may be advised to make.

Appeal allowed.

[7 All. 553]
FULL BENCH.

The 7th March, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE STRAIGHT,
MR. JUSTICE OLDFIELD, MR. JUSTICE BRODHURST, AND
MR. JUSTICE MAHMOOD.

Indar Sen and another.....Defendants
versus
Naubat Singh and others.....Plaintiffs.*

*Act XII of 1811 (N.-W. P. Rent Act), s. 7—Usufructuary mortgage—
Ex-proprietary-tenant—Sir-land.*

Held by the Full Bench (OLDFIELD and BRODHURST, JJ., dissenting) that a person who creates a usufructuary mortgage of zemindari property becomes an ex-proprietary or occupancy-tenant of the sir-land under s. 7 of the N.-W.P. Rent Act (XII of 1881).

Per PETHERAM, C.J.—A usufructuary mortgage is, for the time being, the proprietor of the property, inasmuch as a proprietor is the person entitled to exclusive possession at the time; and the intention of the Legislature, as expressed in s. 7 of the Rent Act, is that when a zemindar ceases to be entitled to occupy the sir-land as proprietor, he shall have the right to occupy it as an ex-proprietary tenant under s. 5. *Bhagwan Singh v. Murli Singh*, I.L.R., 1 All., 459, dissented from.

Per STRAIGHT, J.—The words “loss” and “part with” in s. 7 of the Rent Act were intended to cover all cases in which a proprietor of land has either voluntarily or by operation of law deprived himself permanently or temporarily of the power to exercise full proprietary right over his property.

Per MAHMOOD, J.—The meaning of the words “proprietary rights” in s. 7 of the Rent Act is equivalent to that of the term “full ownership” corresponding to *dominium* in the Roman Law and fee-simple estate in English Law. The right of a usufructuary mortgagee cannot be called proprietorship; and, having regard to s. 58 of the Transfer of Property Act, the execution of a usufructuary mortgage does not amount to a transfer of the proprietary right.

The word “lose” as used in s. 7 of the Rent Act means the transfer of proprietary rights otherwise than by the will of the owner in consequence of some incident of law. The term “part with” is a general expression including both absolute and temporary alienation; and a usufructuary mortgage is a “parting with” some of the incidents of ownership and falls within the purview of s. 7, [554] inasmuch as the rights of possession and of the enjoyment of the usufruct are transferred from the mortgagor to the mortgagee, though such a transfer does not amount to a total alienation of proprietorship. *Bhagwan Singh v. Murli Singh*, I. L. R., 1 All., 459, dissented from. *Gopal Panday v. Pursotam Das*, I. L. R., 5 All., 121, *Ganga Din v. Dhurandhar Singh*, I. L. R., 5 All., 495, and *Gulab Rai v. Indar Singh*, I.L.R., 6 All., 54, referred to.

Per OLDFIELD, J.—The words “lose or part with his proprietary rights in any mahal” in s. 7 of the Rent Act mean a loss or parting which divests absolutely of all proprietary rights, leaving no interest of a proprietary kind in the mahal; this does not happen in a usufructuary mortgage, and therefore the latter is not a loss of or parting with proprietary rights, within the meaning of s. 7. *Bhagwan Singh v. Murli Singh*, I. L. R., 1 All., 459, approved.

* First Appeal No. 18 of 1884, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 19th May 1883.

Per BRODHURST, J.—The word “lose” in s. 7 of the Rent Act means involuntarily lose, as for instance, by auction sale, and “part with” means voluntarily and entirely divested of by means, *s.g.*, of gift or private sale. “Proprietary rights” means the whole of the proprietary rights; and a usufructuary mortgagor of zamindari property cannot be said to have lost or parted with his proprietary rights therein and therefore does not, under the provisions of s. 7 of the Rent Act, become an ex-proprietary or occupancy-tenant of the sir-land.

THE plaintiffs in this case claimed possession of shares in three villages, “with all the appurtenances,” and of three shops, under a deed of usufructuary mortgage, dated the 3rd April 1882, executed in their favour by the defendants. The deed of mortgage transferred the shares in the villages in question, “together with all the rights appended and detached, cultivated and uncultivated lands, village sites, groves, wells, jungles, ponds, fruit and timber trees, and trees planted and of spontaneous growth, and *Khudkasht* right” belonging to the shares. The lower Court gave the plaintiffs a decree as claimed. The defendants appealed to the High Court on the ground, amongst others, that “the decree for possession of the sir-land is contrary to the terms of the law.”

The Divisional Bench (PETHERAM C.J., and BRODHURST, J.) hearing the appeal, with reference to this ground, referred to the Full Bench the following question :—

“Whether a person who creates a usufructuary mortgage of zamindari property becomes an ex-proprietary or occupancy-tenant of the sir-land under s. 7 of the Rent Act.”

Babu Ratan Chand, for the Appellants.

[555] Mr. J. Simeon, for the Respondents.

Petheram, C.J.—The question is, whether a Zamindar, who mortgages his mahal by usufructuary mortgage, and gives possession to the mortgagee, parts with his proprietary rights by that transaction. This of course depends upon what a usufructuary mortgage is. A mortgage of this description is defined by s. 58 of the Transfer of Property Act to be a transfer of an interest in specific immoveable property for the purpose of securing the payment of money, &c., and the mortgagor delivers possession of the property to the mortgagee, and authorizes him to retain possession and receive the entire profits. Under such a transaction it is evident that the mortgagee is entitled to the *exclusive possession* of the property until the loan is repaid, and becomes, in my opinion, the proprietor of the property during that time, inasmuch as I understand the proprietor of a thing to be the person entitled to the exclusive possession of it *at the time*. If it be true that the transaction has constituted the mortgagee the proprietor of the property, though only for the time being, it must follow that the mortgagor has parted with his proprietary rights as he has ceased to be proprietor. The difficulty in the case really arises from the decision of a Division Bench of this Court in the case of *Bhaqwan Singh v. Murl Singh*, I. L. R., 1 All., 459. Speaking for myself, I can only say that I think that decision is wrong, and that I decline to follow it. In my opinion, the meaning of the Legislature is, that when a Zamindar ceases to be entitled to occupy the sir-land as proprietor, he shall have the right to occupy it as an ex-proprietary tenant under s. 5 of the Rent Act. It follows that I answer the question in the affirmative.

Straight, J.—I am of the same opinion. The mortgage transaction between the parties to the suit, out of which the reference has arisen, transferred the legal estate in the zamindari to the mortgagee, and entitled him to possession thereof to the exclusion of the mortgagor, which possession can only be terminated by surrender of his document of title and reconveyance,

either voluntarily made or enforced through the medium of a redemption suit. It is true that the words "lose" and "part with" in [556] s. 7 of the Rent Act have no special legal significance, but they appear to me to have been intended to cover all cases in which a proprietor of land has either voluntarily or by operation of law deprived himself permanently or temporarily of the power to exercise full proprietary right over his property. The mischief at which this provision of the statute aimed is too well understood to need repetition here, and I can only add that if a usufructuary mortgage be held not to be a "losing" or "parting with" the proprietary right, then in future a usufructuary mortgage will invariably be resorted to instead of a sale, so as to defeat the ex-proprietary right.

Mahmood, J.—In this case I have arrived at the same conclusion as the learned Chief Justice and my brother STRAIGHT, but as the grounds of my conclusion are, though in a very small degree, different from those which they have stated, I think it necessary to explain my own reasons. Before I can go into the question referred to the Full Bench, it is necessary to consider the meaning of the words "proprietary rights" in s. 7 of the Rent Act (XII of 1881). I understand these words to be equivalent to the term "ownership," which is not merely a word of technical legal meaning, but which, I hold, must, according to the general canons of construction, be interpreted in its broadest possible meaning in the absence of words to restrict such interpretation. In that light, the idea of full ownership corresponds to what, in the Roman Law, is termed a "*dominium*," or to what, in the English Law, is called the "fee simple estate." This has been defined by Austin in the following manner:—"The idea of absolute property is a right indefinite in point of user, unlimited in extent of duration, and alienable by the actual owner from every successor who, in default of alienation by him, might take the subject of it." This appears to me to correspond to the meaning of the term "proprietary rights" as used in s. 7 of the Rent Act. It is, as I take it, an elementary proposition of jurisprudence that *dominium* is an aggregate of component rights, such as the right of actual possession, the right of enjoying the usufruct of land, the power of sale, and so on. In my judgment in the case of *Gopal Pandey v. Pursotam Das*, I. L. R., 5 All., 121, I explained what full ownership [557] means, and what its incidents are, and also what the exact nature of occupancy-right is in these provinces. I there said that a person in full ownership can alienate any one or more of its component elements. The question before the Court in that case related to simple mortgage or hypothecation, but my argument applies also to the case now before us, because I said, adopting another passage from Austin, that the full ownership being composed of these rights "indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration," any alienation of these rights would be a mortgage, so long as the object of the alienation was security for the payment of a debt in money. I further said, quoting from another jurist, that any "one or more of the subordinate elements of ownership, such as a right of possession or user, may be granted out while the residuary right of ownership, called by the Romans *nuda proprietas*, remains unimpaired. The elements of the right which may thus be disposed of without interference with the right itself,—in other words, which may be granted to one person over an object of which another continues to be the owner,—are known as *jura in re aliena*."—(Holland on Jur., p. 144). Such being my views as to the nature of proprietorship, I am unable to hold that the right of the usufructuary mortgagee is a right which can be called a transfer of proprietorship; and having regard to s. 58 of the Transfer of Property Act, and especially cl. (a), governing the whole section, and

cl. (d), referring, in particular to usufructuary mortgage, I cannot agree in holding that the execution of a usufructuary mortgage amounts to a transfer of the proprietary right. But here my difference with the learned Chief Justice ends. Upon the rest of the question, I entirely agree with him. The question is then limited to this—what is the meaning of the words “lose” and “part with” as used in s. 7 of the Rent Act?—in other words, to the interpretation of two common English expressions. As to the word “lose” it means, in my opinion, the transfer of proprietary rights otherwise than by the will of the owner, as, for instance, by the sharer falling into arrears of government revenue, or by a decree of a Civil Court, or by a partition of the estate sanctioned by the supreme revenue authorities, or by some other incident of law. With these, however, we are not now concerned. [558] But as to the expression “part with,” that is the sole point on which this case, in my opinion, depends. I think that “part with” does not exclude the idea of an alienation which falls short of sale or any other incident of law which absolutely transfers ownership out and out. To “part with” is an expression philologically connected with the term “separate,” it means to be separated from something. But a man may separate himself from a thing either for ever or only temporarily, and in this sense to “part with” may be called the *Genus*, of which absolute alienation and temporary alienation are *species*. In other words, the phrase must be taken to cover both forms of alienation—an interpretation which is in keeping with the rule of construction that words must be understood in their broadest meaning, unless there are reasons to restrict the meaning. Here no such reasons exist, and, as the learned Chief Justice and my brother STRAIGHT have implied, a usufructuary mortgage is a “parting with” some of the incidents of ownership, because the most important elements of ownership are the right of possession and of the enjoyment of the usufruct, though temporary and for a specific object. These rights are, in the case of usufructuary mortgage, transferred from the mortgagor to the mortgagee, and though such a transfer does not amount to a total alienation of proprietorship, it does fall within the expression “part with” in s. 7 of the Rent Act. I do not hold this opinion on theoretical grounds only, but also on grounds of public policy as apparent from the statute itself. I mean by this that the right of occupancy in sir-land has been obviously intended by the Legislature as a protection to the owners of zamindari shares in villages in India against their own imprudence. Now the case of *Bhaghwan Singh v. Murli Singh*, I. L. R. 1 All., 459, goes directly against this view. In regard to that case, I will not say anything in the nature of an argument against the *ratio decidendi* upon which the judgment was based, beyond the observation that the reasons upon which my view is founded do not appear to have been considered. I agree with the learned Chief Justice in dissenting from that judgment. In another case—*Tarapat v. Kamalnain*, N.-W. P. Legal Remembrancer, 1880, R. & R. Series, 212—which is binding upon the Revenue authorities in these Provinces, the Sudder Board of Revenue held the same view as the decision of [559] the Division Bench of this Court to which I have referred. The reasons which prevent me from agreeing with the one decision apply equally to the other. In the Full Bench case of *Gopal Pandey v. Parsotam Das*, I. L. R., 5 All., 121, I took pains to explain my views of the nature of occupancy-rights in these Provinces, and held that such rights were not capable of transfer by their holder, in the sense of s. 9 of the Rent Act, even by means of simple mortgage. I regret, and I say this with due respect, that that decision was not accepted by the whole Court, but in a subsequent case the Full Bench in *Ganga Din v. Dhurandhar Singh*, I. L. R., 5 All., 495, laid down that a usufructuary mortgage was a “transfer” under s. 9 of the Rent

Act. It is not necessary for me to consider whether the *ratio decidendi* in the one case can possibly be different to that in the other, as it is enough for the purposes of the case to accept the latter ruling which, in my view of the law, accords with the reasoning upon which my judgment in the former case proceeded. Now what is an ex-proprietary tenancy? It is nothing more or less than a right of occupancy which does fall within the prohibition of s. 9, and it was so held by the Full Bench in *Gulab Rai v. Indar Singh*, I. L. R., 6 All., 54, the effect of which I take to be a reversal of an earlier ruling of a Division Bench of this Court in *Markundi Dial v. Rambaran Rai*, I. L. R., 2 All., 735. It appears to me that if the ruling in *Gulab Rai v. Indar Singh* is right, and I take it to be right, no other view than that taken by the learned Chief Justice and my brother STRAIGHT is possible, because if a person holding an occupancy-right cannot alienate it by sale, it follows that he cannot by usufructuary mortgage create any such interest in the usufructuary mortgagee as would deprive him of the occupancy-right generated by the statute. Any other view seems to me to involve the conclusion that a person executing a usufructuary mortgage of his zamindari, including sir-land, might enable the usufructuary mortgagee to own the whole property at the end of sixty years when the right of proprietorship would cease by prescription, and the original owner would be prevented from keeping the occupancy-right, because during the continuance of the mortgage when the mortgagee would remain in possession, the sir-land would either be fallow (which is not likely), or the right [560] of actual possession and cultivation thereof having once been conveyed to the mortgagee, he might let the land to tenants, and thus create rights which would take it out of the category of sir-land as defined in s. 3, cl. (4) of the Rent Act (XII of 1881). Such a result would, in my opinion, defeat the object of the statutory provision, and for the reasons my answer to the reference must be in the affirmative.

Oldfield, J.—The reply to this reference depends on the meaning to be put on the words “lose or part with his proprietary rights in any mahal” in s. 7 of the Rent Act.

In my opinion, they mean a loss or parting which divests absolutely of all proprietary rights, leaving no interest of a proprietary kind in the mahal. This does not happen in the case of a usufructuary mortgage.

A mortgage is defined in the Transfer of Property Act to be the transfer of an interest in specific immoveable property for the purpose of securing the payment of money lent; and it becomes a usufructuary mortgage when the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property, and to appropriate them in lieu of interest, or in payment of the mortgage-money, or partly in payment of the mortgage-money and the mortgagor has a right to recover possession of the property when the money is paid. The mortgagee therefore holds the estate merely as a security for the debt, and not absolutely, and he has therefore only a qualified and limited interest in it, confined to the object of satisfying his debt, and so long as the right of redemption remains in the mortgagor, the full proprietary interest and right cannot be said to have passed from him to the mortgagee, the right to redeem being dependent on the mortgagor remaining proprietor or owner of the property.

In a sale, on the other hand, the proprietary rights pass in their full sense and absolutely. Sale is defined in the Transfer of Property Act to be a transfer of ownership in exchange for a price paid or promised, or part paid and part promised. The transfer of ownership marks the difference between it and mortgage.

[561] The same distinction will be observed in the definition of English mortgage, by which the property is transferred absolutely. Nothing of this sort happens in a usufructuary mortgage, and therefore the latter is not a loss of or parting with proprietary rights, as I understand those words in s. 7.

This is the view taken in *Bhagwan Singh v. Murli Singh*, I. L. R., 1 All., 459, in which I concur.

Brodhurst, J.—The question that has been referred to us is whether a person who creates a usufructuary mortgage of zamindari property becomes an ex-proprietary or occupancy-tenant of the sir-land under s. 7 of the Rent Act (XII of 1881). Paragraphs 1 and 2 of s. 7 of the Rent Act are as follows :—
 “Every person who may hereafter lose or part with his proprietary rights in any mahal shall have a right of occupancy in the land held by him as sir in such mahal at the date of such loss or parting, at a rent which shall be four annas in the rupee less than the prevailing rate payable by tenants-at-will for land of similar quality and with similar advantages.”

“Persons having such rights of occupancy shall be called ‘ex-proprietary tenants,’ and shall have all the rights of occupancy tenants.”

I consider that the words “who may lose,” in paragraph 1 mean involuntarily lose, for instance, by auction-sale, and that the words “part with” mean voluntarily and entirely divested of, by means, *e. g.*, of gift or private sale. If the Legislature had intended that the person making a usufructuary mortgage should thereby become an ex-proprietary tenant of the sir-land, there could have been no difficulty in expressing their meaning in clear and unambiguous language. If the words “every person who may hereafter lose or part with his proprietary rights in any mahal” are meant to include every person who may, for however short a time, make a temporary transfer of a small portion of his zamindari property, I think it cannot but be admitted that the language used to convey that meaning is extremely obscure, and is calculated to mislead a large proportion of the persons interested in understanding it. Obviously a person cannot, in the general acceptance of [562] the words, become an “ex-proprietary tenant,” until he has lost or parted with his proprietary rights, and, in my opinion, the words “proprietary rights” in s. 7 of the Rent Act clearly mean the whole of his proprietary rights. “Usufructuary mortgage” is defined in cl. (d) of s. 58 of the Transfer of Property Act, as follows :—“Where the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property, and to appropriate them in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage, and the mortgagee an usufructuary mortgagee.” A zamindar may make a usufructuary mortgage of the whole or of a portion of his estate on terms that will enable him to redeem the mortgage whenever he has the means to do so. He may mortgage the property for even less than half its value, and subsequently he may sell it for double the amount of the mortgage-money. A person who can redeem the property that he has mortgaged, or can, whenever it suits him to do so, sell that property, either to the mortgagee or to a third person cannot, in my opinion, be said to have “lost or parted with,” his proprietary rights in the property.”

A person can undoubtedly be the proprietor of an estate without being in actual possession of it. A person takes a house or a farm on a lease for a term of years; he is on certain conditions entitled to exclusive possession of the house or farm for the term of years, but nevertheless he is not the proprietor of the house or farm, but is merely the tenant in temporary possession. The

money which he pays as rent to the landlord is paid on certain dates within the tenancy, whereas the money that is paid by the mortgagée with possession to the mortgagor—the landlord—is generally paid prior to occupation by the mortgagée. The mortgagor, being in immediate want of cash, raises a loan by giving over to the money-lender temporary possession of the whole or of a portion of his estate, and by this mortgage transaction he obtains, as it were, his rents in advance. My opinion on the question referred to us is in accordance with the judgment of a Bench of this Court (PEARSON and SPANKIE, JJ.) in the case of [563] *Bhagwan Singh v. Murlī Singh*, I. L. R., 1 All., 459. That judgment was delivered on the 27th July 1877, when Act XVIII of 1873 was the Rent Act in force, and on the 26th October 1880, it was approved of and followed by both members of the Sudder Board of Revenue (Messrs. Carmichael and Plowden) in the case of *Tarapat v. Kamalnain*, N.- W. P. Legal Remembrancer, 1880, R. & R. Series, 212. I consider that not only are the judgments above mentioned in accordance with the law, but that no other conclusions could have been arrived at without straining the language of the section.

I believe it to be a duty of the Legislature, and one which they duly perform, to keep themselves acquainted with the reported judgments of the High Courts and Sudder Boards of Revenue, in order that the laws referred to in those judgments may, when requisite, be amended. The two judgments above mentioned were binding on all Subordinate Civil and Rent Courts throughout the North-Western Provinces, and therefore, if the Legislature had considered that a wrong construction had, in those judgments, been placed on the meaning of s. 7 of Act XVIII of 1873, they would surely have felt it their imperative duty to amend the law and to recast the section, so that no doubt could possibly remain as to its meaning; but Act XII of 1881 did not come into force until nearly four years after the date of the High Court judgment, and the two paragraphs of s. 7, Act XVIII of 1873, were reproduced in precisely the same words in s. 7, Act XII of 1881, with the addition of a third paragraph, which in no way affects the present case. I am satisfied, first, from the language of s. 7, and secondly, from that section having been reproduced in Act XII of 1881, notwithstanding the two judgments above referred to, that those judgments are correct, and therefore my answer to the reference is, that a person who creates an usufructuary mortgage of zamindari property does not, under the provisions of s. 7 of the Rent Act, become an ex-proprietary or occupancy-tenant of the sir-land.

NOTES.

[The opinion of the minority in this Full Bench case was approved and adopted in a later Full Bench case, (1894) 16 All., 337, and followed the two other cases of the same Court:—(1893) 15 All., 219; Weekly Notes, 1893, p. 177.

See (1885) 7 All., 847 F. B., for further stages of the litigation.]

[564] APPELLATE CIVIL.

The 16th March, 1885.

PRESENT:

MR. JUSTICE BRODHURST AND MR. JUSTICE MAHMOOD.

Kallu and another.....Decree-holders

versus

Muhammad Abdul Ghani and another.....Judgment-debtors.*

*Execution of decree—Act XV of 1877 (Limitation Act), Sch. ii, No. 179—
Application or "step in aid of execution"—Application by pleader
for execution after decree-holder's death.*

Where a decree-holder died without taking out execution of his decree, and, two days after his death, his pleader made an application for execution on his behalf, this being the first application of the kind,—held, that, inasmuch as the authority of a pleader ceases at the moment of his client's death, the application was invalid, and was not such an application or step in aid of execution of the decree as could save a subsequent application for execution by the decree-holder's heirs from being barred by limitation.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Munshi Kashi Prasad, for the Appellants.

Babu Ram Das Chakarbaty and Munshi Ram Prasad for the Respondents.

Mahmood, J.— We are of opinion that this appeal should be dismissed. The facts necessary for consideration in connection with the point of law seem to be as follows :—A decree, dated the 13th February 1880, was held by one Ram Lal, in whose favour it had been passed. No execution appears to have been taken out by the original decree-holder, who died on the 11th February 1883. Two days after his death, on the 13th February, an application was made on his behalf by his pleader for execution, this being the first application of the kind. The Court executing the decree admitted the application as being within time, but the judgment-debtor appealed from the order passed on the application to the District Judge, who passed an order that "the heirs might be allowed to carry on the execution;" and he seems to have directed the heirs to make an application within two days from the date of his decision. It is unnecessary to consider whether or not such a direction was legal; but, as a matter of [565] fact, no application for execution was made by the present appellants, the heirs of the decree-holder, until the 30th August 1883, and it is in connection with the application then made that the present appeal has been preferred.

The Court of First Instance, regarding the judgment of the District Judge as conclusive as to the validity of the former application, entertained the present as within time. There was however no such adjudication as would be covered by the Privy Council ruling in the case of *Ram Kirpal v. Rup Kuari*, 1. L. R., 6 All., 269: L. R., 11 Ind. Ap., 37, and therefore the District Judge on appeal held that execution of the decree was barred. The appeal has now come before us, and the whole matter depends on the question whether the application for execution of the 13th February 1883, was such an application or step in aid of execution of decree as would prevent limitation from running out in regard

* Second Appeal No. 51 of 1884, from an order of C. W. P. Watts, Esq., Offg. District Judge of Saharanpur, dated the 25th January 1884, reversing an order of Babu Ishri Prasad, Munsif of Deoband, dated the 22nd November 1883.

to this application. Now it is clear, and it has been admitted, that the decree-holder had died two days before the application was made. No valid application could be made by his pleaders, because the authority of a pleader ceases at the moment of his client's death, and therefore we hold that the period of limitation should be calculated from the date of the decree up to the date of the present application, and that being a period of more than three years, the application is barred, and the appeal must be dismissed with costs.

Brodhurst, J., concurred.

Appeal dismissed.

[7 All. 565]

The 16th March, 1885.

PRESENT :

MR. JUSTICE STRAIGHT AND MR. JUSTICE BRODHURST.

Ahmad Khan.....Judgment-debtor

versus

Madho Das.....Objector.*

Civil Procedure Code, ss. 322 B, 322 D—Dispute as to extent of judgment-debtor's liability to claim—Appeal from order disposing of dispute—Nature of appeal—Act VII of 1870 (Court Fees Act), sch. ii, No. 11.

An appeal from the decision of a dispute under s. 322 B of the Civil Procedure Code falls directly within the exception of art. 11 of sch. ii of the Court-Fees Act (VII of 1870), and the memorandum of appeal should therefore be presented as for a decree in a suit, upon an *ad valorem* stamp.

Srinivasa Ayyangar v. Peria Tambi Nayakar, I. L. R., 4 Mad., 420, dissented from.

[566] The facts of this case are sufficiently stated for the purposes of this report in the order of STRAIGHT, J.

Shah Asad Ali, for the Appellant.

The Senior Government Pleader (Lala Juala Prasad) and Munshi Hanuman Prasad, for the Respondent.

Straight, J.—It will be convenient, in order to make the question of law raised for our decision clear, to state the following facts :—A money decree was obtained against the appellant Ahmad Khan, and it was transferred to the Collector under the rules of 1880, prepared in pursuance of s. 320 of the Civil Procedure Code. The Collector thereupon issued notices in manner provided by s. 322 A, and thereupon the respondent Madho Das submitted a claim showing that Ahmad Khan was indebted to him in an aggregate amount of Rs. 13,044-4-6 due in respect of an hypothecation bond and two hundis. Ahmad Khan disputed the accuracy of the amount of this demand, alleging, among other matters, that he had made certain payments for which he had not been

* First Appeal No. 141 of 1884, from an order of J. L. Denniston, Esq., Offg. District Judge of Ghazipur, dated the 13th May, 1884.

given credit, that the conditions of the bond as to payment of interest on default were penal, and that no interest was recoverable in respect of the hundis after due date. A dispute thus having arisen, within the meaning of the 3rd paragraph of s. 322 B, the Collector struck certain issues, and submitted them as therein provided to the Judge for his determination. That officer dealing with the matter remarks:—"These were virtually the issues of the Civil Court for some thousands of rupees." He further, in accordance with findings recorded by his predecessor in office on the subject, declared that the bond should bear interest at the given rate or rates and the same with regard to the hundis; and he forwarded to the Collector a statement of the accounts as embodying his decision. Ahmad Khan, being injuriously affected by this decision, now appeals, as from a miscellaneous order, on various grounds, and a preliminary objection is taken by the respondent to the hearing of the appeal, on the ground that, looking to the terms of s. 322D, it should have been presented as from a decree in a suit upon an *ad valorem* stamp, and not as an appeal from an order on a Rs. 2 stamp. I think this contention is a sound one and must prevail. By art. 11 of sch. ii of the Court Fees Act, [567] it is provided that the stamp payable in respect of a memorandum of appeal to a High Court, "when the appeal is not from an order respecting a plaint or from a decree or order having the force of a decree" shall be two rupees. Now, s. 322D of the Procedure Code explicitly enacts that the decision of a dispute under s. 322B "shall, as between the parties thereto, have the force of, and be appealable as, a decree." The appeal before us, therefore, is an appeal from a decision which is declared to have the force of a decree and to be appealable as such, and it falls directly within the exception of art. 11 of sch. ii of the Court-Fees Act above-mentioned. It should, therefore, in my opinion, have been preferred upon the stamp provided for appeals from decrees, and, being insufficiently stamped, we cannot entertain it. I am aware that in taking this view, I have the authority of TURNER, C.J., (*Srinivasa Ayyangar v. Peria Tambi Nayakar*, I. L. R., 4 Mad., 420) to the contrary; but I regret I am unable to accept it. With deference to that learned Judge, I cannot help thinking that his attention was not directed to the article of the Court-Fees Act, which, according to my view, determines the question. It seems to me that, looking to the nature of the proceedings to be held under s. 322B for the investigation of the nature and extent of decrees and claims, and the determination of the priorities of such decrees and claims, it was intended that those decree-holders or claimants, who chose to submit their decrees or claims to the Collector pursuant to s. 322A, should, when a dispute arises of the kind mentioned in s. 322B, be bound, if it is referred for decision to the Civil Court, by the decision of such Civil Court, as by a decree in a suit; moreover, it may be remarked that this decision might, as in the case now before us, often determine very important questions, the investigation of which would require the bestowal of much time and labour by the Civil Court. In view of this state of things, it does not appear to me to be unusual or unwarrantable that appeals from such a decision should be held to require an *ad valorem* stamp. The memorandum of appeal must be returned to the appellant in order that he may supply the requisite stamp-paper within one month from this order.

Brodhurst, J.—I concur.

[568] *The 19th March, 1885.*

PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Sirbadh Rai and others.....Defendants'

versus

Raghunath Prasad.....Plaintiff.*

Mortgage—First and second mortgages—Payment by purchaser of mortgaged property of first mortgage—Right of purchaser to benefits of first mortgage—Right of second mortgagee to bring to sale mortgaged property.

The purchasers of the equity of redemption of land which had been mortgaged in 1866 and 1874 to different persons, paid off the prior mortgage. The second mortgagee sued to bring the property to sale in satisfaction of his mortgage.

Held, that the prior mortgage was not extinguished, and that the purchaser of the equity of redemption had, by paying off the mortgage, acquired an equitable right to its benefits, which they could use against the second mortgage. *Gokaldas Gopaldas v. Parannal Preamsukhdas*, I. L. R., 10 Cal., 1035; L.R., 11 Ind. Ap., 126, followed.

Per OLDFIELD, J. (MAHMOOD, J., dissenting), that the prior mortgage afforded a defence against the claim of the second mortgagee seeking to bring the property to sale, *Gokaldas Gopaldas v. Parannal Preamsukhdas*, I. L. R., 10 Cal., 1035; L.R., 11 Ind. Ap., 126, followed.

Per MAHMOOD, J., that the ruling of the Privy Council in *Gokaldas Gopaldas v. Parannal Preamsukhdas*, I. L. R., 10 Cal., 1035; L.R., 11 Ind. Ap., 126, did not go beyond laying down the proposition that when the purchaser of the equity of redemption pays off a prior mortgage, which carries with it the right of possession of the mortgaged property, the mortgage is not extinguished for all purposes, but such purchaser, acquiring the benefits of the usufructuary mortgage, is entitled to remain in possession, and can successfully resist a suit by a subsequent usufructuary mortgagee seeking to disturb such possession.

Also *per* MAHMOOD, J., that although the persons who had paid off the prior mortgage were entitled to claim its benefits, they could not be understood to have acquired rights greater than those which the prior mortgagee himself possessed; that as holders of the equity of redemption they could not resist the suit which aimed at enforcing a valid security, and as, persons entitled to the benefits of the prior mortgage, they were at best in the position of assignees of that mortgage; that the union of the two capacities could not confer upon them rights higher than those which the mortgage they had paid off created; that a puisne incumbrancer is not prevented by the mere fact of the existence of a prior mortgage from enforcing his security without paying off the prior mortgage, so long as such enforcement does not clash with the rights secured by the prior mortgage; and that therefore the purchaser of the equity of redemption held that right subject to the plaintiff's mortgage of 1874, and the fact of their having redeemed the prior mortgage did not place the equity of redemption on a better footing, though it entitled them to the benefits of that mortgage secured to them in the same manner as to the original mortgagee whose rights they had acquired by subrogation. *Gaya Prasad v. Salik Prasad*, I. L. R., 3 All., 682; *Ramu Naikan v. Subbaraya Mudali*, 7 Mad. H. C. Rep., 229, and *Mulchand Kuber v. Lallu Trikam*, I. L. R., 6 Bom., 404, referred to.

[569] THE facts of this case are sufficiently stated for the purposes of this report in the judgments of the Court.

Munshi Sukh Ram, for the Appellants (Defendants).

* Second Appeal No. 1460 of 1883, from a decree of Babu Mrittonjoy Mukarji, Subordinate Judge of Ghazipur, dated the 28th August 1883, modifying a decree of Babu Rajuath Prasad, Munsif of Balia, dated the 29th March 1883.

Lala Lalta Prasad, for the Respondent (Plaintiff).

Oldfield, J.—It appears that Jarawan Singh and Daulat Kuar mortgaged three bighas of land, in May 1866, for Rs. 401 to one Lachman Rai, and subsequently, in June 1874, mortgaged their four annas share, which included the said land, to plaintiff.

In June 1878, the appellant bought the equity of redemption and paid off the prior mortgage out of the purchase-money. The plaintiff-respondent seeks in this suit to bring the said land to sale in satisfaction of his subsequent mortgage. The first Court disallowed this portion of the claim, but it was decreed by the Subordinate Judge, and the appeal, which takes exception to the decree on this point, must prevail. It has been established by rulings of this Court that, where a purchaser of the equity of redemption has a prior mortgage of his own, or gets in a prior mortgage, the prior mortgage is not necessarily extinguished, but will be presumed to exist for his benefit against subsequent mortgagees: and the law to that effect has now been settled by the recent decision of the Privy Council in *Gokaldas Gopaldas v. Puranmal Premsukhdas*, I. L. R., 10 Cal., 1035: L. R., 11 Ind. Ap., 126, a case somewhat similar to the one before us, where one purchasing the equity of redemption had paid off a prior mortgage on certain house property, and it was held that the prior mortgage had not become extinguished, and he had a good defence to the suit for possession of the property brought by a subsequent mortgagee.

Their Lordships remark that in these cases "the obvious question to ask in the interests of justice, equity, and good conscience, is, what was the intention of the party paying off the charge? He had a right to extinguish it, and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention shall be ascribed to him? The ordinary rule is, that a man having the right to act in either of two ways, shall be assumed to have acted according to his interest."

So in the case before us, I hold that the prior mortgage was not extinguished, and that it affords a defence against the claim [570] seeking to bring the property to sale. I would modify the decree of the Lower Appellate Court, and restore that of the first court with costs.

Mahmood, J.—The facts of the case necessary for the disposal of this appeal seem to be these:—

The land in dispute in this appeal, namely, plot No. 111, was originally mortgaged, in 1866, to one Lachman. Subsequently, on the 9th June 1874, the mortgagors executed another mortgage of a four annas share in the village, including plot No. 111, to the present plaintiff, and, on the 29th June 1878, the mortgagors executed a deed of sale in respect of plot No. 111 in favour of the defendants-appellants for the purpose of raising money to pay off Lachman's mortgage of 1866 and other debts due by them to various creditors.

The object of this suit was to bring the four annas share to sale by enforcement of the lien created by the mortgage deed of the 9th June 1874. The Court of First Instance decreed the claim, but exempted the plot No. 111, on the ground that it had been purchased by the defendants-appellants by payment of consideration-money, which paid off Lachman's mortgage of 1866, which had priority over the plaintiff's mortgage of 1874.

The plaintiff appealed to the Lower Appellate Court, so far as the exemption of plot No. 111 was concerned, and that Court, without going into the merits of the case, modified the decree of the lower Court, by decreeing enforcement of lien against plot No. 111 also, on the ground that, even if the mortgage of 1866 had been satisfied by the purchasers of the plot, they could

not claim the benefit of the priority of the mortgage, because the mortgage must be taken to have been extinguished for all purposes, and could not therefore be pleaded in defence of the plaintiff's suit, which was based upon the mortgage of the 9th June 1874. In other words, the Lower Appellate Court held that the defendants-appellants purchased the land (on the 29th June 1878) subject to the plaintiff's mortgage, and the land was therefore liable to be sold in enforcement of the plaintiff's lien, regardless of the fact that they had paid off Lachman's mortgage of 1866. The present appeal has been preferred by the defendants, purchasers of plot No. 111, under the sale-deed of the 29th June 1878. The facts of the case thus stated seem to me to raise two distinct questions of law. *First*, whether the discharge by the appellants of Lachman's mortgage of 1866 entitles them to the benefits of that mortgage, notwithstanding the purchase by them of land No. 111, to which that mortgage related; and *secondly*, whether the appellants can resist the plaintiff-respondent's claim to enforce his mortgage of June 1874, by bringing the land to sale.

So far as the first question is concerned, I entirely concur with my brother OLDFIELD in the view that the appellants, as purchasers of the equity of redemption, have, by paying off Lachman's prior mortgage, acquired an equitable right to the benefits of that mortgage, which they can use against the plaintiff's mortgage. That in such cases the prior mortgage is not extinguished, but subsists in favour of the person paying off the mortgage, has been explained by Mr. Justice STORY in s. 1035 *c* of his celebrated work on Equity Jurisprudence (ed. 1877).

The rule was first enunciated in India by Mr. Justice HOLLOWAY in *Ramu Naikan v. Subbaraya Mudali*, 7 Mad., H. C. Rep. 229, in which that learned Judge disapproved the doctrine laid down by the English Courts in *Toulmin v. Steere*, 3 Mer., 210, which had some time been followed by the Bombay Courts—*Itcharam Dayaram v. Raji Jaga*, 11 Bom., H. C. Rep. 41,—till a Full Bench of that Court in *Mulchand Kuber v. Lallu Trikam*, I. L. R., 6 Bom., 404, adopted the view of the Madras High Court. The rule was again followed in *Shantapa v. Balapa*, I. L. R., 6 Bom., 561; by a Division Bench of the same Court, and by this Court in *Gaya Prasad v. Salik Prasad*, I. L. R., 3 All., 682, and in *Ali Hasan v. Dhirja*, I. L. R. 4 All., 518. The doctrine has now been settled by the recent ruling of the Privy Council in *Gokaldas Gopaldas v. Puranmal Premasukhdas*, I. L. R., 10 Cal., 1035; I. L. R., 11 Ind. Ap. 126, in which the English cases on the subject were considered. The rule there laid down fully supports the view taken by my brother OLDFIELD, and indeed s. 101 of the Transfer of Property Act (IV of 1882) and some other sections of that enactment appear to me to be based [572] upon the same principle of equity; I have therefore no doubt that the appellants in this case are entitled to the benefits of the priority of Lachman's mortgage of 1866, which they have paid off.

In regard to the second question, however, I confess, with regret, that I have difficulty in understanding the Privy Council ruling in the extensive sense in which my brother OLDFIELD has interpreted it. The ruling does not seem to me to go beyond laying the proposition in which I have already expressed my concurrence, namely, that when the purchaser of the equity of redemption pays off a prior mortgage, which carries with it the right of possession of the mortgaged property, the mortgage is not extinguished for all purposes; but such purchaser, acquiring the benefits of the usufructuary mortgage, is entitled to remain in possession, and can successfully resist a suit by a subsequent usufructuary mortgagee seeking to disturb such possession. The rule appears

to me to be a necessary consequence of the doctrine of subrogation, and it is obvious that to allow the possession of a prior usufructuary mortgagee to be ousted by a person holding a subsequent usufructuary mortgage, would be to violate the fundamental principle of the priorities of lien. In the case before the Privy Council, the purchaser of the equity of redemption had paid off a prior usufructuary mortgage, which essentially carried with it the right to possession of the mortgaged property as the means of liquidating the mortgage-debt, and the object of the puisne usufructuary mortgagee's suit was to oust such possession by virtue of his mortgage. The suit, if decreed, would have operated in defeasance of an essential incident of the prior mortgage. It is clear that when the essential incidents of a prior incumbrance clash with the incidents of a subsequent incumbrance, the latter must give way, and the former must prevail. The principle is well expressed in the language of s. 48 of the Transfer of Property Act, which lays down that "where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created." This seems to me to be the essence of the rule of priority upon [573] which the Lords of the Privy Council seem to have acted by applying the doctrine of subrogation to the case, the effect of which I am considering, and I do not understand their Lordships' judgment to have laid down any rule which goes beyond the limits of this proposition.

Such being my interpretation of the ruling of the Privy Council in the case of *Gokaldas Gopaldas*, I. L. R., 10 Cal., 1035; L. R., 11 Ind. Ap. 126, I cannot help feeling that the present case has a different aspect. The appellants, by paying off Lachman's prior mortgage of 1866, are no doubt entitled to claim the benefits of that mortgage, but they cannot, in my opinion, be understood to have acquired rights greater than those which Lachman himself possessed. It seems to me that the appellants possess two distinct capacities, *first* as holders of the equity of redemption, and, *secondly* as persons entitled to the benefits of Lachman's mortgage of 1866. It is clear that in the former capacity they could not resist the suit which aims at enforcing a valid security, and in the latter capacity, the payment of the mortgage of 1866 can at best place them in position of assignees of that mortgage (*vide* last sentence in Story's Equity Jurisprudence, s. 1035 c).

But such position will not, as I understand the law, enable them to prevent sale of the property in enforcement of the plaintiff's mortgage of 1874, because such sale would not disturb or clash with the rights under the mortgage of 1866, which they have acquired by subrogation, and in their capacity, as *such*, the exercise of the plaintiff's rights cannot affect them. Nor can I hold that the union of the latter capacity with the former can in itself confer upon them rights higher than those which the mortgage they have paid off created. To hold the contrary view seems to me to amount to the proposition that the purchaser of the equity of redemption and the first mortgagee could, by a transaction entered into in the absence of the intermediate incumbrancer and irrespective of his interests, place him in a worse position than before. Such a doctrine would be analogous in principle to the rule of tacking, which the law of mortgage in this country, so far as I am aware, never recognized, and which has now been expressly negatived by s. 80 of the Transfer of Property Act.

[574] The matter, therefore, resolves itself into the question, whether the holders of the rights of mortgage of 1866 could prohibit the enforcement of

the mortgage of 1874, in other words, can a prior mortgagee prevent the sale of the equity of redemption in enforcement of a subsequent security?

It seems to me that, notwithstanding the mortgage, the mortgagor or the holder of the equity of redemption can alienate his rights by private sale, and it follows that he can do so by hypothecation. Such sale or hypothecation would, of course, be subject to the prior mortgage, and could in no manner disturb the priority of lien possessed by the prior incumbrancer or militate against his interests. So long as there can be no conflict between the rights created by the prior and the puisne incumbrancers, it appears to me that property subject to two or more incumbrancers can be sold in enforcement of any one of them, and the purchaser in such sale would acquire such right as the position of the incumbrance with reference to the rule of priority could convey. Such seems to me to be the effect of the unreported ruling of this Court (S. A. No. 159 of 1876), to which my brother OLDFIELD was a party. I think I may safely say that such was the law, and the uniform course of decision, before the passing of the Transfer of Property Act; and I have not been able to find any provision in that Act which lays down the contrary rule. Section 74 of the Act enunciates the rule that a subsequent mortgagee possesses the right to pay off a prior mortgage; but such provision cannot be understood to confer upon the prior incumbrancer the power of prohibiting either the mortgagor from dealing with the equity of redemption, or the puisne incumbrancer from enforcing his security, subject, of course, to the rights created by the prior incumbrancer. Indeed, s. 96 of the Act distinctly contemplates enforcement of puisne incumbrance without paying off the prior incumbrancers, for it speaks of the sale of property subject to prior mortgage. Such a sale in enforcement of a puisne incumbrance cannot affect the prior mortgage, and no such conflict of rights can take place as in the case before the Privy Council, where both the contending mortgages included the right of possession, which of course could not be simultaneously enjoyed by both the mortgagees. It seems to me that any other view of the law would necessarily involve [575] the proposition that the only manner in which a puisne incumbrancer by hypothecation can enforce his security, is to pay off the prior mortgage first, and then to bring the property to sale. It is easily conceivable that such a rule would operate as a great hardship in cases where the value of the prior security is enormously larger than the amount of the puisne incumbrance; whilst in cases where the amount due on the prior mortgage does not become payable till long after the due date of the subsequent mortgage, the puisne incumbrancer would be obliged to wait for his money till the prior mortgage became redeemable. I find much difficulty in holding that the law contemplates such contingencies, and I am of opinion that a puisne incumbrancer is not prevented by the mere fact of the existence of a prior mortgage from enforcing his security, so long as such enforcement does not clash with the rights secured by the prior mortgage.

Under this view, the appellants as purchasers of the equity of redemption, hold that right, subject to the plaintiff's mortgage of 1874, and the fact of their having redeemed the mortgage of 1866 does not place the equity of redemption on a better footing, though it entitles them to the benefits of that mortgage, secured to them in the same manner as to the original mortgagee Lachman, whose rights they have acquired by subrogation. In arriving at this view, I have had to consider whether the case of *Gaya Prasad v. Salik Prasad*, I. L. R., 3 All., 682, is an authority which binds me to adopt a contrary opinion. Having carefully examined the case, I find that it was not a Full Bench ruling of this Court, but only a reference under s. 575 of the Civil Procedure Code,

arising out of a difference of opinion between the learned Judges of the Division Bench (PEARSON and OLDFIELD, JJ.). The case was then heard by STUART, C.J., and STRAIGHT, J., in the absence of the learned Judges who had referred the case,—a procedure which, according to the view expressed by a Bench of three Judges of this Court in the case of *The Rohilkhand and Kumaon Bank v. Row*, I. L. R., 6 All., 468, was erroneous. But putting aside this consideration, I find that out of the four judgments that are reported in that case, the judgments of my brothers OLDFIELD and STRAIGHT bear upon the question which I am now considering whilst the judgment of [576] PEARSON, J., proceeds upon a totally different ground, and the judgment of STUART, C.J., is silent upon the point. Under these circumstances, I do not feel myself bound by that ruling upon the point immediately before me, namely, whether the purchaser of equity of redemption, who pays off a prior mortgage, can, by reason of acquiring the benefits of that mortgage, prevent the property from being brought to sale in enforcement of a mortgage which is anterior to the purchase, but subsequent to the mortgage paid off. Before leaving this question, however, I must refer again to some of the cases which I have already cited. The report of the case of *Ramu Naikan*, 7 Mad., H. C. Rep. 229, is not very clear upon this point, but I may take it, that it laid down the rule “that a subsequent mortgagee gets all to which he is entitled when he is allowed to redeem the first mortgage.” This is the *dictum* of Deruburg, cited and adopted by Mr. Justice HOLLOWAY in that case; and the effect of the last part of Mr. Justice WESTS’ judgment in the case of *Mulchand Kuber*, 11 Bom., H. C. Rep., 41, seems to be the same. With nearly the whole of that judgment I fully concur, and I would not willingly dissent from the conclusion of such eminent judges, even upon the point now under consideration, were it possible for me to hold that the right of a prior incumbrancer enables him to suspend the enforcement of the puisne incumbrance by hypothecation, and that redemption of the former is a condition precedent to the enforcement of the latter: and so long as I cannot hold this, I find myself unable to hold that the doctrine of subrogation can enable the party who benefits by it to hold rights which the prior incumbrancer to whom he is subrogated himself never held. I have carefully studied, and, I may say with great advantage, the judgments of Mr. Justice HOLLOWAY and Mr. Justice WEST, both of whom I esteem as eminent judges and great jurists, but (I say this with profound respect) neither of those judgments contain any exposition of the law upon the exact point on which I have ventured to differ from them, and no other authorities have been cited which sufficiently satisfy me to arrive at any conclusion other than that at which I have arrived. In all the cases to which I have been referred, the exact point seems to have been assumed or taken for granted as a necessary corollary to the doctrine of [577] subrogation, which prevents extinguishment of the prior mortgage.

If the case had been decided on the merits by the Lower Appellate Court, the result of my opinion would be to uphold the decree of the Lower Appellate Court, directing sale in enforcement of the plaintiff’s mortgage of 1874, but to render such sale subject to the mortgage of 1866, to the benefits of which the appellants are entitled. I do not think the case can be decided finally here, because the Subordinate Judge had before him a contention as to the genuineness of the mortgage of 1866, and other pleas touching the merits, which he declined to consider, on account of the erroneous view he took relative to the extinguishment of the mortgage of 1866. Those were pleas which can be disposed of only by the Court of first appeal, and I would therefore, with reference to the observations which I have made, decree this appeal, and,

setting aside the decree of the Lower Appellate Court, remand the case to that Court for disposal. Costs to abide the result.

NOTES.

[See *infra* Notes to 7 All., 577.]

[7 All. 577]

The 19th March, 1885.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Janki Prasad.....Defendant

versus

Sri Matra Mautangui Debia.....Plaintiff.

Mortgage—First and second mortgages—Payment by purchaser of mortgaged property of first mortgage—Right of purchaser to benefits of first mortgage—Right of second mortgagee to bring to sale mortgaged property—Registered and unregistered instruments—Optional and compulsory registration—Act III of 1877 (Registration Act), s. 50.

At a sale in execution of a decree, J purchased certain property which was at that time subject to two mortgages, the first under an unregistered deed in favour of M and dated in 1872, and the second under a registered deed in favour of L and dated in 1880. The registration of the latter both deeds was optional, the former under Act VIII of 1871, and the latter under Act III of 1877. J subsequently satisfied the mortgage under the registered deed of 1880, which was delivered to him. M then brought a suit to recover the money due to him under the mortgage-deed of 1872 by sale of the mortgaged property.

Held by OLDFIELD, J., that applying the rule laid down by the Privy Council in *Gokaldas Gopaldas v. Puranmal Premsukhdas*, 1.L.R., 10 Cal., 1035; L. R., 11 Ind., Ap 126, J having paid off the mortgage under the registered deed of 1880, should have the benefits of that mortgage, [578] and was entitled to set up the deed which he held against the unregistered deed of 1872, against which, under s. 50* of the Registration Act (III of 1877) it would take effect, as regards the property comprised in it. *Lachman Das v. Dip Chand*, 1. L. R., 2 All., 851, referred to.

Per MAHMOOD, J., that the word "unregistered" in s. 50 of the Registration Act, must, in reference to the circumstances of the present case, be read as "not registered

* Second Appeal No.1665 of 1883, from a decree of Maulvi Muhammad Samiullah Khan, Subordinate Judge of Aligarh, dated the 14th August 1883, modifying a decree of Lala Mata Prasad, Munsif of Aligarh, dated the 7th April 1883.

Registered documents relating to land, of which registration is optional, to take effect against unregistered documents.

as the registered document or not.

Nothing in the former part of this section applies to leases exempted under the proviso in Section 17, or to the documents mentioned in Clauses (e), (f), (g), (h), (i), (j), (k) and (l), of the same section.

Explanation.—In cases where Act No. XVI of 1864 or Act No XX of 1866 was in force in the place and at the time in and at which such unregistered document was executed, "unregistered" means not registered according to such Act, and, where the document is executed after the first day of July 1871, not registered under Act No. VIII of 1871, or this Act.]

† [Sec. 50 :—Every document of the kinds mentioned in Clauses (a), (b), (c) and (d) of Section 17, and Clauses (a) and (b) of Section 18, shall, if duly registered, take effect as regards the property comprised therein, against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature

under Act VIII of 1871," and that, so reading the section, the registered mortgage-deed of 1880 was entitled to priority over the unregistered mortgage-deed of 1872. *Lachman Das v. Dip Chand*, I. L. R., 2 All., 851, and *Sri Ram v. Bhagirath Lal*, I. L. R., 4 All., 227, distinguished.

Also *per* MAHMOOD, J., that the position of *J* by reason of his having paid off the registered mortgage of 1880, could at best be that of an assignee of that mortgage having priority over the mortgage-deed on which the plaintiff was suing: that such priority could not enable him to place the equity of redemption upon a higher footing than it would have been had he not paid off the registered mortgage of 1880; and that, as a consequence, the sale of the property in enforcement of the mortgage of 1872 should be allowed to take place, but subject to the rights of priority which *J*, had acquired by reason of his having paid off the registered mortgage of 1880. *Sirbadh Rai v. Raghunath Prasad*, *supra*, p. 568, and *Gokaldas Gopaldas v. Purannal Premsukhdas*, I. L. R., 10 Cal., 1035; L. R., 11 Ind. Ap., 126, referred to.

THE facts of this case are sufficiently stated for the purposes of this report in the **judgments** of the Court.

Munshi Sukh Ram and Babu Harkishen Das for the Appellant (defendant).

Babu Jogindro Nath Chaudhri, for the Respondent (plaintiff).

Oldfield, J.—The plaintiff-respondent holds a deed of mortgage, unregistered, dated the 15th February 1872, executed in his favour by Ugan and others, mortgaging the property in suit.

The mortgagors executed another deed of mortgage, dated the 18th December 1880, which was registered, in respect of the same property, in favour of Sundar Lal; and they also executed a third unregistered deed of mortgage in respect of the same property, on the 26th July 1881, in favour of Sundar Lal. Sundar Lal obtained a decree on the 6th February 1882, upon the last deed, for sale of the property mortgaged, had it attached, and sold in execution, and it was purchased by the defendant Janki Prasad, appellant, before us. Janki Prasad subsequently satisfied [579] the mortgage under the registered deed of the 18th December 1880, which was delivered to him. The plaintiff-respondent has brought this suit to recover the money due to him on the mortgage-deed, dated the 15th February 1872, by sale of the mortgaged property. He made Ugan the mortgagor, and Janki Prasad the purchaser of the property, defendants in the suit. We are only concerned in this appeal with the claim against Janki Prasad. The material plea that Janki Prasad set up was, that he had satisfied the mortgage-debt under the registered deed dated the 18th December 1880, and he contended that this document, being registered, will take effect as regards the property comprised in it against the unregistered deed of the plaintiff, and in consequence the latter cannot bring the property to sale in satisfaction of his claim under his deed of mortgage.

The Court of First Instance allowed the plea and dismissed the suit. The Subordinate Judge has disallowed the plea, and given a decree for the sale of the property. Janki Prasad, defendant, has appealed, and the grounds of appeal are, in my opinion, valid. It is now settled law by the decision of the Privy Council in *Gokaldas Gopaldas v. Pyranmal Premsukhdas*, I. L. R., 10 Cal., 1035; L. R., 11 Ind. Ap., 126, that when a person purchases the equity of redemption and holds a prior mortgage of his own, or pays off a mortgage on the property, there is in neither case of necessity an extinguishment of the mortgage, and, if he so intends, it will be kept alive for his benefit, and in the absence of express evidence, such intention will be assumed if it be for his interest to keep it alive. Applying the rule to the case before us, the appellant will have the benefit of the mortgage under the registered deed dated the 18th

December 1880, and he is entitled to set up the deed which he holds against the unregistered deed of the plaintiff, and it will, under the provisions of s. 50, Registration Act, take effect against the plaintiff's deed as regards the property comprised in it—*Lachman Das v. Dip Chand*, I. L. R., 2 All., 851—and the plaintiff's claim to bring such property to sale to satisfy his mortgage-debt must be disallowed. I would modify the decree of the Subordinate Judge and affirm that of the Court of First Instance, which dismissed the suit, with all costs.

[580] Mahmood, J.—The facts of the case, so far as they are necessary for the disposal of this appeal, are, that the property to which the suit relates was hypothecated to the plaintiff under an unregistered deed dated the 15th February 1872. The same property was, for the second time, hypothecated to one Sundar Lal, under a registered deed dated the 18th December 1880, and it was hypothecated for the third time to the said Sundar Lal under an unregistered deed of the 26th July 1881.

It appears that Sundar Lal sued on the bond on the 26th July 1881, and obtained a decree on the 6th February 1882, and, in execution of that decree, the defendant purchased that property at the auction-sale, at which Sundar Lal's mortgage of the 18th December 1880, was duly notified. The defendant subsequently paid off that mortgage and is now in possession. The present suit was instituted by the plaintiff for recovery of the money due on the bond of the 15th February 1872, by enforcement of lien against the hypothecated property. The Munsif dismissed the suit on the ground that the defendant-purchaser, having paid off the registered mortgage of 1880, was entitled to the benefits of that mortgage, and that the deed, being registered, took (under s. 50 of Act III of 1877) priority over the plaintiff's deed of the 15th February 1872, and the property could not therefore be sold in enforcement of the plaintiff's incumbrance. On appeal by the plaintiff, the Lower Appellate Court held that the defendant, having purchased the property in enforcement of the unregistered mortgage of the 26th July 1881, purchased it subject to the plaintiff's unregistered prior incumbrance of the 15th February 1872, and that the fact of his having paid off Sundar Lal's registered mortgage of the 18th December 1880, could not save the property from being sold in enforcement of the plaintiff's lien. The present second appeal has been preferred by the defendant, and the argument addressed to us on his behalf raises two questions for determination.

First.—Did Sundar Lal's registered mortgage of the 18th December 1880 possess priority over the plaintiff's unregistered mortgage of the 15th February 1872, on which it is based ?

Secondly.—What is the effect of the defendant's paying off Sundar Lal's mortgage upon the relief prayed for in the suit ?

[581] In considering the first question, it is important to notice that the plaintiff's unregistered mortgage of 1872 was executed when the registration law was regulated by Act VIII of 1871, under which the registration of the deed was optional, the amount of the mortgage being less than Rs. 100. For similar reasons Sundar Lal's registered mortgage of the 18th December 1880 did not compulsorily require registration under the present Registration Act (III of 1877). The registration of both deeds being thus optional, and one of them being registered, the question arises, whether the registered deed has priority notwithstanding the fact that the plaintiff's mortgage is anterior in date. In connection with this question, we have been referred to two Full Bench rulings of this Court—*Lachman Das v. Dip Chand*, I. L. R., 2 All., 851, and *Sri Ram v. Bhagirath Lal*, I. L. R., 4 All., 227—neither of which appears to me to be on all fours with the present case. In the case of *Lachman Das*

the contention was between a document *optionally* registered under Act VIII of 1871, and a document *compulsorily* registered under Act III of 1877; whilst in the case of *Sri Ram* both the contending documents were executed before the passing of the present Registration Act III of 1877. Here the contention lies between two *optionally* registrable documents, one of which was optionally registrable under Act VIII of 1871, which was then in force, and the other was registered under Act III of 1877, and the question therefore rests upon the interpretation of s. 50 of the latter enactment. Reading that section with the last part of the *Explanation* attached to it, it is obvious that the word "*unregistered*," which occurs in the body of the section, must, with reference to the exigencies of the present case, be read as "*not registered under Act VIII of 1871*;" and reading the section in this manner, I have no doubt that Sundar Lal's registered mortgage-deed of the 18th December 1880 will take effect in preference to the plaintiff's unregistered mortgage of the 15th February 1872, that is, will have priority. Upon the second question in the case, I am of opinion that the defendant, as purchaser of the equity of redemption, who has paid off the registered mortgage of 1880, is entitled to the benefits of that mortgage, and can use them as a shield against any [582] such claim by the plaintiff as would militate against the rights secured by that mortgage. But whether those benefits are such as go beyond the terms and incidents of the mortgage itself, and entitle the defendant to resist the plaintiff's suit to bring the property to sale in enforcement of his mortgage, is another question. The fact of the mortgage of 1880 being registered can only give it priority over the plaintiff's mortgage, and the benefits of priority are available to the defendant who has satisfied that mortgage. But does such priority place the defendant's rights *qua* purchaser of the equity of redemption on a higher footing than they would otherwise have been? In other words, is the defendant entitled to prevent the property from being sold in enforcement of the plaintiff's mortgage? A similar question arose in the case of *Sirbadh Rai v Ragunath Prasad*, *supra*, p. 568, in which I have explained my reasons for dissenting from the affirmative answer, and have endeavoured to show that the ruling of the Privy Council in the case of *Gokaldas Gopaldas*, I. L. R., 10 Cal., 1035; L. R., 11 Ind. Ap., 126, does not go the length of supplying such an answer.

Taking the same view in the present case, I hold that the position of the defendant, by reason of his having paid off the registered mortgage of 1880, can at best be that of an assignee of that mortgage having priority over the mortgage-deed on which the plaintiff is suing, that such priority cannot enable him to place the equity of redemption upon a higher footing than it would have been had he not paid off the registered mortgage, and that, as a consequence, the sale of the property in enforcement of the plaintiff's incumbrance of 1872 should be allowed to take place, but subject to the rights of priority which the defendant-appellant has acquired by reason of his paying off the registered mortgage of 1880. I would therefore partially decree the appeal, and modify the decree of the the Lower Appellate Court to the extent above indicated, and under the circumstances would make no order as to costs.

NOTES.

[See the beautiful exposition of the law on the subject in Ghose's *Law of Mortgage in India*, IV Ed., Vol. I. p. 482, 484.

The following cases lay down the same principle:—(1884) 10 Cal., 1035; 11 I. A., 126; (1884) 8 Mad., 568; (1886) 8 All., 105; (1887) 11 Mad., 345; (1887) 11 Mad., 452; (1891) 13 All., 432; 581; 17 All., 48; (1896) 20 Mad., 274; (1899) 16 Cal., 529; (1905) 1 C. L. J., 531; (1904) 1 All., L. J., 288; (1905) 25 Mad., 37; (1901) 29 I. A. 9; 29 Cal., 154; 8 C. W. N., 697; (1907) 29 All., 385 F. B.; (1909) 32 All., 138.]

[583] *The 23rd March, 1885.*

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND
MR. JUSTICE BRODHURST.

Man KuarPlaintiff

versus

Tara Singh and others.....Defendants.¹

Sale in execution of decree—Sale set aside on objection by third person—Suit to have sale confirmed—Declaratory decree—Civil Procedure Code, ss. 244, 278, 283, 311—Act I of 1877 (Specific Relief Act), s. 42.

Held that persons other than the decree-holders or the persons whose property was sold in execution of decree were not competent to apply to the Court, under s. 311 of the Civil Procedure Code, to set aside the sale.

M in whose name property had been purchased at an execution sale which was improperly set aside, brought a suit to have the order setting aside the sale reversed, and the sale confirmed in her favour, and for a declaration that the property was not liable to be sold in execution of a decree of the defendants against third persons, under which it had been attached and advertised for sale.

Held that such a suit could only be maintained under s. 42 † of the Specific Relief Act (I of 1877), but that s. 244 of the Civil Procedure Code indicated the intention of the Legislature that such questions should be determined in the execution department, and, reading together the provisions of ss. 244, 278 and 283 of the Code, the suit was premature and therefore not maintainable.

THE facts which gave rise to this suit were as follow :—

The share in a certain village of certain persons called Bhola Nath and Sham Sundar was put up for sale in execution of a decree held against them by one Kanhaiya Lal, and was purchased in the name of their mother, Man Kuar, the plaintiff in this suit. The defendants in this suit, Tara Singh and Bhajan Singh, who held a decree against Bhola Nath and Sham Sundar, applied to have the sale set aside on the ground that the property had been fraudulently and collusively purchased by Bhola Nath and Sham Sunder, in their mother's name, after the sale had been irregularly published, in order to defeat their (defendants') decree. The Court executing the decree, in execution of which the property had been sold, allowed the application and set aside the sale. After this, the defendants caused the property to be attached and advertised for sale in execution of their decree as the property of Bhola Nath and Sham Sundar. Thereupon Man Kuar brought the present suit against them, in which she claimed to have the

* Second Appeal No. 494 of 1884, from a decree of A. F. Millet, Esq., District Judge of Shahjahanpur, dated the 21st August 1883, affirming a decree of Mirza Abid Ali Beg, Subordinate Judge of Shahjahanpur, dated the 11th June 1883.

† [Sec. 42 :—Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief :

Discretion of Court as to declarations of status or right. Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Bar to such declaration.

Explanation.—A trustee of property is a 'person interested to deny' a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.]

order setting aside the sale set aside, and the sale confirmed in her favour, and to have it declared that the property was not [584] liable to be sold in execution of the decree of the defendants against Bhola Nath and Sham Sundar.

The Court of First Instance held that, although the defendants were not competent to object to the sale under s. 311 of the Civil Procedure Code, yet in a suit to have the sale confirmed they were entitled to object to it; and that there had been material irregularity in the publication of the sale, and therefore the sale was invalid. It therefore dismissed the plaintiff's suit. This decree, on appeal by the plaintiff, was affirmed by the Lower Appellate Court.

In this second appeal, the plaintiff contended that the defendants were not competent to object to the sale, and the order setting it aside was made *ultra vires*, and should be set aside.

Pandit *Ajudhia Nath*, and *Babu Ratan Chand*, for the Appellant.

Pandit *Bishambar Nath*, for the Respondents.

Petheram, C.J., and Brodhurst, J.—We think that the appeal must be allowed on both grounds. The facts of the case are somewhat complicated, but when one comes to look at them, they appear to be as follows:—A decree was obtained by one Kanhaiya Lal against four persons, who may, for the purposes of this decision, be styled defendants *A* and *B* and defendants *C* and *D*. *A* and *B* were owners of one property and *C* and *D* were owners of another property. Both properties were attached and put up to sale; but as the two properties were distinct and situated in different places, they were put up to sale in two separate lots. The property of *A* and *B* was sold and purchased ostensibly by the uncle for the mother of *A* and *B*. For the purposes of deciding this point, and for this purpose only, I assume that the property was purchased by the mother by the money of *A* and *B*; that *A* and *B* found the money; and that the mother was the trustee for *A* and *B* in respect of this property. Upon the application of *C* and *D* impeaching the sale on the ground that the property was really purchased by *A* and *B* fraudulently and in collusion, the Court set aside the sale under s. 311, Civil Procedure Code. The first question then is, whether the order setting aside the sale on the objections of *C* and *D* is correct? Whether the order setting [585] aside the sale was just or unjust is beside the question. The question is, could *C* and *D* object under s. 311 to the validity of the sale of the property of *A* and *B*, and had the Court jurisdiction to set aside the sale on the application of *C* and *D*? Now *C* and *D* were neither the decree-holders nor the persons whose property was sold, and we do not see how they could apply under s. 311 to set aside the sale. We think the order setting aside the sale was without jurisdiction and invalid, and it must be reversed. The other question is, whether in this suit, brought by the mother on the allegations that this sale was improperly set aside, and that *C* and *D* have attached this property on the allegation that it was the property of *A* and *B*, their debtors (her two sons), she could contest the validity of the execution-proceedings taken by *C* and *D* on the allegation that the property was hers. It may be that she has a right to bring the suit, but the question is whether at present it is maintainable at all? If it is maintainable at all, it must be under s. 42 of Act I of 1877. To maintain such a suit, the plaintiff must allege that she is entitled to a legal character and right, and that *C* and *D* are interested in denying her right. Looking at s. 42 of Act I of 1877 alone, it may be said with considerable force that such a suit is maintainable. But if we look at s. 244 of the Civil Procedure Code, it indicates the intention of the framers of the Code that such questions should be determined in the execution department. Section 278 of the same Code provides a machinery for contesting the validity

of execution-proceedings, and s. 283 again provides the machinery by which a regular suit is brought to contest the validity of the order passed in the execution department. Reading all these sections together, we do not think the suit is maintainable, and the proper mode for contesting the validity of the execution-proceedings is the one indicated by the Procedure Code. The suit is premature, and upon that ground and no other we dismiss the suit. The appeal is allowed in respect to the first claim. The second claim will be dismissed on the ground that it is premature. Under the circumstances of the case the appeal is allowed, but without costs.

Appeal allowed.

NOTES.

[This case was dissented from in (1896) 18 All., 410, which decision was approved of in (1898) 23 Bom., 266.

See the following other decisions in accordance with 23 Bom., 266 :—(1868) 5 Bom., H. C. Rep., 139 ; (1885) 12 Cal., 108.]

[586] FULL BENCH.

The 1st April, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR JUSTICE STRAIGHT,
MR. JUSTICE OLDFIELD, MR. JUSTICE BRODHURST AND
MR. JUSTICE MAHMOOD.

Harpal Singh.....Defendant

versus

Bal Gobind and another.....Plaintiffs.*

Act XII of 1881 (N.-W. P. Rent Act), s. 8—Act X of 1859, s. 6—Mortgage—Occupancy-tenure—Sir-land.

Where land, originally the sir of a proprietor, has been transferred to a mortgagee, and has in his hands lost its character of sir, and has been leased to a tenant on the usual conditions of a tenancy, which otherwise do not bar the acquisition of a right of occupancy in the land, such a right will be acquired by twelve years' occupancy under s. 8 of the Rent Act.

In 1846, B mortgaged a share in a village, together with certain land which was recorded as his sir, and which was so described in the deed of mortgage. After the mortgage, it ceased to be recorded as his sir, and was recorded as land held by tenants in the same way as other lands in the estate. In 1857 it was leased to S, and in 1863 to H, and from 1863 to 1882 remained in the possession of the last-mentioned lessee. In 1882 B redeemed the mortgage, and subsequently brought a suit against H to establish that the land was his sir, and for possession of it.

Held by the Full Bench that there being nothing in the terms of the mortgage-deed to indicate that the land was transferred to the mortgagee to be held as sir, and the land having ceased to be recorded as the sir of the proprietor, and not having been leased as the sir of the lessor, it had not retained its character as sir when the defendant's tenancy commenced,

* Second Appeal No. 192 of 1884, from a decree of D. M. Gardner, Esq., District Judge of Benares, dated the 24th November 1883, affirming a decree of Shah Ahmad-ul-lah, Munsif of Benares, dated the 7th April 1883.

so as to prevent him from acquiring a right of occupancy therein under the provisions of s. 8 of the Rent Act.

Per MAHMOOD, J., that there is nothing in the law to prevent a zamindar from relinquishing his rights in sir-land and converting it into land held by ordinary tenants; that the mortgage-deed of 1846 showed that the sir right in the land in suit had been relinquished by the mortgagor; and that the sir-land once relinquished by the zamindar ceases to have that character, and cannot prevent the accrual of the occupancy-right within the meaning either of s. 6 of Act X of 1859 or of s. 8 of Act XII of 1881.

The right of occupancy conferred by the Legislature upon cultivators of more than twelve years' standing is a right wholly independent of the wishes either of the zamindar or his mortgagee in possession, and when a cultivator acquires such a right, it cannot be taken as in the nature of a grant from either of them. The right of occupancy may thus be acquired during the currency of a usufructuary mortgage and during the period of the mortgagee's possession of the zamindari rights, and the zamindar upon redeeming the mortgage cannot [587] disturb the possession of such occupancy tenants on the ground that, when he mortgaged the zamindari, it was free of such occupancy-tenures. *Heeroo v. Dhoree*, N.-W. P. H. C. Rep., 1870, p. 129, referred to.

THE plaintiff in this case, a shareholder in a village called Dadupur, claimed certain land situate in that village as his sir land. It appeared that in 1841 the land in suit was recorded as plaintiff's sir. On the 23rd May 1846, the plaintiff's share was usufructuarily mortgaged on his behalf by Lachminia, his mother, to one Dhan Singh, for Rs. 300. This sum it appeared was due to Dhan Singh under a *zar-i-peshgi* lease, under which he was in possession of the share. The deed of mortgage, after reciting that the sum of Rs. 300 was due to the mortgagee and that he was pressing for payment, continued as follows :—

"I have accordingly, in lieu of the said Rs. 300, made a usufructuary mortgage of the one-fourth share aforesaid, which was already in the possession of the said mahajan under a lease; and the 30 bighas of fields, sir and sair items, which are in my possession, I have also put into the said mahajan's possession. But I have retained in my possession for my support only 10 bighas (kham) of fields, agreeing to pay revenue at one rupee per bigha, and I therefore agree and covenant that the said mahajan shall remain in entry and possession of the said share together with sir lands and sair items, and after paying the Government revenue and village expenses, as detailed above, he may take the remainder in interest. I shall repay the principal sum of Rs. 300 in the space of ten years, and if within this period I do not repay this sum, the said mahajan is at liberty to continue as heretofore in possession under this document. Neither I nor my heirs shall make any kind of deviation from the foregoing stipulations; if we do, it will be invalid, and accordingly this usufructuary deed of mortgage has been executed, that it may be of use in time of need."

The land in suit was, it was alleged, a portion of the 30 bighas described as sir in the deed of mortgage. In 1857 the land in suit was in the possession of one Sukal, having been let to him by the mortgagee. In 1863 it was let by the mortgagee to Harpal Singh, defendant in this suit, and remained in his possession from that year. In 1882 the plaintiff redeemed the mortgage, and [588] subsequently brought the present suit against Harpal Singh to establish that the land was his sir, and for possession of it. The defendant set up as a defence to the suit that he had been in continuous occupation for more than twelve years, and had acquired a right of occupancy, under s. 8 of the N.-W. P. Rent Act, 1881. Both the lower Courts, regarding the land as sir when it was mortgaged, and when it was let to the defendant, held that the defendant could not acquire a right of occupancy in it.

The defendant appealed to the High Court.

The Divisional Bench (PETHERAM, C.J. and MAHMOOD, J.) hearing the appeal referred the following question to the Full Bench :—

“Under the circumstances of this case, did Harpal, appellant, acquire an occupancy-tenure within the meaning of s. 8 of the Rent Act, or did the land remain as sir, so as to preclude the creation therein of an occupancy-tenure?”

For the purposes of this reference it was assumed that the land was the sir of the mortgagor at the time the mortgage was made and was the subject of the mortgage.

Munshi Kashi Prasad, for the Appellant.

The Senior Government Pleader (Lala Juala Prasad), for the Respondents.

The following judgments were delivered by the Full Bench :—

Petheram, C. J., and Straight, Oldfield, and Brodhurst, JJ.—It has been found that Harpal was put into occupation of this land, in 1863 as a tenant by Dhan Singh, who was the mortgagee under the deed of the 23rd May 1846, and the question is whether this land was sir when Harpal's tenancy commenced; for if it was, no right of occupancy can be acquired by him in respect of it, whether we look to the law which was in force when his tenancy began, in s. 6, Act X of 1859, or to the present law, s. 8 of the Rent Act.

Now, although the mortgagor held this land as his sir at the time he transferred it in mortgage, there is nothing in the terms of the mortgage-deed of the 23rd May 1846, to indicate that he transferred it to the mortgagee to be held as sir. It passed out [589] of his own control, and was no longer held by him as sir; and whether or not he intended that the mortgagee should hold it as sir, it is clear that, as a matter of fact, the mortgagee did not treat the land as sir. It ceased to be recorded as the sir of the proprietor, as had hitherto been the case, and was recorded as land held by tenants in the same way as other lands in the estate held by tenants on which a right of occupancy might be acquired, and it had been let to one Sukul Ahir in 1857 before it was let to Harpal in 1863, and not leased to them as the sir of the lessor. There is nothing in fact to show that this land retained the character of sir-land at the time it was leased to Harpal. Under such circumstances, where land, originally the sir of a proprietor, has been transferred to a mortgagee in mortgage, and has in his hands lost its character of sir and been leased to a tenant on the usual conditions of a tenancy, which otherwise do not bar the acquisition of a right of occupancy in the land, such a right will be acquired by twelve years occupancy under s. 8, Rent Act.

The answer to the reference will be that Harpal acquired a right of occupancy in the land.

Mahmood, J.—I am of the same opinion, but wish to add a few observations. There is nothing in the law to prevent a zamindar from relinquishing his rights in sir-land and converting it into land held by ordinary tenants. In this case the mortgage-deed of 1846 clearly shows that the sir right in 30 bighas including the land now in suit had been relinquished by the mortgagor who held these rights. The land was taken possession of by the mortgagee, who appears to have let it to tenants, the last of whom is Harpal (defendant-appellant), whose tenancy admittedly began in 1863. He has ever since been in possession as cultivator, and the question arises whether, even conceding that the land was originally the plaintiff's sir, the defendant has acquired the right of occupancy. I hold that the sir-land once relinquished by the zamindar ceases to have that character, and cannot prevent the accrual of the occupancy-right within the meaning either of s. 6 of the old Rent Act (X of 1859) or of s. 8 of the present Rent Act. The right of occupancy conferred by the

Legislature upon cultivators of more than twelve years' standing is a right wholly [590] independent of the wishes either of the zamindar or of his mortgagee in possession, and when a cultivator acquires such a right, it cannot be taken as in the nature of a grant from either of them.

The right of occupancy may thus be acquired during the currency of a usufructuary mortgage and during the period of the mortgagee's possession of the zamindari rights, and the zamindar upon redeeming the mortgage cannot disturb the possession of such occupancy-tenants on the ground that, when he mortgaged the zamindari, it was free of such occupancy-tenures. Such was the rule laid down by TURNER, Offg. C.J., and ROSS and SPANKIE, JJ., in *Heeroo v. Dhoree*, N.-W. P. H. C. Rep., 1870, p. 129, and agreeing in the view therein taken, I hold that it is applicable to the present case.

[7 All. 590]

The 9th January, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE AND MR. JUSTICE MAHMOOD.

Sheo Dayal Mal and another.....Defendants

versus

Hari Ram and another.....Plaintiffs.*

Registration, place of—Act VIII of 1871 (Registration Act), ss. 28, 85—
"Whole or some portion of the property"—Bona fide transferee for value
of mortgaged property—Notice—Ignorance of existing incumbrance.

• The terms of s. 28 † of Act VIII of 1871 must not be construed in their literal sense, inasmuch as to do so would defeat the intention of the Legislature that registration should be made with reference to the locality of the property to which the document relates; and hence the words of the section "some portion of the property" must be read as meaning some substantial portion.

A bond which purported to mortgage 500 square yards of land situate at P, two entire villages and shares in fourteen villages in the G district, and a village in the C district, and which required registration under Act VIII of 1871, was registered at P.

Held that the bond was not properly registered in accordance with the provisions of s. 28 of Act VIII of 1871.

Per MAHMOOD, J.—The imperative direction of s. 28 of Act VIII of 1871 is addressed not to the registering officer, but to the person presenting a document to that officer for registration; and therefore s. 85, which refers only to defects in the appointment or procedure of the registering officer, could not cure the irregularity which was committed under s. 28.

Held that a statement in answer to interrogatories, which was made by the purchaser of mortgaged property, to the effect that, at the time of the purchase, he was aware of the mortgage and believed that it had been satisfied, was no [591] proof of the purchase having

* First Appeal No. 26 of 1882, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 7th November 1881.

† [Sec. 28 :—Save as in this part otherwise provided, every document mentioned in section

Place for registering documents relating to immoveables.

seventeen, clauses (1), (2), (3) and (4), and section eighteen, clauses (1), (2), (3) and (4), shall be presented for registration in the office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates is situate.]

been made after notice of a prior mortgage, inasmuch as it was inconsistent with the knowledge of an *existing* incumbrance.

THE suit to which this appeal related was one for the recovery of Rs. 79,655 principal and interest due on a bond dated the 20th May 1873, and for the sale of the property mortgaged therein. It was instituted in the Gorakhpur district. This bond had been given to the plaintiffs by the defendant Brooke, and he had subsequently to its date transferred by sale to the other defendants, Sheo Dayal and Har Dayal, the property mortgaged by it to the plaintiffs. The bond purported to mortgage 500 square yards of land in Muhalla Mugalpura in the city of Patna, two entire villages and shares in fourteen villages in the Gorakhpur district, and a village in the Champaran district. The defendants Sheo Dayal and Har Dayal defended the suit upon the ground, amongst others, that the bond was not admissible in evidence, not having been registered in accordance with the provisions of s. 28 of Act IX of 1871, under which it had been registered, inasmuch as it had been registered at Patna, where the defendant Brooke had not any property at the time of registration, the recital in the bond as to the 500 square yards of land in Muhalla Mugalpura being false. With reference to this defence, the lower Court framed the following issue:—"Had Mr. Brooke any immoveable property in Patna, the 500 yards of land in Muhalla Mugalpura to wit, so that the legality of the registration of the bond, dated the 20th May 1873, is indisputable; and, if Mr. Brooke had not such land, is the registration of the deed in Patna valid or not, and the deed admissible in evidence?" Upon this issue, the lower Court found that the defendant was the owner of land in Patna at the time of the registration of the bond, and held that the registration of the bond at Patna was consequently in accordance with the provisions of s. 28 of Act VIII of 1871.

The first question raised by this appeal by the defendants Sheo Dayal and Har Dayal from the decree which the lower Court gave the plaintiffs was whether the registration of the bond at Patna was in accordance with law.

Mr. C. H. Hill, Mr. T. Conlan, and Babu Dwarka Nath Banarji, for the Appellants.

[592] Pandit Ajudhya Nath, Lala Lalta Prasad, and Babu Baroda Prasad Ghose, for the Respondents.

For the appellants it was contended that the defendant Brooke possessed no property whatever at Patna at the time of registration of the bond; and further that, assuming that the defendant Brooke possessed at the time of registration of the bond the land at Patna which it purported to mortgage, the bond had not been registered in accordance with the provisions of s. 28 of Act IX of 1871, as the true intent and meaning of that section was that the instrument shall be registered in the district in which the substantial part of the property is situated, and regard being had to the relative value and extent of such land, and of the mortgaged property situate in the Gorakhpur district, such land was not a "substantial" portion of the property to which the bond related.

For the respondents it was contended that the finding of the lower Court that the defendant Brooke possessed the land at Patna described in the bond was correct, that s. 28 must be construed as it stood, and the word "substantial" could not be interpolated; that the bond having been as a matter of fact registered must, there having been no fraud contemplated, be taken to have been duly registered, the registration of an instrument in the wrong district being a defect of the nature contemplated by s. 85, and not such a defect as would invalidate the registration. Reference was made to *Har Sahai v. Chunni Kuar*, I. L. R. ,

4 All., 14; *Bishunath Nark v. Kalliani Bai*, Weekly Notes, 1882, p. 175; *Sah Mukhun Lal Panday v. Sah Kundan Lal*, 15 B.L.R., 228; 24 W. R., 75; L.R., 2 Ind. Ap., 210, and *Muhammad Ewaz v. Birj Lal*, 1 L. R., 1 All., 465; L. R., 4 Ind. Ap., 166.

It was also contended, on the one side, that the respondents had purchased from the defendant Brooke with notice of the mortgage to the plaintiffs, and on the other, that they had not purchased with such notice.

Petheram, C.J.—I think that this appeal must be allowed on the ground that the deed executed by Mr. Brooke, on the 20th May 1873, was invalid as against subsequent purchasers by reason of not being properly registered. I take the facts which are necessary for the purposes of this judgment, to be [593] the following:—Mr. Brooke is the owner of valuable property at Gorakhpur and also at Champaran, each of which places is at a considerable distance from Patna, and he had also at Patna a property which is assumed to be worth about Rs. 500, but which was, in all probability, worth less than that amount, and which, at all events, bore a very small proportion to the whole property belonging to Mr. Brooke, and mortgaged by the deed of the 20th May 1873. Under these circumstances, the bond in question was registered at Patna. Now, the first question which arises in this appeal is, whether it was sufficiently registered with reference to the provisions of s. 28 of Act VIII of 1871, which contained the registration law in force at the time when the bond was executed. That section provides that “every document mentioned in s. 18, clauses (1), (2), (3), and (4), and s. 17, clauses (1), (2), (3), and (4), shall be presented for registration in the office of a Sub-Registrar, within whose Sub-District the whole or some portion of the property to which such document relates is situate.” The document of the 20th May 1873 comes under cl. (2) of s. 17, which makes compulsory the registration of “other instruments (not being wills) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs. 100 or upwards, to or in immoveable property.” Now, here we have an instrument purporting to create a vested interest in immoveable property of greater value than Rs. 100, and therefore it required registration in the place referred to in s. 28, namely, the office of a Sub-Registrar, within whose Sub-District “the whole or some portion of the property to which” it related was situate. Now, since Mr. Brooke had about Rs. 500 worth of land at Patna, which was hypothecated in the bond, “some portion” of the property to which the bond related was undoubtedly situate in the place of registration. And, therefore, if the words of s. 28 are to be taken in their literal sense, the bond must be regarded as having been properly registered. But it seems to me that to take them literally would be to defeat the real object which the Legislature had in view when it enacted the section. That object was, that the registration of a document should have some reference to the locality of the property to which the document [594] relates. The section first speaks of the sub-district in which the *whole* of the property is situate. But in a case like the present in which there is a large and valuable property in one sub-district, and another small piece of land situate at a distance, it seems to me that to allow registration of a document affecting both properties in the place where the smaller and less valuable is situate, would be inconsistent with the implied intention of the Legislature, that registration should be made with reference to the locality of the property.

What, then, is the rule to be followed in cases where a literal interpretation of the terms of an enactment would defeat the intention with which the enactment was made? Mr. Wilberforce in his book on *Statute Law* (1881) has

expressed the rule in clear language, and has collected the cases by which it has been established. He says (p. 131):—"It has often been laid down that while words are to be understood in their plain and ordinary sense, they must not be read so literally as to defeat the object of an enactment. Acting on this principle, the Courts have both in ancient and modern times given some words a wider meaning than they usually bear, and have restricted or modified the meaning of others." He cites cases which establish this principle, and in some of which the literal meaning has been enlarged, while in others it has been restricted by the Courts. In the case before us we must first consider whether the intention of the Legislature cannot be effected without either enlarging or restricting the meaning of the terms which it has used. For the reasons which I have already given, I do not think that this is possible.

If the words in s. 28 of Act VIII of 1871—"some portion of the property"—are construed to mean some *substantial* portion, then the obvious intention of the Legislature is effected, and registration is kept to the place where a man's property is known to be situate. Now, the property of Mr. Brooke at Patna cannot be regarded as a substantial portion of the whole property hypothecated, and therefore I am of opinion that the deed must be considered invalid. Cases were cited to show that an insufficient registration may not absolutely invalidate a deed with reference to s. 49. It is probable that in those cases, the question of registration [595] arose between the parties to the deed, and if the operation of s. 49 is confined to the case of persons subsequently taking the property, then the decisions referred to are not irreconcilable with the views which I am now expressing. Then comes the question whether the purchaser bought after the mortgage and with notice of it, in which case he would have no *locus standi*. The only evidence as to notice is in one of the defendant's answers to interrogatories, in which he stated that he was aware of the mortgage and believed that it had been satisfied. This statement is inconsistent with the knowledge of an *existing* encumbrance, and therefore is no proof of the purchase having been made after notice of a prior mortgage.

Mahmood, J.—I concur in the judgment delivered by the learned Chief Justice, but I wish shortly to express my own views as to the validity of the document upon which the suit is based. The construction placed upon the provisions of s. 28 of Act VIII of 1871 by the learned Chief Justice is, in my opinion, the only construction possible, and if the registration of the deed with which we are now concerned was not in accordance with those provisions so construed, it is undoubtedly invalid under the Registration Law. Much of the argument of the learned pleader for the respondents has turned on the analogy of the interpretation of s. 85 of the same Act, and also on two cases decided by their Lordships of the Privy Council—*Sah Mukhun Lai Panday v. Sah Kundan Lal* 15 B. L. R., 228; 24 W. R. 75; L. R., 2 Ind. Ap. 210, and *Muhammad Ewaz v. Birj Lal*, I. L. R., 1 All., 465; L. R., 4 Ind. Ap., 166. I have carefully examined these cases, and some other authorities also, one being a decision of the Calcutta High Court, in which BROUGHTON, J., gave a judgment which has been followed by this Court. I think that in this case we must distinguish between those matters which are of the essence of the Registration Law and those which are merely subsidiary to the object which the Legislature in making that law had in view. And I take it as an almost universal rule of construction that the words of a statute must be understood in a sense calculated to promote the object with which it was enacted. I interpret the word "shall" in s. 28 of Act VIII of 1871 to imply an absolutely imperative command addressed by [596] the Legislature to all persons presenting documents for registration. It is obvious that the insignificant piece of land at

Patna was not "some portion" of the hypothecated property, using that expression in the sense in which I believe it to have been used in s. 28. Under that section, therefore, an irregularity was committed, and the question then arises whether or not that irregularity is condoned by any provision of Act VIII of 1871, or any other Act, or by any principles which ought to be applied in the construction of statutes. The learned pleader for the respondents relied on s. 85 of Act VIII of 1871 :—"Nothing done in good faith pursuant to this Act or any Act hereby repealed by any registering officer, shall be deemed invalid merely by reason of any defect in his appointment or procedure." Now, the imperative direction of s. 28 is addressed not to the registering officer, but to the person presenting a document to that officer for registration. Section 85, on the other hand, is not addressed to the parties, but relates to the registering officer. I do not think, therefore, that s. 85 can help the respondents' case, especially as that section refers only to defects in the appointment or procedure of the registering officer. Here there is no question of defective appointment, nor, looking to the sections of the Act which appear under the heading of procedure, do I think that any defect of procedure under these sections can be shown. The only remaining question is that of notice to *bona fide* transferees for value, which is one of the main objects of the Registration Law. The registration being vitiated by irregularity, as the learned Chief Justice has shown, I am further of opinion that no other notice to the purchaser has been sufficiently proved. I concur, therefore, in decreeing the appeal with costs.

Appeal allowed.

NOTES.

[This case was *dissented from* in (1886) 9 All., 46.]

[7 All. 596]

The 15th January, 1885.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Bradley.....Defendant
versus

Atkinson.....Plaintiff.*

*Landlord and tenant—Notice to quit—Act IV of 1882
(Transfer of Property Act), ss. 106, 111.*

On the 11th December 1882, A, who had, on the 1st July 1882, let rooms in a dwelling-house to B, sent a letter to the tenant in the following terms :—"If the rooms [597] you occupy in the house No. 5, Thornhill Road, are not vacated within a month from this date, I will file a suit against you for ejectment, as well as for recovery of rent due at the enhanced rate." On the 1st February 1883, the lessor instituted a suit against the tenant for ejectment, with reference to the above letter.

Held by OLDFIELD, J., (MAHMOOD, J., dissenting) that, with reference to the terms of s. 106 of the Transfer of Property Act, the letter was not such a notice to quit as the law required, inasmuch as the notice did not expire with the end of a month of the tenancy ; and that this defect was not cured by the circumstance that the lessor waited until the end of the month to enforce his right to eject by suit.

* Second Appeal No. 8 of 1884, from a decree of F. S. Bullock, Esq., Officiating District Judge of Allahabad, dated the 2nd October 1883, affirming a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Allahabad, dated the 18th June 1883.

Held by MAHMOOD, J., (OLDFIELD, J., dissenting) that the letter dated the 11th December 1882 was a valid notice to quit under ss. 106 and 111 of the Transfer of Property Act, and sufficient to determine the tenancy, inasmuch as it gave the tenant more than fifteen days' notice, and its terms were such that he could with perfect safety have acted upon it by quitting the premises at the proper time, namely, by the end of the month, which he must be presumed to have known was the right time to leave, without any risk of incurring liability to payment of further rent, the landlord having clearly indicated his intention to terminate the tenancy, and the notice being binding upon him; that the additional time given by the notice must be taken to have been given for the convenience of the tenant, and not with the object of continuing the tenancy; and that the suit for ejectment, not having been brought till long afterwards, was maintainable. *Doe v. Smith*, 5 Ad. & E., 353; *Ahearn v. Bellman*, L. R., 4 Exch. Div., 201, *Nocoordass Mullick v. Jewraj Baboo*, 12 B. L. R., 263, and *Jagut Chander Roy v. Rup Chand Chango*, I. L. R., 9 Cal., 48, referred to.

Also *per* MAHMOOD, J.—The words “fifteen days” in s. 106 of the Transfer of Property Act imply a fixation of the shortest period of notice allowed by the section; and the term “expiring” means that the terms of the notice must be such as to make it capable of expiring according to law at the right time, so as to render it safe for the tenant to quit coincidentally with the end of a month of the tenancy, without incurring any liability to payment of rent for any subsequent period.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of OLDFIELD, J.

Mr. C. H. Hill, for the Appellant.

The Junior Government Pleader (Babu Dwarka Nath Banarji) for the Respondent.

Oldfield, J.—This is a suit to eject the defendant-appellant from premises let to him by the plaintiff, and to recover rent. The tenancy commenced on the 1st July 1882. For the purposes of this appeal, the only facts necessary to state are, that on the 11th December 1882, the plaintiff sent a letter to the defendant, which was in effect, a notice to quit. He wrote that “If the rooms you occupy in the house No 5, Thornhill Road, are not vacated [598] within a month from this date, I will file a suit against you for ejectment, as well as for recovery of rent due at the enhanced rate.”

This was a notice to quit expiring on the 10th January 1883, and the present suit, which was instituted on the 1st February 1883, has been brought with reference to the above notice.

The Courts below have decreed the claim for ejectment and for a portion of the rent claimed.

This appeal on behalf of the defendant refers only to the decree for ejectment, which it is contended could not be made, there having been no valid notice to quit or termination of tenancy.

The law which governs contracts of this kind is s. 106 of the Transfer of Property Act:—“In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee by fifteen days' notice expiring with the end of a month of the tenancy.”

The lease we are dealing with comes under the last part of the section, and is a lease from month to month, and in the absence of a contract or local law or

usage to the contrary, is terminable by the lessor or lessee by fifteen days' notice expiring with the end of a month of the tenancy.

The notice of the defendant does not fulfil the requirements of the law, as it did not require the tenant to quit at the proper time; or, in the language of the Act, the notice did not expire with the end of a month of the tenancy. The tenancy commenced on the first of the month, and the end of a month of the tenancy was the last day of a month on which the notice should have expired, whereas it expired on the 10th of the month.

This notice therefore was not such as the law requires, and had not the effect of terminating the tenancy on the 10th January, the day on which it expired; and it does not help the plaintiff that he waited until the end of the month to enforce his right to eject by [599] suit. He cannot in this way cure the defect in the notice. The notice was ineffectual to terminate the tenancy on the day on which it expired, and is not good for the purpose of terminating it on a subsequent date to which the notice had no relation.

The Judge admits that "the law in England is, that the validity of a notice is supported by its being for a period which does not expire with the tenancy;" but adds that he knows of no such law in this country, and that by the custom in this country the only notice recognized is a month's notice without regard to the period of tenancy.

The Judge appears to have overlooked the provisions of s. 106 of the Transfer of Property Act, which is the law on the subject; and there is no evidence on the record by which such a custom as he refers to is established which can override the law.

The appeal is allowed, and I would modify the decrees of the Courts below by disallowing the claim for ejectment. The appellant will have his costs in all Courts.

Mahmood, J.—The learned counsel for the appellant has limited his argument to the question of the validity or otherwise of the notice to quit, dated the 11th December 1882, and I confine my judgment to the same point. The sole question therefore is, whether or not that notice was sufficient in law to determine the tenancy, and to enable the plaintiff to maintain a suit for the ejectment of the defendant. Mr. *Hill* referred to ss. 106 and 111 of the Transfer of Property Act, the former of which runs thus:—"In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable on the part of either lessor or lessee by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable on the part of either lessor or lessee by fifteen days' notice expiring with the end of a month of the tenancy." The last clause obviously applies to the present case, which is one of a lease for purposes other than those mentioned in the first clause, and therefore, in the absence of a contract or local law or usage to the contrary, we must take the lease to have [600] been a lease from month to month, and subject to the provisions contained in the second part of the section which I have just read. Then s. 111 shows how a lease of immoveable property determines, and cl. (h) gives the following instance:—"On the expiration of a notice to determine the lease, or to quit, or of intention to quit the property leased, duly given by one party to the other." I here lay stress upon the word "*duly*," and the whole question before us is, whether the notice to quit, dated the 11th December 1882, was duly given in accordance with the requirements of s. 106.

Before explaining the construction which I place upon that section, I will notice Mr. *Hill's* argument relating to the English law on this subject. To me it seems that even under the English law (and I say this with regret, because my brother *OLDFIELD* differs with me) this notice would be sufficient to determine the lease. In the first place, what is precisely the reason why notice should be necessary before a lease can be ended? Mr. *Hill* argued very soundly that the relation of landlord and tenant, being the result of a deliberate contract, is subject to the general rule of jurisprudence that no contract can be rescinded except by the mutual consent of the parties to it, or some other rule to which the law has given similar effect. Now, in regard to the contract of a lease between landlord and tenant, the law says that the relation between them may be terminated at the choice of either, subject to certain specified conditions. Notice is absolutely necessary in a case such as this, and that notice, in order to be effectual, must fulfil the requirements of the law. Now, the object of giving tenants notice to quit is, that "as the tenant is to act upon the notice when he receives it, it should be such a notice as he may act upon *safely*, and therefore it must be one which is binding upon all parties concerned at the time it is given, and needs no recognition by any one of them subsequently.....No particular form of the notice is necessary, but there must be a *reasonable certainty* in the description of the premises, and in the statement of *the time* when the tenant must quit." (Parsons *On Contracts*, Vol. I, p. 514). What this means is, that the terms of the notice must make the matter so clear as to enable the tenant to take action on it *safely*, in the sense of leaving the premises at the proper time without any further liability for rent, because, as Story in his work [601] *On Contract* says, in s 1257, "if the lodgings be kept beyond the term for which they are let, a new term commences, for which the tenant is bound to pay full rent, whether he occupy them during the whole term or not." And because the main object of the notice is to save the tenant from running a risk of incurring such liability, the same learned author in s. 1260 of his work goes on to say :—"The notice must be explicit and positive. It must not give the tenant an option of leaving the premises or entering into a new contract. But it need not be worded with the accuracy of a plea;" and to this observation, relying upon certain cases, he appends a note to the effect that "the notice to be served by the landlord upon the tenant-at-will to determine his tenancy need not specify the time within which the premises must be surrendered. If a time is specified in the notice served upon the tenant, which elapses within less than one month from the time of service of the notice, it will not vitiate the notice. It is sufficient if the tenant has thirty days' notice in writing of the intention of the landlord to terminate the tenancy." Of course this passage is not fully applicable to the present case, because, by reason of the statutory provisions contained in s. 106 of the Transfer of Property Act, the lease here must "be deemed to be a lease from month to month, terminable on the part of either lessor or lessee by fifteen days' notice expiring with the end of a month of the tenancy." The principle, however, which regulates the object of the notice is applicable, because even a tenant from year to year,—to use the words of Mr. Woodfall (p. 204),—"is substantially a tenant at will; except that such will cannot be determined by either party without due notice to quit," and the "notice to quit must be clear and certain, so as to bind the party who gives it, and to enable the party to whom it is given to act upon it at the time when he ought to receive it." (p. 318.) Thus the *object* of the notice to quit, whenever it is required by law to terminate the tenancy, is identical, whether the tenancy be from year to year, or, as in this case, from month to month. In both cases the turning point as to the validity of the notice is, whether it was sufficiently clear to

make it safe for the tenant to quit at the proper time without incurring the risk of liability to rent after he has quitted the premises. I am not aware of any rule of law [602] which requires the landlord, any more than the tenant, to inform the other of the specific time when such notice would legally terminate the tenancy. Both are by a necessary legal presumption supposed to know the law, and it is obvious that, both being contracting parties to the lease, they must be taken to be aware of the terms of the contract. The principle of the rule is the same as that in the case of *Right v. Darby*, 1 T. R., 162, cited in Addison *On Contracts* (p. 353), where it is laid down that "when a lease is determinable on a certain event, or at a particular period, no notice to quit is necessary, because both parties are equally apprised of the determination of the term." And the same principle prevailed in another case—*Doe v. Smith*, 5 Ad. & E., 353,—cited by the same author (p. 358), where a notice was given to quit "at the expiration of half a year from the delivery of this notice, or at such other time as your present year's holding shall expire after the expiration of half a year from the delivery of this notice," and the notice was given towards the close of the current year. It was held that the word "present," which rendered the notice inaccurate and unmeaning, might be rejected, as there was no danger of the tenant having been misled by it.

The other English authorities, to be found in Addison *On Contracts* and in Woodfall *On Landlord and Tenant*, go to show that it was formerly held that a notice to quit, which was accompanied by an intimation giving an option to the tenant to continue the tenancy on other terms, was bad in law; but even in the former treatise it is laid down on the authority of *Doe v. Wrightman*, 4 Esp., 6, that when the notice is given in the alternative, in order to hit one of two periods on which the term is known to end, such notice is a perfectly good notice, and possesses all the certainty that is reasonably requisite for the information of the tenant. But the latest case is *Ahearn v. Bellman*, L. R., 4 Exch. Div., 201, decided by the Court of Appeal, in which the judgment of BRETT, L. J., may possibly go to a certain extent to support the reasoning upon which Mr. *Hill's* argument is based, but the *ratio decidendi* adopted by the majority of the Court—BRAMWELL and COTTON, L. JJ.—certainly does not favour the contention pressed upon us on behalf of the appellant. The majority of the Court in that case laid down the [603] principle that a notice to quit which is in itself sufficient to enable the tenant to quit at the proper time without any chance of being liable to payment of any rent for any period subsequent to his quitting the premises, is valid in law to terminate the tenancy. I am of opinion that the same principle applies to this case. Our statute law says that a tenancy, such as the one in this case, could be terminated by giving fifteen days' notice to the landlord—the "notice expiring with the end of a month of the tenancy." Here the notice is dated the 11th December 1882, so that the tenant had more than fifteen days' notice, and its terms were such that he could have perfectly safely acted upon it by quitting the premises at the proper time, namely, by the end of the month, which he must be presumed to have known was the right time to leave without any risk of incurring liability to payment of further rent—the landlord having clearly indicated his intention to terminate the tenancy, and the notice being perfectly binding upon him. It is true that in this case the notice gave the tenant longer time than that required by the law, but such additional time must be taken to have been given for the convenience of the tenant, and not with the object of continuing the tenancy. What the notice meant was:—"I no longer want you as my tenant; the sooner you leave the better, but I give you a month's time to vacate the premises, and if you do not do so, I will sue you

for ejectionment, but will not do so before the end of the time which I am giving." I fail to see how the notice could have misled the tenant into thinking that any choice was left to him to continue the tenancy, nor am I able to see any reason why a notice to quit, which showed indulgence to the tenant to have longer time than that absolutely required by the law, should vitiate its legal effect. There is nothing in the notice to suggest that the landlord intended to claim rent for any period subsequent to the end of December, and I take the period of a month named therein simply to mean that the landlord would not put the tenant into Court before the lapse of that time. Indeed, the plea urged on behalf of the defendant is at its best based upon an extremely technical ground which I, speaking for myself, would never allow unless it is founded upon substantial grounds of justice, equity, and good conscience, which must guide the [604] administration of the rules of law in our Courts. But to what does the whole argument of the appellant amount? Mr. Hill conceded that if the notice to quit had simply required the tenant to quit at the end of the month, it would have been valid, and the question therefore is, whether a notice, which merely desires the tenant to quit within a month (which included the proper period), or accept the alternative of a suit for ejectionment, is invalid. I must here point out that the notice did not say that the tenant was to quit at the end of the month, but "*Within a month.*" I have carefully considered the cases cited by Mr. Hill, but I do not think that they are on all fours with this case, because in them the notice to quit did not, as here it does, leave any choice to the tenant to leave at the proper time required by law. If this notice had in like manner peremptorily and without any alternative ordered the tenant to leave the premises at an improper period specified in the notice—say the 10th of January next—I should have agreed with Mr. Hill. But it gave a month's time enabling the tenant to leave at any time during the month in which his tenancy would legally end. I hold that it was a good notice for the purpose of determining the tenancy.

Now, in order to justify this conclusion by the terms of s. 106 of the Transfer of Property Act, I must refer to three important expressions in that section. The first of these is "*terminable*," and there can be no doubt that the lease in this case is "*terminable*," meaning by that term capable of being ended. Then the words "*fifteen days*." I take to imply a fixation of the shortest period of notice allowed by the section. Lastly, what is meant by the term "*expiring*"? I think the meaning is that the terms of the notice must be such as to make it capable of expiring according to law at the right time, so as to render it *safe* for the tenant to quit co-incidentally with the end of the month of the tenancy, without incurring any liability to payment of rent for any subsequent period. The terms of the notice in this case were undoubtedly clear enough to indicate that the defendant was no longer wanted as tenant of the premises, and the expression "*within a month from this date*" certainly cannot convey the meaning either that the landlord intended to continue the tenancy, or that the tenant was in any manner precluded from acting in [605] accordance with the behests of law by quitting the premises at the end of the month. Indeed, the notice threatened the defendant with an action for ejectionment if he did not vacate the premises "*within a month*;" and though the expression included some days of the month of January, the effect was simply to give time to the defendant to vacate the premises, and if such time exceeded the limits of the legal length of the notice, it certainly did not place the tenant at a disadvantage, nor convey any intention on the part of the landlord to give the tenant the option of continuing the tenancy after the end of December, which was the legal limit of the notice. Confining myself to the limited

scope of the case as argued before us, the test of the matter seems to be : how has the defendant Bradley been aggrieved by the terms of the notice ? Was it so ambiguous as to preclude him from quitting at the end of December, or to render him liable for payment of rent for subsequent period if he did quit the premises at that time ? I think the case of *Doe v. Smith*, 5 Ad. & E., 353, which I have already cited, was even a stronger case than the present, and I should say here, as was said there, that the notice left no danger to the tenant of being misled by its terms, so as to subject him to the liability of payment of rent if he quitted at the right time required by the law to terminate the tenancy. The law does not require one party to explain its principles to the other, and the rule as to giving notice to quit cannot be administered regardless of the reason upon which it is based.

In conclusion I wish to refer to two cases which were cited at the hearing—*Nocoordass Mullick v. Jewraj Baboo*, 12 B. L. R., 263, and *Jagut Chunder Roy v. Rup Chand Chango*, I. L. R., 9 Cal., 48. Both of these cases were decided before the Transfer of Property Act came into force, and are therefore no authorities governing this case. But if any matter of principle is to be evolved from them, both of them would go to support my view, because in the former case the terms of notice left it open to the tenant to leave the premises before or at the end of the month—the length of the notice being of course now modified by s. 106 of the Transfer of Property Act. The rule laid down in the latter case has of course been similarly modified, but if the *ratio decidendi* may be taken to lay down any [606] matter of principle applicable to this case, the tendency of the ruling is to support the view adopted by me in this case.

Under the circumstances of this case, and regarding it in the limited manner in which it has been argued before us, I am of opinion that the notice, dated the 11th December 1882, was valid under s. 106 and s. 111, cl. (h) of the Transfer of Property Act, and was therefore sufficient to determine the tenancy, and that as this suit for ejectment was not brought till long afterwards, namely, the 1st of February 1883, it was maintainable. And in order to guard myself against being misunderstood, I wish to observe that in this appeal, as it has been argued before us, we are not concerned with the question whether the plaintiff is entitled to recover any money as rent or otherwise from the defendant for any period subsequent to the end of December 1882. I may add that no case has been cited in which the notice to quit being worded as in this case, was held to be invalid in law for the purpose of terminating the tenancy.

I would dismiss the appeal with costs.

NOTES.

[See the Letters Patent appeal in this case, in (1885) 7 All., 899 *infra*, where the judgment of MAHMOOD, J., was reversed and that of OLDFIELD, J., was affirmed. And also the Notes thereto.]

[7 All. 606]
FULL BENCH.*The 21st February, 1885.*

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE
STRAIGHT, MR. JUSTICE OLDFIELD, MR. JUSTICE
BRODHURST, AND MR. JUSTICE MAHMOOD.

Jamaitunniissa.....Defendant

versus

Lutfunniissa.....Plaintiff.*

*Civil Procedure Code, ss. 540, 561, 584—Decree—Judgment—Appeal—
Objections by respondent to decree—Res judicata—Civil Procedure
Code, s. 13.*

In a suit to obtain possession of certain property, and to set aside a deed called a deed of endowment (*wakfnama*) on the ground that the defendant had fraudulently obtained its execution, the defendant pleaded (i) that the deed was a valid one, and (ii) that she was in possession of the property in satisfaction of a dower debt, and her possession could not be disturbed so long as the debt remained unsatisfied. The Court of First Instance held that the deed was invalid, but that the defendant was entitled to remain in possession of the property till her dower-debt was satisfied, and the Court passed a decree which merely dismissed the suit, without embodying the finding as to the deed. On appeal by the plaintiff to the District Judge, the defendant filed objections under s. 561† of the Civil Procedure Code in regard to the first Court's decision that the deed of endowment was invalid. The Judge dismissed [607] the plaintiff's appeal, affirming the finding as to dower, and, refusing to decide the question of the validity of the deed, as being unnecessary for disposal of the claim, disallowed the defendant's objections. The defendant appealed to the High Court.

Held by the Full Bench (OLDFIELD and MAHMOOD, JJ., dissenting) that if a decree is, upon the face of it, entirely in favour of a party to a suit, such decree being the thing which by law is made appealable, and nothing else, that party has no right of appeal therefrom. If, in the judgment of which such decree is the formal expression, findings have been recorded upon some issues against that party, and he desires to have formal effect given to them by the decree, so as to allow of his filing objections thereto under s. 561 of the Civil Procedure Code, or of appealing therefrom under s. 540, he must take steps under s. 206 to have the decree properly brought into conformity with the judgment, so that there may be matter on the face of it to show that something has been decided against him; but if he fails to take this course, the decree, though in general terms, will stand good as finally deciding

* Second Appeal No. 1186 of 1883, from a decree of C. J. Daniell, Esq., District Judge of Moradabad, dated the 9th May 1883, affirming a decree of Maulvi Nasir Ali Khan, Sub-ordinate Judge of Moradabad, dated the 10th March 1883.

†[Sec. 561 :—Any respondent, though he may not have appealed against any part of the decree, may upon the hearing not only support the decree on

Upon hearing, respondent may object to decree as if he had preferred separate appeal.

any of the grounds decided against him in the Court below, but take any objection to the decree which he could have taken by way of appeal, provided he has filed a notice of such objection not less than seven days before the date fixed for the hearing of the appeal.

Form of notice, and provisions applicable thereto.

Such objection shall be in the form of a memorandum, and the provisions of Section 541, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.]

the issues raised by the pleadings upon which the ultimate determination of the cause and the decree itself rested.

The findings in a judgment upon matters which subsequently turn out to be immaterial to the grounds upon which a suit is finally disposed of, as to the plaintiff's right to any portion of the relief sought by him as declared by the decree, amount to no more than *obiter dicta*, and do not constitute a final decision of the kind contemplated by s. 13 of the Civil Procedure Code.

Held also that, in the present case, the Judge was right in holding that the question as to the validity or otherwise of the deed of endowment was wholly immaterial.

The judgment of STRAIGHT, J., in *Lachman Singh v. Mohan*, I. L. R., 2 All., 497, approved and followed.

Per OLDFIELD, J., *contra*, that the decree, to agree with the judgment and fulfil the requirements of s. 206 of the Civil Procedure Code, should contain the material points for determination arising out of the claim and material for the decision thereon; that if this has not been done, the defect is a good ground of appeal, notwithstanding that the decree, on its face, may be altogether in favour of the appellant, and notwithstanding that he may not have applied for amendment of the decree under s. 206, or for review of judgment; and that, in the present case, the defect in the decree would afford a good ground of appeal.

Per MAHMOOD, J., that inasmuch as the provisions of s. 13 of the Civil Procedure Code relate as well as to the trial of issues as to the trial of suits, and in the present case the validity or otherwise of the deed was a matter directly and substantially in issue between the parties, and was adjudicated upon, the finding of the first Court upon that issue was not a mere *obiter dictum*, but would be binding upon the defendant as *res judicata* notwithstanding the fact that the suit against her was dismissed on the ground that she held possession of the property in lieu of dower; that whatever has the force of *res judicata* is necessarily appealable, that the word "from" as used in s. 540 or s. 584, and the expression "objection to the decree" in s. 561, refer not only to matters existing upon the face of the decree, but also to those which should have existed but do not exist there; and that the defendant in the present case was aggrieved or injured by the omission in the decree of the first Court, and was therefore [608] entitled to file objections to it, and, for the same reason, to appeal to the High Court from the decree of the Lower Appellate Court.

Also per MAHMOOD, J., that it was doubtful whether the reliefs contemplated by ss. 206 and 623 were open to the defendant; but that, even conceding that she ought to have sought her remedy under either of those sections, her neglect to do so did not make her incapable of obtaining the same result by the exercise of her right of appeal.

Anusuyibai v. Sakharam Pandurang, I.L.R., 7 Bom., 484; *Man Singh v. Narayan Das*, I. L. R., 1 All., 480; *Mohan Lal v. Ram Dial*, I. L. R., 2 All., 843; *Niamat Khan v. Phadu Buldra*, I. L. R., 6 Cal., 319; *Pan Kooer v. Bhagwant Kooer*, N.-W. P. H. C. Rep., 1874, p. 19., referred to.

THIS was a reference to the Full Bench by OLDFIELD and MAHMOOD, JJ. The facts of the case and the points of law referred are stated in the order of reference, which was as follows:—

"This suit has been brought to obtain possession of certain property by right of inheritance from one Sikandar Ali Shah, and to set aside a deed, called a deed of endowment (*wakfnama*), which it is alleged the defendant fraudulently induced the said Sikandar Ali Shah to execute.

The defendant-appellant in this Court, Jamaitunnissa, amongst other pleas, contended in the Court of First Instance that the deed was a valid one, and that she was in possession of the property in satisfaction of a dower-debt, and her possession could not be disturbed so long as the dower-debt remained unsatisfied.

The Court of First Instance held that there was no valid deed of endowment which could interfere with the plaintiff's succession by inheritance, but

that the defendant-appellant was entitled to remain in possession of the property till her dower-debt was satisfied, and the Court dismissed the suit, the decree being merely a decree dismissing the suit, without embodying the finding as to the deed of endowment. The plaintiff instituted an appeal in the Judge's Court, in respect of the finding in regard to dower, and she took other objections to the judgment and decrees; the defendant (appellant in this Court) filed objections under s. 561, Code of Civil Procedure, in regard to the Subordinate Judge's decision that the deed of endowment was invalid.

The Judge dismissed the plaintiff's appeal, affirming the finding as to dower, and refused to decide the question of the validity of [609] the deed of endowment, as he considered it unnecessary for disposal of the claim. •

The decree dismissed the appeal, and disallowed the defendant's objections.

The defendant Jamaitunnissa has preferred a second appeal to this Court, and a preliminary objection has been urged by the respondent that the appeal is not maintainable.

It is contended that the appeal which is allowed by s. 584, Civil Procedure Code, lies from the decrees of the subordinate Courts, not from the judgment; and that as the decree of the Judge affirmed the decree of the first Court which dismissed the plaintiff's suit, no ground of appeal on which the defendant can maintain an appeal from that decree is open to her; and, in the same way, the defendant's objections under s. 561, Code of Civil Procedure, which she filed in the Judge's Court to the finding of the Court of First Instance, were not maintainable under that section, since objections can only be taken to the decree or any part of it, and not to the judgment; and the decree of the Court of First Instance only dismissed the plaintiff's suit, and did not embody the finding of the question of the deed, and there was therefore nothing in it to which the objections were applicable.

The respondent's counsel relied on the Full Bench decision of this Court in *Pan Koor v. Bhugwant Koor*, N.-W. P. H. C. Rep., 1874, p. 19.

There is however, a more recent decision of this Court—*Lachman Singh v. Mohan*, I. L. R., 2 All., 497, which appears in some degree to modify the view of the law taken in the former case, and we think it desirable to refer the questions that have arisen in this case to the Full Bench.

"1.—Whether the appeal to this Court on the part of the defendant Jamaitunnissa is maintainable?"

"2.—Whether her objections under s. 561 in the Judge's Court were maintainable?"

Mr. A. Strachey, Munshi Hanuman Prasad, and Shah Asad Ali, for the Appellant.

Mr. T. Conlan and Babu Ratan Chand, for the Respondent.

[610] Petheram, C.J., and Straight and Brodhurst, JJ.—The two questions submitted to us by this reference in substance come to this:—Can a defendant file objections under s. 561 of the Code to, or appeal under s. 540 from, a decree, which upon the face of it dismisses the plaintiff's claim in general terms, and does not record any adverse finding or declaration in respect of such defendant? It seems to us that the decision of these points must turn upon the language of the two sections above mentioned, and with regard to the latter of them we adopt and approve the judgment of STRAIGHT, J., in *Lachman Singh v. Mohan*, I. L. R., 2 All., 497, in which he differed from the majority of this Court as then constituted. It may further be observed that the reasoning therein is applicable, *mutatis mutandis*, to s. 561, which confines the objections which may be taken by a respondent, to objections to the decree.

We may add, as supporting the view we take, that there are two rulings of the Calcutta Court, one of a Division, the other of a Full Bench, to be found in the Indian Law Reports, 7, Calcutta Series, pp. 206 and 322. Shortly to summarise the opinion we hold, it is this:—If a decree is, upon the face of it, entirely in favour of a party to a suit, such decree being the thing which by law is made appealable and nothing else, that party has no right of appeal therefrom. It may be that in the judgment, of which such decree is the formal expression, findings have been recorded upon some issues against that party; but if this be so, and he desires to have formal effect given to them by the decree, so as to allow of his filing objections thereto under s. 561 of the Code, or of appealing therefrom under s. 540, he must take steps under s. 206 to have the decree properly brought into conformity with the judgment, so that there may be matter on the face of it to show that something has been decided against him. In other words, he must obtain insertion in the decree itself, which alone contains the final determination of the cause, and not the judgment, such portions of the Court's findings as he considers himself injuriously affected by, so as to place himself in the position which the statute recognizes as giving him a right to impeach the decree. If he fails to follow this course, the decree, though in general terms, will stand good as finally deciding the [611] issues raised by the pleadings upon which the ultimate determination of the cause and the decree itself actually rested. More than these the decree cannot cover, and we are clearly of opinion that the findings in a judgment upon matters which subsequently turn out to be immaterial to the grounds upon which a suit is finally disposed of as to the plaintiff's right to any portion of the relief sought by him as declared by the decree, amount to no more than *obiter dicta*, and do not constitute a final decision of the kind contemplated by s. 13 of the Code. For, if in a second proceeding between the same parties, the question of *res judicata* is raised with regard to them, it is the former decree explained by the light of the pleadings, in the sense we have indicated as to what was then directly and substantially in issue in such first suit, which must be looked at in order to determine whether the plea in bar is a good or a bad one. In the case out of which this reference has arisen, the question as to the validity or otherwise of the so-called *wakfnama* was wholly immaterial, and the Judge in his judgment on the appeal has rightly so held.

The plaintiff claimed possession of the property by ejectment of the defendant, and the first Court held that the defendant was in possession and entitled to it in lieu of the dower-debt to her. Upon this finding alone, there was an end of the plaintiff's case, as the quality of the defendant's estate did not properly come into question, the moment it appeared she was at the time of the suit entitled to possession. We find that the decree before us is, on the face of it, entirely in favour of the defendant, and the proper presumption is that it has been correctly prepared in advertence to the judgment. The mode in which this presumption could have been rebutted and the decree set right is provided in s. 206 of the Code, and we do not think that any other mode than that directly created by statute for bringing the decree into conformity with the judgment exists, and that until it appears upon the face of the decree that something has been decreed adversely to the defendant, no right of appeal arises, because there is nothing in the decree itself for him to appeal against. Our reply to the two questions of this reference must therefore be in the negative.

Oldfield, J.—I have already expressed my opinion on the question raised by this reference in the case of *Lachman Singh v. [612] Mohan*, I. L. R., 2 All., 497. Section 540 gives a right of appeal from the decrees, or from any part of the decrees, o. the Courts exercising original jurisdiction to the Courts authorized

to hear appeals from the decisions of those Courts. By s. 206 the decree must agree with the judgment, and it must specify clearly the particulars of the claim, and the relief granted, or other determination of the suit. The judgment must contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision. The decree, therefore, to agree with the judgment and fulfil the requirements of s. 206, should contain the material points for determination arising out of the claim, and material for the decision thereon, and if any issue material for the decision of the suit has been decided, the determination of it should be contained in the decree; and if this has not been done, the defect is a good ground of appeal, notwithstanding that the decree, on its face, may be altogether in favour of the appellant. For instance, it might happen that a plaintiff's suit has been dismissed, but a material issue has been decided in his favour and against the defendant, the decree omitting mention of it, and merely containing a dismissal of the suit. Here I think the defect in the decree would afford a good ground for appeal. It has been said that the appellant's remedy in such a case is, under s. 206, to have the decree corrected or by review of judgment, and, when the decree has been amended, to institute an appeal; but it is possible that those sections would not afford relief, or that relief would be refused, and, if an appeal is denied him, he might be without any remedy at all.

Besides, the law expressly gives a right of appeal from decrees, and this right cannot be affected by the circumstances that the appellant might have had recourse to other remedies; and it seems to me a round-about and unsatisfactory mode of giving redress, to direct a party to get the decree put into proper form and then institute an appeal from it, when he might obtain redress direct by the institution of the appeal. I would reply to the references in the affirmative.

Mahmood, J.—I regret that in this case I am unable to concur in the conclusion at which the learned Chief Justice and the majority of the Court have arrived. I agree in the conclusion arrived at by my learned brother **OLDFIELD**, though upon grounds somewhat different from those which he has stated. The facts of the case are sufficiently set out in the order of reference, and I need not repeat them. The first question before us relates to appeals from decrees, and the second to objections to decrees under s. 561 of the Civil Procedure Code, and our answers to both questions must depend upon the same principle. My reason for saying this is, that both in s. 540, relating to first appeals, and in s. 561, relating to objections made by a respondent by way of cross-appeal, and in s. 584, relating to second appeals, the word "decrees" is used, and whatever meaning we attach to the word in one of these sections, we must attach to it in all three. Reading the interpretation-clause of the Code, I think it impossible to hold that "decree" means the same thing as "judgment," because two different definitions are given of the two words, and these definitions are so clear that it is impossible to confound them. Bearing this in mind, it is important, applying a canon of construction which is followed in England, to consider the phraseology of the corresponding sections in the old Civil Procedure Code. In that Code, the section relating to first appeals corresponding to s. 540 of the present Code was s. 332, in which the word "decrees" was employed, but in s. 372 corresponding to s. 584 as to second appeals, the expression used was not "decree," but "decision." The same expression was also used in s. 348 of the old Code corresponding to s. 561. In the present Code, the word "decree" is uniformly used. I will not commit myself to the opinion that the Legislature necessarily meant different things by the words "decision"

and "decree," but, if the change of phraseology implies any change in the law at all, it must be that appeals are now allowed from "decrees" only. This view is supported by the circumstance that in s. 594 the term "decree" is again defined for the purpose of appeals to Her Majesty in Council. The section says:—"In this chapter, unless there be something repugnant in the subject or context, the expression "decree" includes also judgment and order." This appears to me to show that the term "decree" as used in other parts of the Code must not be interpreted in such a wide sense, and it follows that neither [614] appeals nor objections under s. 561, by way of cross-appeals, can lie otherwise than from decrees.

The determination of the questions now before us seems to depend therefore on two considerations—*first*, whether the *finding* or part of decree in respect of which the present appeal has been presented, is such a finding as could operate as *res judicata*; and *secondly*, whether, if so, it does not follow that such finding or part of decree must be susceptible of appeal. I hold, following the *dictum* of Savigny quoted by WEST, J., in *Anusuyabai v. Sakharani Pandurang*, 1 L. R., 7 Bom., 464, that the one question necessarily depends upon the other, and that "everything that should have the authority of *res judicata* is, and ought to be, subject to appeal, and reciprocally an appeal is not admissible on any point not having the authority of *res judicata*."—Sav. Syst., s. 293. I understand this to be sound jurisprudence and indeed common sense, and I have no hesitation in saying that any system of procedure must be defective which is inconsistent with it. I proceed therefore to consider whether the finding of the Court of First Instance, that the *wakfnama* was null and void, is such as would be binding upon the parties so as to preclude the appellant from showing in any subsequent litigation that the deed was valid.

In order to decide this question, I wish first to refer to the cases which were cited during the argument, and in the first place to the case of *Man Singh v. Narayan Das*, 1 L. R., 1 All., 480, in which a Court of competent jurisdiction, having tried and determined an issue arising in a suit on which the suit might have been disposed of, proceeded to try and determine another issue which also arose out of the pleadings, but the determination of which in that suit was not required for its disposal. It was held that such Court was not bound under the circumstances to refrain from trying and determining such last-mentioned issue, and that the trial and determination of it could not be treated as a nullity, and the issue could not again be tried and determined in another suit. Another case supporting Mr. Strachey's contention is that of *Mohun Lal v. Ram Dhal*, 1 L. R., 2 All., 843, which was decided by a Full Bench of this Court, and in which it was held that an issue which had been directly [615] and substantially raised between the parties, and had been determined, could not be re-opened, whatever the formal decree might show. There are several older cases in point, but I need only refer to *Ranee Sengar v. Ranee Rugseel*, N.-W. P., S. D. A. Rep., 1853, p. 112, and *Ram Das v. Bhyroopershad*, N.-W. P., S. D. A. Rep., 1854, p. 388, in which it was held that where a usufructuary mortgagor sued the usufructuary mortgagee for recovery of possession of the mortgaged property, on the allegation that the mortgage had been liquidated by the usufruct, a finding that a certain sum still remained due, and which resulted in the dismissal of the suit, would be binding upon both parties. I should here mention a case on the other side decided by the Calcutta Court in 1862—the case of *Brijololl Upadhya v. Motee Soonderee*, W. R., Sp., 33, in which it was laid down that in a suit by a mortgagor against a mortgagee to

recover possession of property mortgaged under a *zur-i-peshgee* lease, the only question at issue being whether all the debts had been paid or whether the plaintiff could re-enter, the correctness of the account might be questioned by the defendant in any future suit. I only refer to this case incidentally, because I shall show further on why I am unable to accept the rule sanctioned by it. The latest case on the subject is *Niamut Khan v. Phadu Buldia*, I. L. R., 6 Cal., 319, in which the learned Judges of the Calcutta Court, after referring to certain rulings by the Privy Council, held that a finding of this description would amount to *res judicata* in subsequent litigation between the parties. The rulings referred to in that case make it clear to my mind that this decision would meet with the approval of their Lordships of the Privy Council, and I have therefore no doubt that, as the authorities stand, the finding of the Court of First Instance in the present case regarding the *wakfnama* is one which would operate as *res judicata*.

I wish, however, to show that the terms of the statute justify this conclusion, because some of the rulings to which I have referred are older than the existing Civil Procedure Code. Section 13 of the Code, which relates to *res judicata*, deals with two matters, *first*, the trial of suits, and *secondly*, the trial of issues. Under [616] Act VIII of 1859, the terms of the Act limited the prohibition of further trials to *suits* which had been previously tried and determined. Section 2 ran thus:—"The Civil Court shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction, in a former suit between the same parties, or between parties under whom they claim." In that section the principle of *res judicata* was embodied only to a limited extent; but, in interpreting the section, the Privy Council holding that, apart from legislative enactment, the principle of *res judicata* was an essential part of the law of procedure in every civilized country, applied that principle to the trial of issues as well as to the trial of suits. Section 13 of the present Code is founded on a long course of judicial decisions, and especially on the *dicta* of the Privy Council, and has formulated in express terms the rule, which previously was only expressed in part by legislative enactment, that the principle of *res judicata* applies both to the trial of suits and to the trial of issues. The distinction between the two things appears to me to be clear. A suit ends in a dismissal or a decree, in whole or in part. An issue ends in a *finding*; and the rule contained in s. 13 goes the length of saying that not only is a *suit* which has once been tried and determined not again maintainable, but an *issue* which has once been *directly* and *substantially* raised and decided, shall not be litigated a second time. I draw this distinction without expressing any view as to what I shall presently consider, namely, that a matter directly and substantially in issue must necessarily affect the decree in the suit in which such an issue has arisen. Now, Explanation I provides that "the matter above referred to must in the former suit have been alleged by one party, and either denied or admitted, expressly or impliedly, by the other." In the present case the plaintiff distinctly alleged that the *wakfnama* was invalid. The defendant has distinctly denied it. So there can be no doubt, with reference to Explanation I, that this was a matter directly and substantially in issue between them. In the next place, Explanation II provides that "any matter which might and ought to have been made ground of defence or attack in such former suit, shall be deemed to have been a matter directly and substantially in issue in such suit." In reference to the word "ought" I think that, the suit being for [617] ejectment, the defendant was bound not only to put forward her defence

that she was in possession of the property in virtue of her dower-debt, but also the other defence, based upon a higher title, namely, that she had received the property under a deed of gift.

I have therefore no doubt that the validity of the deed was a "matter directly and substantially in issue," and that the result of the finding upon that issue would have the effect of *res judicata* in subsequent proceedings between the same parties. Upon this point I desire to refer to the observations of WEST, J., in *Anusuyabai v. Sakharam Pandurang*, I. L. R., 7 Bom., 464, where that learned Judge, just before citing the passage from Savigny, to which I have already referred, remarked that "from a judgment against a plaintiff no adjudication in his favour can properly be derived as *res judicata*. It is not and cannot be an essential element of the jural relation on which an adverse decree rests, and no appeal lies against a more incidental decision by one who is not in any way prejudiced by the concluding decision to which the partial ones are but subsidiary." Now WEST, J., is a Judge with whom I never differ except with great diffidence, but I am obliged to say that with his judgment in that case I can only partly agree. I entirely go with him in his view that whatever has the authority of *res judicata* must be subject to appeal; but I cannot agree that in the case with which he was dealing there was no *res judicata* as to the plaintiff's ownership of the lands. I now pass to the case of *Niamat Khan v. Phadu Buldia*, I. L. R., 6 Cal., 319. I have carefully read the judgments of the learned Judges who decided that case, and I confess I am unable to reconcile them with the judgment of WEST, J., in *Anusuyabai v. Sakharam Pandurang*, I. L. R., 7 Bom., 464. What the learned Judges of the Calcutta Court held was that the finding contained in the judgment only does operate as *res judicata*, but that because the person who benefits by the decree in the suit does not take care that something should be entered in the decree which is distinctly adverse to him, he is debarred from appealing from such defective decree, and yet the finding stands conclusive against him. WEST, J., on the contrary, held that whatever had the force of *res judicata* was necessarily appealable. Numerous other rulings have [618] been cited, and among them *Pan Kooer v. Bhugwant Kooer*, N.-W.P.H. C. Rep., 1874, p. 19. What was ruled in that case was not long afterwards distinguished from cases like the present by *Ram Gholam v. Sheo Tahat*, I. L. R., 1 All., 266. In that case, the plaintiffs sued for the redemption of certain mortgaged property, and the defendants-mortgagees raised two defences to the suit; first, that the plaintiffs were not the heirs of the deceased mortgagor, and were therefore not entitled to redeem; and secondly, that, even if they had a *locus standi*, the mortgage-debt had not been satisfied. The Court of First Instance held that the plaintiffs were entitled to redeem, but dismissed the suit on the ground that the mortgage-debt had not been satisfied. It was held by this Court that the defendants were entitled to appeal, and that the case of *Pan Kooer v. Bhugwant Kooer*, N.-W.P.H.C. Rep., 1874, p. 19, was not applicable. Again, in the case of *Lachman Singh v. Mohan*, I. L. R., 2 All., 497, a defendant was allowed to appeal against a decree in the following terms:—"Ordered that the plaintiff's claim as it stands at present be dismissed." In that case, it is true that my learned brother STRAIGHT dissented from the opinion of the majority, but the decision of the Full Bench was that, under the circumstances, an appeal would lie. Another case—referred to by WEST, J., in *Anasuyabai v. Sakharam Pandurang*, I. L. R., 7 Bom., 464,—is *Balak Tewari v. Kausil Misr*, I.L.R., 4 All., 491, to which I was a party, and in which a decision was arrived at on a reasoning somewhat, though not altogether, inconsistent with my present view. In regard to that case, I will

only say that it is not quite on all fours with the present, and that I concurred in the judgment of my learned brother TYRRELL out of deference to the ruling of the Full Bench in *Pan Kooer v. Bhugwant Kooer*, N.-W. P. H. C. Rep., 1874, p. 19, and probably in ignorance of the ruling in *Ram Gholam v. Sheo Tahal*, I. L. R., 1 All., 266, and in the later case of *Lachman Singh*, I. L. R., 2 All., 497.

Having referred to these cases, I wish to illustrate how any other view of the rule of *res judicata* would materially defeat the policy of the law upon which the rule itself is based. The reason of the maxim *Nemo debet bis vexari pro eadem causa* seems to me to apply as much to the trial of issues as to the trial of suits, for in either case the harassment to litigants would be similar if matters could be re-agitated after having been once duly adjudicated upon. Such I understand to be the rule laid down in the celebrated case of the *Duchess of Kingston*, and to have been repeatedly applied by the Lords of the Privy Council to Indian cases, some of which were cited by the learned Judges of the Calcutta Court in the case of *Niamut Khan v. Phadu Buldia*, I. L. R., 6 Cal., 319, to which I have already referred, and, as I have already indicated, s. 13 of the Civil Procedure Code only reproduces the well known rule of law. I am aware that nothing which constitutes mere *obiter dictum* can bind the parties; but it seems to me to be equally certain that a finding which conclusively binds one party must necessarily bind the opposite party also, and that, but for this reciprocity, the rule of *res judicata*, far from attaining its object of putting an end to litigation, would only achieve the contrary result of increasing litigation. Now taking, *exempli gratia*, the cases of *Ram Gholam v. Sheo Tahal*, I. L. R., 1 All., 266, and *Anusuyabai v. Sakharam Pandurang*, I. L. R., 7 Bom., 464, to both of which I have already referred, I confess I am unable to conceive what advantage could have been gained by allowing the issue as to the title of the plaintiffs to be re-agitated in any subsequent litigation; indeed they could not be re-agitated, according to the rule laid down by the Lords of the Privy Council in the case of *Soorjomonee Dayee v. Suddanund Mohapatter*, 12 B. L. R., 304:—"If both parties invoked the opinion of the Court upon this question, if it was raised by the pleadings and argued, their Lordships are unable to come to the conclusion that, merely because an issue was not framed, which, strictly construed, embraced the whole of it, therefore the judgment upon it was *ultra vires*." Now, in either of the two cases which I have taken for the sake of illustration, the finding as to the substance of the mortgage would undoubtedly be binding upon the plaintiff, because it was on that ground that his suit was dismissed; nor can there be any doubt that that same finding would be binding upon the defendant. Indeed the finding itself would be unintelligible but for the finding in favour of the plaintiff's title which was made the subject of appeal in those two cases with opposite results—one Court holding that the appeal would lie and the other that it would not. To take the illustration further, I will suppose the case of a plaintiff-mortgagor suing for redemption on the ground that the usufruct of the mortgaged property had paid off the mortgage; the defendant resists the suit on the ground that Rs. 5,000 is still due on the mortgage; and the Court, having taken accounts, arrives at the conclusion that only Rs. 200 is still due, and on that ground dismisses the suit. The finding as to the balance of the account would no doubt be binding upon the plaintiff, whose suit has been dismissed upon that ground, and I confess I fail to see how it can bind the plaintiff and not the defendant; for, as I said before, the principle of reciprocity is an essential element of the rule of *res judicata*. The result of a contrary view would be that in a subsequent suit by the same plaintiff, in which he offered to redeem the mortgage on payment of the balance

found due against him in the former suit, the defendant-mortgagee might again re-agitate the issue as to the accounts, and harass the plaintiff again, thus defeating the policy of the maxim upon which the ruling of *res judicata* itself is based. There might indeed be a series of redemption suits by such a mortgagor, and in each case he might be called upon to prove that which he had already proved before; and it might be that in each case upon the same accounts the Court arrived at a different conclusion as to the balance still due on the mortgage. I cannot conceive that the rule of *res judicata* contemplates any such results—*interest reipublice ut sit finis litium*. Applying these principles to the present case, I repeat what I said before, that the adjudication as to the invalidity of the *wakfnama* would be binding upon the defendant as *res judicata* notwithstanding the fact that the suit against her was dismissed on the ground that she held possession in lieu of dower.

I now come to the direct question raised by this reference :—Is the present case an appeal from a decree? I do not understand the word “from” as used in s. 540, or s. 584, or the expression “objection to the decree” in s. 561 of the Civil Procedure Code to refer only to matters existing upon the face of the decree, and not to those which should have existed but do not exist in the decree. In my opinion, if certain prayers are made by a plaintiff or certain defences set up by a defendant in a suit, and one only of such prayers is granted by the decree, and a defence furnishing a full answer to the suit, though adjudicated upon, is not in the decree, the party objecting to such omission is entitled to say that the [621] decree is wrong, because he appeals “from” the decree. The claim in the present case (though the plaint is not as scientific as it might be) is twofold; first, that a deed of gift set up by the defendant may be declared invalid; and secondly, that the plaintiff be awarded possession of the property in suit. The decree dismissed the suit, regarding it merely as a suit for possession. But the complaint of the defendant is that it should have dismissed it absolutely on the ground that the defendant was full owner, as the deed of gift was valid; in other words, that the suit should have been dismissed *in toto* on the ground that the plaintiff's right of inheritance did not apply to the property in suit, as it did not belong to the deceased at the time of his death. This not having been done by the decree, the defendant is aggrieved or injured by the omission in the decree which, though defective, and though on the face of it dismissing the plaintiff's suit, in effect decrees her claim so far as it related to the invalidity of the *wakfnama*, and could at best be taken to dismiss the suit in the form in which the suit was brought, as was the case in *Lachman Singh v. Mohan*, 1 L R, 2 All., 497, where a right of appeal was allowed to the defendant. When the case went to the Lower Appellate Court, it might be viewed in two aspects. Section 561 of the Code gives two distinct rights to the respondent in the appeal. The first is the right of upholding the decree of the Court of First Instance on any of the grounds which that Court decided against him, and, in that case, no notice or memorandum of the kind required by the last paragraph of the section would be necessary. The second right is that of taking any objections to the decree which the respondent might have taken by way of appeal. If the Judge in this case had held that the defendant's possession was not in lieu of her dower-debt, but under the deed of gift, and had maintained the first Court's decree, then no doubt the *plaintiff* would have had a right of appeal, not only in respect of the finding of the first Court that the defendant's possession was in lieu of her dower, but also in respect of the Lower Appellate Court's finding, that it was in virtue of the deed of gift. I do not see why the right of appeal should be allowed to one party and not to the other in respect of the same matter, namely, the validity or invalidity of the *wakfnama*. I

[622] make this observation bearing fully in mind the distinction drawn by the Civil Procedure Code between "judgment" and "decree." Issues are the result of the pleadings of the parties (ss. 146 and 147, Civil Procedure Code); evidence is taken on the issues; judgment constitutes the finding upon that evidence with reference to the issues; and decree is the up-shot or the result of those findings. It is of course possible that when more than one issue arises in a suit the answer to one issue may furnish a full basis for the disposal of the *whole* suit, either by decreeing it or dismissing it. In such a case, it is perfectly conceivable that if the Court went on to record findings upon other issues not essential to the justification of the decree, such findings might be mere *obiter dicta*, not having the force of *res judicata*. From such *obiter dicta*, as I said before, no appeal could lie. But in a case like the present, where the prayer of the plaintiff not only claimed possession but also sought the cancellation of the *wakfnama*, the pleading of the parties necessarily gave rise to two issues essential for the disposal of the suit—essential in the sense of rendering the dismissal of the *whole* suit impossible without the determination either of both issues in favour of the defendant or of the issues as to the *wakfnama* in her favour. What the Court of First Instance did in this case was to decide both issues—the main issue as to the defendant's title under the *wakfnama* against her, and the minor issue as to her possession in lieu of dower in her favour. There is no doubt in my mind that neither of the findings can be regarded as mere *obiter dictum*, but because both of these were directly and substantially in issue within the meaning of s. 13 of the Civil Procedure Code, and because both were adjudicated upon, they would operate as *res judicata* in any subsequent litigation between the parties. Such being the case, the defendant, in my opinion, had the right of appeal to the Lower Appellate Court "from the decree" within the meaning of s. 540 of the Civil Procedure Code, on the ground, that the evidence produced by her entitled her to a decree throwing out the plaintiff's claim *in toto* in such a manner as to leave no room for another suit in which possession might be claimed on payment of dower in lieu of which the Court of First Instance held the defendant to be in possession. If the intention of the appeal were to obtain an addition in the [623] decree to the effect that the *wakfnama* was invalid, it is obvious that the appeal would be meaningless, because such addition would, if anything, place the defendant-appellant in a worse position than she was before under the decree of the first Court. The object of the appeal is quite the reverse. It undoubtedly aims at having an addition made in the decree to remove a defect, but the appellant's prayer is, that that addition should be to declare her title in the property to be absolute, and not merely in lieu of dower. Such a complaint can, according to my view, be made the subject of an appeal "from the decree," or of an "objection to the decree," within the meaning of ss. 540, 584 and 561 of the Civil Procedure Code respectively.

This leads me to the consideration of the argument that a full remedy was given to the defendant by s. 206 of the Code. In the first place, it appears to me to be very doubtful whether s. 206 entitles a defendant in a case such as this to have the decree so prepared as to make it more expressly adverse to him; and, in the next place, it cannot be forgotten that if the Court which passed the decree declined to amend it, such refusal could not be made the subject of appeal under s. 588 or any other part of the Code, and, in the case of *Raghunath Das v. Raj Kumar*, *Ante*, p. 276, my learned brother OLDFIELD, and I have differed even upon the question whether any order passed under s. 206 can be made the subject of revision.

The case has been ably argued by Mr. Strachey, and before concluding I wish to notice the excellent manner in which he met the objection that the

object of the defendant's present appeal and other objections under s. 561 before the Lower Appellate Court might have been achieved by her by applying for review of judgment under s. 623 of the Civil Procedure Code. I accept his argument that the word "decree" which occurs in that section would be an insuperable impediment in the appellant's way for such a remedy if the argument of the learned Counsel for the respondent is to be accepted, because the word "decree" occurs in that section, and must be interpreted in the same sense as in ss. 540, 561 and 584 of the Civil Procedure Code.

[624] Apart from this, however, I confess that I am unaware of any rule that if more than one remedy is provided by statute for any grievance or injury, either of such remedies, in the absence of express provisions to that effect, is a bar to the other. Even conceding that the defendant in this case ought to have sought her remedy under s. 206 or under s. 623, I cannot hold that her neglect to do so makes her incapable of obtaining the same result by the exercise of her right of appeal.

For these reasons, my answer to the two questions referred to the Full Bench is in the affirmative.

NOTES.

[I. BAR OF RES JUDICATA IS MUTUAL—

See (1886) 13 Cal., 356; (1892) 15 Mad., 477; (1896) 8 All., 332; (1907) 6 C.L.J., 621.

II. FINDINGS ON UNNECESSARY ISSUES—

When a decree is generally in favour of a party, though some findings in the judgment are against him, his only remedy is to apply under s. 206 of the Civil Procedure Code (1882). And when such findings are not necessary for the decision of the suit, they cannot operate as *Res judicata*:—(1893) 18 Bom., 597; (1899) 22 Mad., 364; (1895) 17 All., 174.

In (1906) 23 All., 865, the absence of relief against the person of the defendant in the decree was held to operate as *res judicata*.

See also the elaborate judgment of SUNDARA AYYAR, J., in (1913) M. W. N., 775.]

[7 All. 624]

APPELLATE CIVIL.

The 6th March, 1885.

PRESENT :

MR. JUSTICE STRAIGHT AND MR. JUSTICE BRODHURST.

Mulchand.....Defendant

versus

Bhikari Das....Plaintiff.*

Act XII of 1881 (N.-W.P. Rent Act), s. 140—Case struck off with liberty to plaintiff to bring a fresh suit—Omission to sue for part of claim in case struck off—Fresh suit for omitted claim not barred—Civil Procedure Code, s. 43—Act XII of 1881, s. 93 (h)—Village expenses—Expenses of cultivating sir-land held in partnership by plaintiff and defendant.

A recorded co-sharer of a mahal sued the lambardar for his share of the profits of the mahal for the year 1286 fash. At the time of the institution of the suit, the profits for 1287

* Second Appeal No. 514 of 1884, from a decree of T. B. Tracy, Esq., Offg. District Judge of Bareilly, dated the 31st January 1884, affirming a decree of H. Blunt, Esq., Deputy Collector of Bareilly, dated the 14th September 1883.

and 1288 fasli also were due, but no claim was then made in respect of them. The suit was struck off on account of the non-appearance of the parties, under s. 140 of Act XII of 1881 (N.-W. P. Rent Act), with leave to the plaintiff to bring a fresh suit. Subsequently the plaintiff brought a suit against the same defendant for his share of the profits of the mahal for 1287 and 1288 fasli.

Held that the suit was not barred by the provisions of s. 43 * of the Civil Procedure Code.

Held also that the Courts below had properly refused to deduct from the plaintiff's claim as "village expenses" within the meaning of s. 93 (h) of the Rent Act, certain charges on account of the expenses of cultivation of *sir*-land held in partnership by the plaintiff and the defendant.

THE plaintiff in this suit, a recorded co-sharer of a mahal, sued the defendant, the lambardar, for his share of the profits of the mahal for the fasli years 1287 and 1288. It appeared that in January 1882, the plaintiff had brought a suit against the defend-[625]ant for his share of profits for 1286 fasli, and that, at the time when that suit was instituted, the profits now claimed were due. There was in that suit no adjudication between the parties, but the case was struck off under s. 140 of Act XII of 1881 (N.-W. P. Rent Act), with leave to the plaintiff to bring a fresh suit. It was contended in this suit on behalf of the defendant that the suit was barred by the provisions of s. 43 of the Civil Procedure Code. It was urged that the plaintiff, having omitted to sue for the profits for 1287 and 1288 fasli when he filed his plaint on account of the profits for 1286 fasli, was now barred from suing in respect of 1287 and 1288 fasli.

The Court of First Instance decreed the claim, holding that the provisions of s. 43 of the Civil Procedure Code did not apply to a case in which there had been no adjudication, and in which leave had specially been granted to the plaintiff to bring a fresh suit. On appeal, the defendant contended that the Court of First Instance had erred in not applying the provisions of s. 43 of the Civil Procedure Code to the case. He further contended that the Court of First Instance ought not to have refused to deduct from the plaintiff's claim certain charges described as "*sir* expenses," i.e., the expenses of cultivation of *sir*-land held in partnership by the plaintiff and the defendant.

Upon the first point, the Lower Appellate Court observed :—"Had the claim in respect of 1286 fasli been decreed or dismissed by the Court after hearing the parties and their witnesses, the present suit would unquestionably have been barred by the operation of s. 43. But, the suit having been struck off on account of the non-appearance of the parties, it seems only reasonable that the plaintiff-respondent should be considered to be in the same position as if he had never filed the suit." In regard to the claim of the defendant to "*sir* expenses," the Court observed :—"This does not appear, properly speaking, to be an item of the village-expenses contemplated by s. 93 (h) of the Rent Act."

* [Sec. 43 :—Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action ; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

Suit to include whole claim.

Relinquishment of part of claim.

A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies ; but if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

Omission to sue for one of several remedies.

For the purpose of this section, an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action.]

In second appeal, the defendant contended again (i) that the claim was barred by the provisions of s. 43 of the Civil Procedure Code, (ii) that the Courts below had erred in disallowing the cost of cultivating the *sir*-land, and (iii) that the Lower Appellate Court had not disposed of all the pleas in appeal before it.

[626] *Munahi Kashi Prasad*, for the Appellant.

Mr. A. S. T. Reid, for the Respondent.

Straight, J.—I think the Courts below have rightly held that the suit is not barred by the provisions of s. 43 of Act XIV of 1882. It appears that the plaintiff formerly sued the defendant for his share of the profits of 1286 fasli. At the time of the institution of that suit the profits now claimed were due. This suit was struck off on account of the non-appearance of the parties, under s. 140 of Act XII of 1881, and leave was specially reserved for the plaintiff to bring a fresh suit. I do not see anything in the law to prevent the plaintiff from bringing the present suit. At any rate, before the case was struck off he could have so amended his plaint as to have included the present claim. If he could do so, *a fortiori* I do not see any reason why he should not do the same in a fresh suit. As it is, the claim for 1286 fasli is barred by limitation, and the plaintiff can now proceed with his claim in respect of 1287 and 1288 fasli.

I also concur with the Judge in that portion of his judgment in which he disposes of the plea about *sir* expenses. As to the third plea, the judgment of the Judge fully disposes of all the pleas. The appeal is dismissed with costs.

Brodhurst, J.—I concur.

Appeal dismissed.

NOTES.

[See also (1894) 17 All., 53; (1887) 10 Mad., 160 for the same position.]

[7 All. 626]

FULL BENCH.

The 7th March, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE STRAIGHT,
MR. JUSTICE OLDFIELD, MR. JUSTICE BRODHURST
AND MR. JUSTICE MAHMOOD.

Niamat Ali.....Plaintiff
versus

Asmat Bibi and another.....Defendants.*

Pre-emption—Wajib-ul-arz—"Rights and interests"—"Qimat"
—"Sale"—*Exchange*.

The *wajib-ul-arz* of a village gave a right of pre-emption by a clause providing that in case of transfer by any co-sharer of his rights and interests (*haqiqat*), his partners should have a right to purchase at the same price (*qimat*) as the vendee had given. One of the co-sharers transferred to a stranger one biswa and six dhurs of a grove or garden in exchange for another piece of land.

* Second Appeal No. 1655 of 1883, from a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Allahabad, dated the 31st August 1883, reversing a decree of Pandit Indar Narain, Munsif of Allahabad, dated the 2nd February 1883.

Held, by the Full Bench that this transaction was a transfer of *haqiqat* within the terms of the *wajib-ul-arz*.

[627] *Held*, also, that the plot of land which was given in exchange for the one biswa and 6 dhurs must be considered as a price (*qimat*), within the terms of the *wajib-ul-arz*.

Per MAHMOOD, J., that the word "*qimat*" must be interpreted in the sense given to it by the Muhammadan Law, including not only money but other kinds of property capable of being valued at a definite sum of money, and covering the consideration of "sale" as well of exchange as defined in ss. 54 and 118 of the Transfer of Property Act (IV of 1882) respectively. *Sahib Ram v. Kishen Singh*, Weekly Notes, 1882, p. 192, referred to. *Hazari Lal v. Ugrah Rai*, Weekly Notes, 1884, p. 103, dissented from.

THE plaintiff in this case sued to enforce the right of pre-emption, in respect of one biswa and six dhurs of a grove or garden consisting of three bighas and two biswas of land, which the defendant Farukh Ali had transferred to the defendant Minhajuddin in exchange for another piece of land. The suit was based on the *wajib-ul-arz* of the mahal in which the land in suit was situated, and the plaintiff claimed on the ground that he and Farukh Ali were sharers in the same thoke, and the defendant Minhajuddin was not a sharer in that thoke. The plaintiff valued the land at Rs. 3, and claimed possession on payment of that sum, or any sum which the Court might determine the value of the land to be. The defendant Minhajuddin defended the suit on the grounds, amongst others, that the provisions of the *wajib-ul-arz*, in respect of the right of pre-emption, applied only to revenue-paying interests in the mahal, and not to "an isolated piece of garden land, not assessed to Government revenue," and that, the land not having been sold, but having been exchanged, the transfer gave the plaintiff no cause of action.

The provision in the *wajib-ul-arz* relating to the right of pre-emption was as follows:—" *Ba surat intiqal haqiqat kisi patidar ki us qimat par jo shakhs ghair dawe istehqak kharidari awal shurkar karib, etc.*"

"If any sharer transfer his rights and interests (*haqiqat*), near partners, etc., have a right to purchase at the same price (*qimat*) which the stranger gives."

The Court of First Instance gave the plaintiff a decree for possession of the land in suit on payment of Rs. 13 as "compensation" to the defendant Minhajuddin within one week.

On appeal by the legal representatives of the defendant Minhajuddin, who had in the meantime died, the Lower Appellate [628] Court held that the suit was not maintainable and dismissed it. It observed as follows:—

"The first question that the grounds of appeal raise is, whether the land in dispute is subject to the pre-emptive clause of the *wajib-ul-arz*. The word '*haqiqat*' is used in it as being subject to pre-emption on its being transferred by its owner. This word is ordinarily understood in the sense of a zamindari right in a village expressed in annas or biswas in undivided estates, and in bighas and biswas when an estate is divided. This sense the word '*haqiqat*' bears when it is not accompanied by qualifying terms. When in common parlance we say such a body's *haqiqat* is sold, we mean that his zamindari right in a village, the extent of which is expressed in the manner above observed, is sold, and not that any specific thing, such as a particular plot of land, cultivated or uncultivated, a particular grove, orchard or garden, or a particular part of the habitation-site that is comprised within zamin-right rights, is sold. Court people have frequently in their mouths the word '*haqiqat* cases.' These cases are understood to be those in which shares of zamindari rights are concerned, and not any house, site, garden (*bagh*), land of a *bagh*, tank, trees, or a particular parcel of cultivated or uncultivated land, though these may be things apper-

taining to a share of zamindari rights. Such being the ordinary meaning of the word *haqiyat*, it must be held to have the same meaning when used in the pre-emptive clause of the *wajib-ul-arz* of mauza Manaori, where the land in dispute is situated. Consequently the condition of pre-emption as inserted in it cannot be taken to apply to the particular piece of land that is the subject of dispute in this case. I may also observe that the ruling of the Full Bench of the Allahabad High Court in the case of *Sahib Ram v. Kishen Singh*, Weekly Notes, 1882, p. 192, applies in this case, inasmuch as the particular piece of garden-land in dispute in this case bears a character similar to that of the *abadi* land in dispute in that case. The question raised on this head is therefore found in favour of the appellants. The second ground of appeal raises the question whether the pre-emption condition of the *wajib-ul-arz* applies to exchange of lands. In my opinion it does not. That condition is to the effect that in case of transfer (*intiqal*) of the [629] *haqiyat* (share of zamindari right) of any pattidar or co-sharer, the right to purchase of the co-sharer (as mentioned in the said record) at the price (*qimat*) offered by a stranger would be preferable. The words '*qimat*' (price) and '*kharidari*' (purchase) used in the clause show that the transfer mentioned in the condition means a sale for a price (*qimat*). Now the word *qimat* in the ordinary acceptance of it means a money-price, and not any other benefit that is received in exchange for a thing. If I am right in this interpretation, the parties to the agreement involved in the said condition of pre-emption had it in their contemplation that when a zamindari share is sold for a money price by a pattidar to a stranger, the co-sharers (as mentioned in the clause) would have the right of pre-emption in respect of it. This Court therefore cannot hold the said pre-emptive clause to apply to a case of exchange of lands, such as is the subject of dispute in this case."

On second appeal by the plaintiff, the Divisional Bench (BRODHURST and DUTHOIT, JJ.), hearing the appeal, referred the following questions to the Full Bench :—

"(1) Was the transfer of the one biswa and six dhurs of land made by Farukh Ali, on the 13th August 1881, or was it not, a transfer of *haqiyat* within the terms of the *wajib-ul-arz*? (2) Can the plot of land which was given in exchange by Minhajuddin, or can it not, be considered as a price (*qimat*) within the terms of the *wajib-ul-arz*."

Mr. C. H. Hill and Pandit Sundar Lal, for the Appellant.

Mr. G. E. A. Ross and Babu Ram Das Chakrabati, for the Respondents.

The following judgments were delivered by the Full Bench :—

Petheram, C. J.—I think that the first question referred to us in this case must be answered in the affirmative. It is—"Was the transfer of the one biswa and six dhurs of land made by Farukh Ali, on the 13th August 1881, or was it not, a transfer of *haqiyat* within the terms of the *wajib-ul-arz*? The only question here is, whether a transfer of a part of a man's land in a village can be considered a "transfer of his rights and interests" within the meaning of the *wajib-ul-arz*. Now documents like the *wajib-ul-arz* must be read as a whole and in the light of common sense, and, [630] so read, it is evident that the object of the *wajib-ul-arz* is the exclusion of strangers from the village. If it is so read that although a man may not sell the whole, he may sell a *part*, of his land in the village, without letting in the right of pre-emption, the whole object of the *wajib-ul-arz* would be defeated, because the result might be the admission of a great number of strangers. That appears to me to amount to a *reductio ad absurdum*, and I am therefore of opinion that when any co-sharer sells any part of his land, the right of pre-emption belonging to his

partners arises. My answer to the first question is, therefore in the affirmative.

My answer to the second question is in the affirmative also. As I understand the matter, this right of pre-emption has arisen out of a very old custom, under which land was originally occupied by families or communities, and the rule originally was that if any individual went away or failed, his share became divisible among the rest. But afterwards there grew up a right based upon custom, by which the owner, before going away, might sell his share to his neighbours. And later still, he became entitled to sell the share, not only to them but to a stranger, unless his co-sharers chose to buy him out. In that case, the right to sell to the stranger arose upon the refusal of the co-sharers to make the purchase.

It is to this custom that the terms of the *wajib-ul-arz* appear to me to give expression, and the matter therefore comes to this, that before any sharer is competent to transfer his rights and interests, he must offer to transfer them to his co-sharers. It is true that the *wajib-ul-arz* shows that before the co-sharers can fix the price, the owner is entitled to get what he can from an outsider, so that he can insist upon their giving the same. Under these circumstances, the word "*qimat*" is used, and it seems to be generally agreed that the meaning of this word is not "money," but "equivalent" or "value."

If, therefore, the co-sharers want to get the land, they must give the vendor the equivalent or value of the thing for which he desires to exchange his property. Now, in all countries sufficiently advanced in civilization to possess coinage, money is the accepted standard of value, and therefore, because in this case the co-sharers cannot give the thing for which the vendor agreed to exchange his [631] land — it being another piece of land which does not belong to them — they have a right to obtain his land for an equivalent in money. My answer to the second question therefore is in the affirmative.

Straight, J.—I cannot concur in the contention that the pre-emptive clause of the *wajib-ul-arz* is only intended to apply to cases in which a sharer parts with the whole or considerable portion of his *haqiyat*. If this argument were to be admitted, it would, in my opinion, be open to any sharer to defeat such right by disposing of his *haqiyat* piece-meal. I then come to the question whether there was such a transfer of the vendor's *haqiyat* in the present case as gave birth to the plaintiff's right of pre-emption. I think that the exchange was an undoubted transfer of the one biswa and six dhurs to the vendee. The remaining point, to be determined is whether the field given in exchange by the vendee to the vendor can be regarded as the price given, for the purpose of supplying a basis upon which the plaintiff must compensate the vendor. I think that it can, and that the plaintiff, before getting the one biswa and six dhurs must pay whatever may be found to be the value of the field given by the vendee.

Oldfield, J.—My answer to both the questions referred to us is in the affirmative. I wish, however, to express no opinion as to whether the pre-emptor can force the vendor or the vendee to take the value of the property exchanged, that not having been the object of the contract under which the exchange of land for land was intended. Nor do I express any opinion as to whether the proper remedy of the pre-emptor was not rather to have the contract rescinded, and the vendor and vendee put back into their original position, in regard to the land which was exchanged.

Brodhurst, J.—I concur with the learned Chief Justice in answering both of the questions referred to us in the affirmative.

Mahmood, J.—I have arrived at the same conclusions. Upon the first question, as to the interpretation to be placed on the word "*haqiqat*," I have nothing to add to the observations which I made upon a cognate question in the case of *Sahib Ram v. Kishen Singh*, Weekly Notes, 1882, p. 192, which was a case decided by a Full Bench, of [632] which I was a member, but had the misfortune of differing with the majority of the Court. The case has unfortunately not been reported in the Indian Law Reports, but I have adhered to the view which I then expressed as to the nature of the proprietary rights of a co-sharer in a mahal to which, under the *wajib-ul-arz*, the right of pre-emption applies. That case related to the question whether the *abad* area or habitable site of a village came within the meaning of the term "*haqiqat*;" and in the present case the property appears to be a grove. The *ratio decidendi* of my judgment in that case is, *mutatis mutandis*, entirely applicable here, and therefore my answer to the first question must be in the affirmative. I may add, in reference to this question, that in the case of *Hazari Lal v. Ugrah Rai*, Weekly Notes, 1884, p. 103, the Full Bench ruling to which I have referred was relied on in connection with *sir-land*. With all due deference, I dissent from the decision, and must express myself unable to accept the rule of the law therein laid down.

Upon the second question, I have nothing to add to what the learned Chief Justice has said from the Bench on several occasions. The rule of pre-emption was originally introduced into India as a part of the Muhammadan law, and must, by equitable analogy, be administered in the spirit of that law. This view was adopted by Sir BARNES PEACOCK, C.J., a good many years ago. It therefore appears to me that the word "*qimat*," which is of Arabic origin, must be interpreted in the sense given to it by the Muhammadan law, and that is undoubtedly not the technical meaning of the English word "price." In the law of pre-emption "*qimat*" includes not only money, but other kinds of property capable of being valued at a definite sum of money. This is borne out by the passage in Hedaya, which has been cited at the Bar:—"If a man sell a piece of ground for another piece of ground, in this case, as each piece of ground is the price for which the other is sold, the *shafee* of each piece is entitled to take it for the value of the other, land being of the class of *zosat-al-keem*, or things compensable by an equivalent in money," (Grady's edition of Hedaya, p. 555), and in this sense the word may be taken to cover the consideration of "sale" as well as of exchange as defined in ss. 54 and 118 of the Transfer of Property Act (IV of 1882) respectively. Any other view of the law of pre-emption would simply render the object of the right easily defeasible—the object being the exclusion of strangers from the co-parcenary of the property to which the right applies.

My answer to the second question also is therefore in the affirmative.

NOTES.

[See the following cases adopting the same principle:—(1888) 10 All., 553; (1889) 12 All., 426 F. B.; (1895) 17 All., 447; (1907) A. W. N., 230.]

[7 All. 633]

The 14th March, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE STRAIGHT,
MR. JUSTICE OLDFIELD, MR. JUSTICE BRODHURST AND
MR. JUSTICE MAHMOOD.

Sital Prasad and another.....Defendants

versus

Amtul Bibi and another.....Plaintiffs.*

*Sir-land—Sale of sir-land by co-sharer—Validity of transfer—Act XII of 1881
(N.-W. P. Rent Act), ss. 7, 9—Ex-proprietary tenant—Right of occupancy.*

Held by PETHERAM, C. J., and STRAIGHT, OLDFIELD, and BRODHURST, JJ., that the question whether the proprietary rights of a co-sharer in the *sir* of a mahal are distinct and separate from the proprietary rights in the mahal itself, so as to enable the owner of one share to sell and give possession of his *sir* alone as against his co-sharers, must be determined with reference to the tenure and conditions under which land is held in the mahal by the co-parceners, to be ascertained in each case.

Per PETHERAM, C. J., and STRAIGHT, and OLDFIELD, JJ.—In zamindari tenures, in which the whole land is held and managed in common, a co-sharer cannot convey his right of occupancy in the *sir* as something distinct from his proprietary rights in the mahal. In pattidari tenures, in which the lands are divided and held in severalty, each proprietor managing his own lands, there may be lands which come within the classification of *sir* given in the Rent Act, but they would not seem to be on a different footing from any other land held in severalty by a proprietor.

Per BRODHURST, J.—So long as a person is the sole proprietor of a mahal, he is not restrained by any law from effecting a sale of his proprietary rights in his *sir* land, even though he retains possession of the whole of the other lands of the mahal.

Per MAHMOOD, J.—That the proprietary rights of a joint co-sharer in his *sir* land form an essential part of his rights in the mahal, that such proprietary rights in the *sir* land may be sold, but that the purchaser under such a sale could not obtain any such possession as would operate in defeasance of the ex-proprietary right in such *sir* land conferred by s. 7, and secured by s. 9 of the Rent Act. *Sahib Ram v. Kishen Singh*, Weekly Notes, 1882, p. 192 ; *Hazari Lal v. Ugrah Rai*, Weekly Notes, 1884, p. 103 ; *Gulab Rai v. Indar Singh*, I. L. R., 6 All., 54, and *Tirmal Singh v. Bhola Singh*, Weekly Notes, 1884, p. 169, referred to.

[634] THIS was a reference to the Full Bench by STRAIGHT, Officiating C. J., and BRODHURST, J. The facts of the case and the point of law referred are stated in the referring ORDER, which was as follows :—

STRAIGHT, OFFG. C.J.—There is a question involved in this appeal which appears to me to be of considerable importance, and, as the view I entertain upon it as at present advised seems to me to be at variance with that inferentially expressed by a Division Bench of this Court in a case reported on page 103 of the *Weekly Notes* of the current year (1884)—*Hazari Lal v. Ugrah Rai*—I think it should be referred to the Full Bench.

The point is this :—The defendant, Shaikh Imam Ali, by a sale-deed of the 7th July 1879, purported to convey to the defendants, Sital Prasad and

* Second Appeal No. 130 of 1884, from a decree of Babu Mrittonjoy Mukerji, Subordinate Judge of Ghazipur, dated the 22nd December 1883, affirming a decree of Babu Nil Madhab Rai, Munsif of Ghazipur, dated the 27th June 1883.

Sohan Ram, three bighas fourteen biswas and nine and a half dhurs of land which was admittedly his *sir* cultivation. The plaintiffs seek in the present suit to avoid this transfer on the ground that they, as co-sharers in the mahal with Shaikh Imam Ali, are jointly interested in such *sir*. Both the lower Courts have concurred in giving plaintiffs a decree for cancelment of the deed of sale and for a declaration of their right to joint possession along with Shaikh Imam Ali. Sital Prasad and Sohan Ram have appealed to this Court, and their first plea is, that there is no law to prevent a co-sharer from selling the *sir* land in his possession. Looking to the terms of ss. 7 and 9 of the Rent Act, I am strongly inclined to hold that the lower Courts were right in the view they have taken in the matter, and that a proprietor's holding of *sir* must be regarded as an appurtenance of, and incidental to, his proprietary share, and that he cannot dispose of it apart from such proprietary share. It appears to me that if a transaction like the present were to be sanctioned, an easy means would be afforded to enable persons to defeat the provisions of s. 7 of the Rent Act, as to the accrual of ex-proprietary tenant's rights in the *sir* of a mahal at the date of the loss of the proprietary rights in such a mahal, and to nullify the prohibition of s. 9 of the same law. I would therefore refer to the Full Bench the following question:—Are these proprietary rights in the *sir* of a mahal distinct and separate from the proprietary rights in the mahal itself?

[636] BRODHURST, J.—I concur in making the reference to the Full Bench as proposed by my learned colleague.

Munshi Kashi Prasad, for the Appellants.

Lala Lalta Prasad and Shah Asud Ali, for the Respondents.

The following judgments were delivered by the FULL BENCH:—

Petheram, C. J., and Straight and Oldfield, JJ.—There is nothing in the definition of *sir*-land given in the Rent Act, from which it can necessarily be inferred that the rights of a proprietor in such land are not capable of being sold apart from the other proprietary rights in a mahal, and the provisions of s. 7 only affect rights in *sir* land at the time when a person loses or parts with his proprietary rights in a mahal. The question of the right of a proprietor to dispose of his *sir* land must be determined with reference to the conditions of the tenure under which a mahal is held.

In what are called zamindari tenures, in which the whole land is held and managed in common, a co-sharer has no exclusive right in the *sir* land, only a right to occupy and cultivate it, and the rents of it are taken into account at the distribution of profits. It is because a person holds proprietary rights in the mahal that he is allowed to occupy some of the common land as his *sir*, and he can occupy the *sir* only so long as he continues to be a proprietor in the mahal. It follows that he cannot convey his right of occupancy in this *sir* as something distinct from his proprietary rights in the mahal. In pattidari tenures, however, in which the lands are divided and held in severalty by the different proprietors, and each person managing his own lands, there may be lands which come within the classification of *sir* given in the Rent Act, but they would not seem to be on a different footing from any other land held in severalty by a proprietor.

We can therefore only answer the question which has been referred by saying that it must be determined with reference to the tenure and conditions under which land is held in the mahal by the co-parceners, to be ascertained in each case.

Brodhurst, J.—On the reference made to us, I observe that the proprietor of a mahal may acquire *sir* land for himself, or, on the other hand,

possessing such land, he may allow his rights in [636] it to lapse. There are, I believe, many estates in which there is no *sir*-land, and there are many landed proprietors who, from their high positions and large means, do not require to hold land as *sir*, and to each of whom the right of becoming an ex-proprietary tenant of such land on the sale of an estate would be of no use or value. It is possible, though scarcely probable, that a proprietor of a *mahal* might desire to sell his *sir*-land without having any intention of selling the rest of the land of his estate, or he might desire first to sell the *sir*-land, and subsequently to sell the remainder of the estate, because he could not, owing to his circumstances actually become an ex-proprietary tenant, and therefore wished to sell his estate without reserving any rights, and thus obtain its full value.

The provisions of s. 7 of the Rent Act apply only to such land as is held by the proprietor as *sir* at the time that he loses or parts with his proprietary rights in the *mahal*.

As I have already observed, a proprietor of an estate may allow his rights in *sir*-land to lapse, and, so long as a person is the sole proprietor of a *mahal*, he is not, so far as I am aware, restrained by any law from effecting a sale of his proprietary rights in his *sir*-land, even though he retains proprietary possession of the whole of the other lands of the *mahal*; and I concur with my brother OLDFIELD that the question must be determined in each case with reference to the tenure and conditions under which land is held in the *mahal*.

Mahmood, J.—The question raised by this reference, as amended in the Full Bench, is whether the proprietary rights of one joint co-sharer in the *sir* of a *mahal* are distinct and separate from the proprietary rights in the *mahal* itself, so as to enable the owner of one share to sell and give possession of his *sir* alone as against his co-sharers. The question which has been so formulated seems to me to be a complex one, and, from my point of view, cannot be answered as a whole either in the affirmative or in the negative, because it involves more than one logical proposition. I will therefore deal with the question under two distinct heads—the *first*, relating to the nature of the proprietary rights which the co-sharers of a zamindari *mahal* hold in their *sir*-lands, and the *second* regarding their rights of possession of such lands. These [637] two aspects of the question cannot, in my opinion, be mixed up together, because the rules of our law preclude such a course.

As to the *first* point, I am of opinion that the matter depends upon a full appreciation of the zamindari right in these Provinces in *mahals*, where, there being more than one proprietor, partition of the lands has not taken place. In my judgment in the case of *Sahib Ram v. Kishen Singh*, Weekly Notes, 1882, p. 192, which was heard by a Full Bench of this Court, but which unfortunately has not been reported in the Indian Law Reports, I endeavoured at some length to explain my conceptions of the zamindari rights in a *mahal* in these Provinces. That case related to the rights of the co-sharers in the *abadi* area of a *mahal*, but the *ratio decidendi* adopted by me in that case is fully applicable in principle to *sir*-lands also. A contrary view of the law was taken by a Division Bench of this Court in *Hazari Lal v. Ugrah Rai*, Weekly Notes, 1884, p. 103, in which it was held that the *sir*-land of a co-sharer in the *mahal* did not constitute a part and parcel of his proprietary rights, so as to render the sale of such *sir*-land a basis of the exercise of the pre-emptive right under the *wajib-ul-arz*. With due deference to the learned Judges who laid down the rule, I confess I have never been able to adopt the ruling. In *bharyachari* villages, where no partition has taken place among the co-sharers, the share of each co-sharer is represented only by the extent of land which he occupies or cultivates as his *sir*, and, this being so,

the ruling just referred to would lead to the necessary conclusion that in such a village, notwithstanding a pre-emptive clause in the *wajib-ul-arz*, no right of pre-emption can prevail at all, because, *ex hypothesi*, the co-sharer selling his share does nothing more or less than sell his *sir*-land and his share in the *abadi* area. The anomaly (to say the least of it) of such a proposition is obvious, and without repeating all that I said in the case of *Sahib Ram v. Kishen Singh*, Weekly Notes, 1882, p. 192, I will only say that I do not understand the law in such a sense. In a joint co-parcenary of co-sharers in a zamindari mahal in these Provinces, the rights of each co-sharers are no doubt joint in the whole *mahal*, so long as there is no partition. But it is equally clear that these joint rights are subject to the incidents of the nature of the zamindari tenure itself. Among such incidents is the circumstance that [638] a joint co-sharer may have a house of his own upon the joint *abadi* land, or that he may have possession of specific lands which he cultivates as his *sir*. So long as there is no partition between the various co-sharers, the *abadi* land upon which the house of a co-sharer is situate, as well as the specific lands which he holds as his *sir*, forms part of the joint property of the co-sharers of the *mahal*, equally responsible for payment of Government revenue, equally subject to the process called "partition" in the Revenue Law. These are the incidents of the tenure itself, and, so long as there is no partition, none of the joint co-sharers can oust another co-sharer from his *sir*-land, any more than he could oust him from his house in the *abadi* area. And I take it as a simple proposition of the law regulating zamindari tenure in these Provinces, that a joint co-sharer could by sale convey to the vendee his proprietary rights in his house and the land on which it stands, subject of course to the incidents of the tenure itself. That the sale would be valid, so as to convey proprietary rights to such a purchaser in the specific lands upon which the house stands, cannot be doubted, and I am unaware of any reason why the same rule should not apply to *sir*-lands. The reason of the rule is very simple. Property which is originally joint in its nature may be specifically held by the common consent of all the co-sharers in such a manner as to entitle each co-sharer to hold specific lands. When such an arrangement, *consensu omnium*, is arrived at to its fullest extent regarding the cultivated area of the mahal, the zamindari tenure becomes, as I said before, a *bharyachari* tenure, because the lands occupied or cultivated by each co-sharer as his *sir* represent his share in the profits of the mahal. But when such an arrangement is not carried out to its full extent, and a sharer cultivates an area of land far less than the area which would represent his share in the mahal, such land as the co-sharer cultivates himself is called his *sir*, the profits whereof are taken into account in the *bujharat*, or the annual division of profits among the co-sharers.

Now there is no doubt in my mind that the *sir*-land of a co-sharer necessarily forms a part and parcel of his proprietary rights in the mahal as much as the land upon which his house stands. He originally held the right jointly with the other co-sharers in the land, which may either form the site of his house or constitute [639] the area of his *sir*-land; but the moment he is allowed, *consensu omnium*, to build his house on joint land, or to cultivate any particular field, that which was joint and unspecified becomes definite and specified, the specific land so utilized by him being of course regarded as going to specify certain areas as forming part of his share in the joint mahal. The law respects such arrangements in the sense in which I have interpreted them, because the only process by which joint lands in a zamindari mahal can be divided so as to allot specific lands to each co-sharer is the process of partition

as defined in s. 107 of the Land Revenue Act (XIX of 1873). Section 108 of the same enactment describes the persons who are entitled to claim perfect partition, and among such persons are included those who are entitled to "specific lands" in a mahal. But the provisions of the law which have an immediate bearing upon the particular question which I am now considering are contained in s. 125 of the Land Revenue Act, which lays down that in carrying out a partition "no *sir*-land belonging to any co-sharer shall be included in the mahal assigned on partition to another co-sharer, unless with the consent of the co-sharer who cultivates it, or unless the partition cannot otherwise be conveniently carried out." This shows that the right of a co-sharer in a joint zamindari mahal in his *sir*-land is sufficiently specific to save it from being confused with the rest of his rights in the mahal, even when a perfect partition takes place. For these reasons I hold that *sir*-lands of a joint co-sharer in a mahal form an essential part of his proprietary rights in the mahal, and that he can sell his proprietary rights in such lands much in the same manner as he could have sold the whole of his share, for, in the matter of transfer by sale, what he could do with the whole, he could do with the part.

I now proceed to consider the second proposition involved in the question, namely, whether the sale of his proprietary rights in his *sir*-lands by a joint co-sharer in a zamindari mahal would confer upon the vendee the right of obtaining actual possession of such lands. Upon this point I am of opinion that the Full Bench ruling of this Court in *Gulab Rai v. Indar Singh*, I. L. R., 6 All., 54, furnishes a full answer. Section 7 of the Rent Act (XII of 1881) is intended to confer by statutory provisions fixity of tenure as occupancy-tenants [640] upon persons who, being proprietors at the time and holding *sir*-land, lose or part with their proprietary rights in the mahal. Such ex-proprietary right of occupancy relates only to *sir*-lands as defined in cl. (4) of s. 3 of the Rent Act, and it follows that when a co-sharer divests himself of his proprietary rights in such lands, he becomes, *ipso facto*, an occupancy-tenant of such lands within the meaning of s. 7 of the Rent Act, and when such occupancy tenure is established, it cannot be transferred in contravention of s. 9 of the Act, notwithstanding any covenants made in the deed of sale. The obvious policy of the law is to save peasant proprietors in these Provinces from the consequences of their own imprudence, and that policy would be defeated if *sir*-land could be sold in such a manner as to operate in defeasance of the ex-proprietary right of occupancy in such lands. The reason of the rule which applies to the loss or the parting with of proprietary rights in the co-sharer's whole share in the mahal, applies also to a part of such share, so far as the present question is concerned. A co-sharer in a mahal could of course relinquish his *sir*-land, and reduce it to lands held by ordinary tenants; but no such question of relinquishment arises in this case, and I need not consider it. The effect of the sale of proprietary rights in *sir*-land would enable the purchaser to claim rent from his vendor as an ex-proprietary tenant, such rent to be taken into account in the annual division of profits, and in the reduction of the share of the vendor if he continues to have a share in the mahal. But beyond this the sale of proprietary rights in *sir*-land can have no effect, and would not entitle the purchaser to any such possession as would defeat the fixity of ex-proprietary tenure at which the provisions of ss. 7 and 9 of the Rent Act clearly aim. This view accords with my judgment in *Tirmal Singh v. Bhola Singh*, Weekly Notes, 1884, p. 169.

My answer to the reference therefore is, that the proprietary rights of a joint co-sharer in his *sir*-land form an essential part of his rights in the mahal, that such proprietary rights in the *sir*-land may be sold, but that the purchaser

under such a sale could not obtain any such possession as would operate in defeasance of the ex-proprietary right in such *sir-land* conferred by s. 7 and secured by s. 9 of the Rent Act.

NOTES.

[See also (1889) 12 All., 426 F. B.]

[641] APPELLATE CIVIL.

The 21st March, 1885.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Ramchhaibar Misr.....Judgment-debtor

versus

Bechu Bhagat and another.....Decree-holders.*

Execution of decree—Material irregularity in publishing or conducting sale—objection that property sold was not legally saleable—

Civil Procedure Code, ss. 244, 311, 312.

An objection by a judgment-debtor to a sale in execution of a decree on the ground that the property which was the subject of sale was not legally saleable, is not a matter which can be entertained by the Court under s. 311 of the Civil Procedure Code, so as to afford a ground for setting aside the sale on account of material irregularity in publishing or conducting it. *Ram Gopal v. Khiali Ram*, I. L. R., 6 All., 448, and *Janki Singh v. Ablakh Singh*, I. L. R., 6 All., 393, distinguished.

Per MAHMOOD, J.—The scope of s. 244 of the Civil Procedure Code is limited to matters connected with the execution of the decree between the decree-holder and the judgment-debtor, and covers all the questions which may arise between the decree-holder and the judgment-debtor relating to the execution, etc. of the decree. Questions that may arise after the sale are not, strictly speaking, questions relating to the execution, discharge, or satisfaction of the decree, within the meaning of cl. (3), s. 244 ; but, as soon as there has been a sale, the execution of the decree, so far as the decree-holder is concerned, is over, and the question whether the purchaser has purchased anything by the sale is not a question as to the execution of the decree-holder's decree.

Also *per MAHMOOD, J.*—The expression “conducting the sale” as used in s. 311 of the Civil Procedure Code, does not include any proceedings unconnected with the actual carrying out of the sale, but refers to the action of the officer who makes the sale, and not to anything done antecedent to the order of sale. *Olpherts v. Mahabir Pershad*, L. R., 10 Ind. Ap., 25 referred to.

THE facts of this case are stated in the judgment of OLDFIELD, J.

The Senior Government Pleader (Lala Juala Prasad), for the Appellant.

Munshi Sukh Ram, for the Respondents.

Oldfield, J.—Bechu Bhagat, respondent, held a decree against Ramchhaibar Misr, of the 26th July 1879, and attached and brought to sale the property in suit, which was purchased by Tilak Dhari, respondent. Ramchhaibar Misr, the judgment-debtor, preferred no objection to the attachment of the property, but, after the sale had taken place, he put in an application under s. 311 to

* First Appeal No. 146 of 1884, from an order of Munshi Kulwant Prasad, Munsif of Balia, dated the 9th August 1884.

set aside the sale on the ground of irregularity in pub-[642]lishing and conducting it, and also on the further ground that the property was a right-of-occupancy tenure and not saleable by law. All the objections were disallowed, and the sale was confirmed, and this appeal is from the order under s. 312 confirming the sale, and the ground taken before us in appeal for setting aside the sale is the last of the above-named objections, namely, that the property was not saleable. In my opinion this is not an objection of a nature which can be entertained by the Court under s. 311, Civil Procedure Code, so as to afford a ground for setting aside a sale. When a sale has taken place in execution of a decree, the law allows a judgment-debtor, or any person whose immoveable property has been sold, to apply to set aside the sale on the ground of a material irregularity in publishing or conducting it (s. 311), and, under s. 312, it becomes the duty of the Court to confirm the sale, as regards the parties to the suit and the purchaser, if no such application as is mentioned in s. 311 has been made, or if, having been made, the objection has been disallowed. Now the objection here taken is not of the nature contemplated in s. 311: it is an objection that the property attached and sold is not by law saleable: that is not an objection relating to material irregularity in publishing and conducting a sale to which s. 311 refers. It is an objection which the judgment-debtor might have taken at the time of attachment prior to the sale, but it is not one he can take after the sale under s. 311, so as to afford a ground under s. 312 for setting aside the sale. We cannot therefore hold that the order confirming the sale from which this appeal is preferred was an improper order, as it was the duty of the Court to confirm the sale, whereas in this case all objections which could properly be preferred under s. 311 have been disallowed.

We have been referred to the case of *Ram Gopal v. Khiali Ram*, I. L. R., 6 All., 448, but it contains nothing opposed to the view here taken. That was a suit brought by a judgment-debtor against his decree-holder and a purchaser to set aside a sale, on the ground that the property, being a right of occupancy tenure, was unsaleable, and all that was held was that, as against the decree-holder, the judgment-debtor's proper remedy was not by suit, but under s. 244, Civil Procedure Code, in the execution department, which is also [643] what I have indicated here, that is, before the sale has taken place, but not by application under s. 311 after the sale to set the sale aside.

In the same way there is nothing in the case of *Janki Singh v. Ablakh Singh*, I. L. R., 6 All., 393, which is opposed to the view I here take. On these grounds, and without going into the merits of the objection, I would dismiss the appeal with costs.

Mahmood, J.—I am of the same opinion. It appears to me that in construing and interpreting the law on this question, it is important to bear in mind the order in which the various sections which indicate the agitation or adjudication of points in discussion follow each other. The Code itself seems to me to be very clear. After having dealt with the rules for institution and frame of suits, their trial and modes of recording evidence, and the preparation of decrees, in the first eighteen chapters, chapter XIX deals with an entirely different class of procedure, namely, "the execution of decree." This heading, which is general, is divided into many sub-divisions. Sub-division A points out the Court by which decrees may be executed; sub-division B deals with applications for execution; C relates to stay of execution; and sub-division D deals with questions for the Court executing decrees. The whole of this last sub-division consists of one section, 244, and I here wish to express my views with regard to the clause. I think the scope of this section is limited to matters connected with the execution of the decree between the decree-holder

and the judgment-debtor. In this light, cl. (c), which has been in some cases interpreted in a broader sense than we have done in this case, relates to disputes arising between the decree-holder and judgment-debtor strictly. Now, sub-division *E* deals with the mode of executing decrees. This sub-division ends with s. 265, where sub-division *F* begins, which relates to attachment of property. We then come to another part of the same chapter, namely sub-division *G*, which regulates the sale and delivery of property in execution. This sub-division is further sub-divided into smaller sub-divisions, thus:—(a) is on the general rules as to sales; (b) gives the rules as to the sale of moveable property, and (c) gives the rules as to the sale of immoveable property. It is with this last sub-division (c) that we are especially concerned, because it is [644] in this part of the Code that ss. 311 and 312 occur, and the position which the sub-division (c) occupies in the Code is to be specially borne in mind. It is not necessary to deal further with the order in which the sub-divisions are arranged. I now deal with ss. 244, 311, and 312, which are the important sections in the case. I take it, that when execution of a decree is prayed for by a decree-holder, all the questions which may arise between the decree-holder and the judgment-debtor relating to the execution, etc., of the decree, may be disposed of under s. 244. There may be questions relating to the validity of attachment, the mode of execution, etc., but when one and all of these matters do terminate in a sale, I maintain that all that is comprehended within the definition of “execution” comes to an end there, because the purchaser comes as a third party, and is not bound by s. 244 as to proceedings antecedent to sale. The “execution” so far as s. 241 is concerned, is over, and the questions that may arise *after the sale* are no more, strictly speaking, questions relating to the execution, discharge or satisfaction of the decree within the meaning of cl. (c), s. 244. As soon as there is a sale, the execution of the decree, so far as the decree-holder is concerned, is over, and the question whether the purchaser has purchased anything by the sale is not a question as to the execution of the decree-holder's decree. In a recent case I have expressed the view that, under certain conditions, a judgment-debtor may bring a suit to set aside a sale, and, when those conditions exist, there is nothing in s. 244 to bar such suit, even though the plaintiff be a judgment-debtor. Two rulings have been cited before us on behalf of the appellant. The first is *Ram Gopal v. Khial Ram*, I. L. R., 6 All., 448. To this ruling my brother OLDFIELD was a party. For the reasons given by my brother OLDFIELD, this ruling is distinguishable from the present case. The other ruling cited is *Janki Singh v. Ablakh Singh*, I. L. R., 6 All., 393. So far as the report goes, the ruling is opposed to the view taken by us, and I am not disposed to agree in that ruling, which, however, in some respects, is distinguishable from this case. The real question here is, whether the scope of s. 311 can be regarded as allowing the judgment-debtor, after the sale has actually taken place, to agitate the question of the non-saleability [645] of the rights which were attached, proclaimed for sale, and actually sold. The learned pleader for the appellant has argued that the words “*in conducting the sale*,” as they occur in the section, include all matters antecedent to the sale which would render the sale valid. I cannot accept this condition. If such a principle could be accepted, questions as to the validity of the decree, or to the jurisdiction of the Court by whom the decree was passed, might be re-opened by an application under s. 311. It is against the policy of the Legislature that such questions should be re-opened at such a late stage. Now, I take it that the word “*conducting*,” as used in s. 311, does not include any proceedings unconnected with the actual carrying out of the sale. The word has been used in s. 286, which runs as follows:—“Sales in execution of decrees shall be *conducted* by an officer of the Court, or by any other person whom

the Court may appoint." This section occurs in sub-division G ("Of sale and delivery of property"), in which sub-division s. 311 also occurs.

Now, reading the word "*conducting*" as it occurs in s. 311, together with the word "*conducted*" in s. 286, it is clear that this word refers only to the action of the officer who makes the sale. Anything done antecedent to the order of sale has nothing to do with "*conducting*" the sale. The learned pleader again contended that "*publishing*" a non-saleable thing as saleable is an irregularity in "*publishing*" the sale within the meaning of s. 311 of the Code. With this contention again I cannot agree, and I hold that the matter now agitated does not fall under s. 311, and the order passed under s. 312 cannot be impugned in this manner. It follows that the suit to set aside this order would not be barred under s. 244 of the Code or s. 312, because, in order to set aside an execution-sale under s. 311, there must have been an irregularity in conducting or publishing it. The exact point now raised before us was not raised in the case of *Olpherts v. Mahabir Pershad Singh*, L. R., 10 Ind. Ap., 25, but the whole judgment of their Lordships of the Privy Council proceeds upon a reasoning consistent with that which we have adopted in arriving at our conclusion in this case.

I would dismiss this appeal with costs.

Appeal dismissed.

NOTES.

I. Following this case, it was held in the following cases that the auction-purchaser is not a representative of either party :—(1888) 13 Bom., 34 ; (1890) 15 Bom., 290.

II. In (1888) 16 Cal., 33, the point as to when "questions relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof" cease to arise for determination, was raised but not decided. It was there held that the non-payment and non-receipt of 25% of the purchase-money was a material irregularity which must be enquired into upon an application under s. 311, C. P. C., 1882.

III. In (1902) 24 All., 291, it was held that an application to recover proceeds of a sale in execution when the sale was set aside, was one under s. 244, C. P. C. The main case was distinguished as follows :—"That case (7 All., 641) if carefully looked into, does not support the learned Judge's view. What was really decided in that case was, that after a sale any question which arose between the auction-purchaser and judgment-debtor was not a question relating to the execution of the decree, &c."

IV. In (1907) 29 All., 612, this case was followed and was there held that the judgment-debtor who had neither objected to the sale nor preferred an appeal against the order for sale, had no right, after the sale had been carried out, to prefer an objection that the property sold was not legally saleable.]

[646] EXTRAORDINARY ORIGINAL CRIMINAL.

The 21st March, 1885.

PRESENT :

MR. JUSTICE STRAIGHT.

Queen-Empress

versus

Jagrup and another.

Act I of 1872 (Evidence Act), ss. 26, 30—"Confession."

The word "confession" as used in the sections of the Evidence Act relating to confessions must not be construed as including a mere inculpatory admission which falls short of being an admission of guilt.

IN this case, which was tried at the Criminal Sessions of the High Court before STRAIGHT, J. and a jury, two persons, named Jagrup and Sheru, were charged with the murder of a boy named Hargo Lal. The prosecution proposed to put in evidence the following statement which had been made by the prisoner Jagrup :—

"On the 8th September, 1884, at 11 A.M., I came up from the *khada* (wood-yard) to drink water at the well near the "Compass Ghar," (Mathematical Instrument Factory). Ganesh, Brahman, gave me to drink water; having drunk, I was going to my place in the *khada*. I saw beneath the *Compass Ghar* Sheru talking with the deceased boy Hargo Lal. I went away to my place after seeing this. After 11 A.M., I was sitting at my place on the wood-stack, and saw the following men sitting in the shade beneath a tree, *viz.*, Narain, Ram Dhani and Ram Adhin. At that time Sheru came to the west drain, and called out to me :—"Come quickly, Jagrup, a *biscobra* has appeared. I went to him, and he took me to a wood-stack near the *nim* tree. I saw that the boy Hargo Lal also was present with a piece of wood in his hand. Then in my presence Sheru seized the boy by the neck, and began to strangle him, and throwing him on the ground, sat on his chest. I caught hold of the boy's feet, and said to Sheru :—"Why are you killing the boy? Don't kill him." On this Sheru replied :—"Whom are you trying to stop? Keep silence." Sheru did not mind me, and killed the boy. When the boy's breathing ceased, he let him go. When Sheru had hold of the boy's neck, and was sitting on his chest, the following persons saw it and went away, *viz.*, Narain, Ram Dhani and Ram Adhin. When the boy was dead, I and Sheru took up the corpse and put it by the wood-stack, and I and Sheru put pieces of timber on the boy's body. One gold earring and one silver armlet Sheru gave me, and I took them and went home at evening. [647] Sheru took for himself one silver armlet, one gold earring, and one silver ring."

STRAIGHT, J., ruled that the prisoner Jagrup, at the time when he made the above statement, was in the custody of the police.

Mr. A. Strachey, for the prisoner, objected to the statement being received in evidence, on the ground that it was a confession within the meaning of s. 26 of the Evidence Act. He contended that the word "confession" as used in the Act must be understood as including, not merely admissions of guilt, but also admissions of any incriminating circumstances from which the inference might be drawn that the person making such an admission was guilty of the crime charged against him. In support of this contention, he referred to the definition of the word "confession" in *Stephen's Digest of the Law of Evidence*, art. 21, and to the cases of *Queen v. Bakur Khan*, N.-W. P. H. C. Rep., 1873, p. 213; *Imperatrix v. Pandharinath*, I. L. R., 6 Bom., 34, and *Queen-Empress v. Mathews*, I. L. R., 10 Cal., 1022.

The Public Prosecutor (Mr. C. H. Hill), for the Crown, contended that the statement did not amount to a "confession," and that the meaning of the term should not be extended to any admission falling short of an admission of guilt. He cited *Empress v. Dabee Pershad*, I. L. R., 6 Cal., 530.

Straight, J—It has been argued by the learned counsel for the prisoner Jagrup, that the statement made by the prisoner on the 22nd September 1884, was a "confession" within the meaning of the Evidence Act, and, having been made while the accused was virtually in custody of the police, is inadmissible in evidence against him. In support of this contention, the definition of the term "confession" in Mr. Justice STEPHEN'S *Digest of the Law of Evidence* has been referred to; and Mr. Justice STEPHEN is an authority to whom the greatest respect is due, not only as a distinguished English Judge, but

also as an eminent jurist who, moreover, had a considerable hand in framing some of our most important codes in this country. The work, however, which has been cited was if I remember aright, written in view of a proposal for preparing a Code of Evidence for England, and it can scarce-[648]ly be regarded therefore as an authority to guide me in construing an Act passed by the Legislature of this country in 1872, though I may add that I do not find anything in Mr. Justice STEPHEN'S definition at variance with the view I take. In the present case I do not feel called upon to decide more than the question whether or not this particular statement is admissible in evidence. I am of opinion that it does not constitute a "confession" within the meaning of the Evidence Act. It must be looked at as a whole, and it would not be right to take isolated portions of it, and to consider whether any of them, regarded separately, amounts to an admission of guilt or not, though it is clear that they do not. It is conceded by Mr. Hill, and even by Mr. Strachey, that the word "confession" must be understood in the same sense in all the sections of the Evidence Act which relate to confessions. It must be construed as meaning the same in s. 30 as in ss. 24, 25 and 26. Now, it appears to me that to accept Mr. Strachey's interpretation would lead to this result, and I put it as a *reductio ad absurdum*, that if A and B were jointly tried for the murder of C, and it was proved that A said he was passing along a road, the scene of the murder, about the time C was murdered, upon the strength of such statement anything else he might have said implicating B might be taken into consideration against B as a confession made by A. I cannot think that this was ever intended by the Legislature. What was intended was, that where a prisoner—to use a popular phrase—"makes a clean breast of it," and unreservedly confesses his own guilt, and at the same time implicates another person who is jointly tried with him for the same offence, his confession may be taken into consideration against such other person as well as against himself, because the admission of his own guilt operates as a sort of sanction which to some extent takes the place of the sanction of an oath, and so affords some guarantee that the whole statement is a true one. But where there is no full and complete admission of guilt, no such sanction or guarantee exists, and for this reason the word "confession" in s. 30 cannot be construed as including a mere inculpatory admission which falls short of being an admission of guilt. It must not, therefore, in my opinion, be so construed in the other sections relating to confessions.

[649] In the present case, looking at the statement of the prisoner Jagrup as a whole, I am of opinion that it does not amount to a confession, and is indeed no more than a statement by a person who admits that he witnessed the perpetration of a crime, but denies having participated in it, and alleges that he protested against it.

NOTES.

[This was doubted in (1912) 22 M. L. J., 490 : 14 I. C., 849. See also 11 Bom. L. R., 633.]

The 1st April, 1885.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE STRAIGHT,
MR. JUSTICE OLDFIELD, MR. JUSTICE BRODHURST, AND
MR. JUSTICE MAHMOOD.

Nivath Singh.....Plaintiff

versus

Bhikki Singh.....Defendant.*

Bhikki Singh.....Defendant

versus

Nivath Singh.....Plaintiff.*

Civil Procedure Code, s. 584—Second appeal—Grounds impugning findings of fact.

Held, by the Full Bench (PETHERAM, C.J., dissenting) that, under s. 584 (c) of the Civil Procedure Code, it is competent for the High Court to entertain pleas in second appeals which impeach the findings of fact recorded by the Lower Appellate Court, on the ground that such findings are conjectural, that they ignore the evidence, and that the Court has given no reasons for the conclusions at which it arrived.

Where a Lower Appellate Court has drawn strained or unreasonable conclusions from the evidence, or has discredited or disbelieved witnesses or documentary proof upon capricious or unsustainable grounds, or has stated no intelligible reasons for arriving at its findings of facts, the High Court may take notice of all such matters in second appeal. *Futtehma Begum v. Mohamed Ausur*, I. L. R., 9 Cal., 309; *Assanullah v. Hafiz Mahomed Ali*, I. L. R., 10 Cal., 932, and *Lal Mahomed Bepari v. Shoila Bewa*, 11 Cal. L. Re p., 104, referred to.

Per PETHERAM, C. J.—The High Court is not at liberty in second appeal to look into the evidence in the cause for the purpose of ascertaining whether the lower Courts have found the facts correctly, inasmuch as no question of fact is included in the grounds of appeal allowed by s. 584 of the Civil Procedure Code, and it would seem that the intention of the Legislature was that in small causes the findings of the lower Courts on questions of fact should be absolutely final.

By "specined law" in clause (a) of s. 584 is meant the statute law, and by "usage having the force of law" the common or customary law of the country or community, and the clause is confined to cases in which the Lower Appellate Courts have either misconstrued a statute or written document, or have come to a wrong conclusion as to what is the customary law of the country or community with [650] reference to questions at issue between the parties. Clause (b) can only refer to mistakes in law, and does not extend the operation of clause (a). The term "procedure" in clause (c) means the practice followed by the Courts in the trial of cases, and cannot be construed as including the mental process by which a Court comes to a conclusion upon a question of fact.

Per MAHMOOD. J.—That the Legislature, by framing s. 574 of the Civil Procedure Code, intended to guard against such failure of justice as might arise from the defective or arbitrary exercise of the extensive powers possessed by the Court of First Appeal in cases

* Second Appeals Nos. 169 and 305 of 1884, from a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 20th December 1883, modifying a decree of Shaikh Asghar Ali, Munsif of Deoria, dated the 7th September 1883.

which, with reference to their nature, would be proper subjects of second appeal; and a judgment of a Court of First Appeal which falls short of due compliance with the various clauses of s. 574 is essentially defective, and may properly be made the subject of complaint in second appeal under s. 584. *Ramnarain v. Bhawanidin*, Weekly Notes, 1882, p. 104, and *Sheoambar Singh v. Jallu Singh*, Weekly Notes, 1882, p. 158, referred to.

The word "procedure" in clause (c) of s. 584 must be understood in its most generic sense, including all the rules contained in the Civil Procedure Code or any other law regulating the investigation of cases by the civil Courts.

When the Court of First Appeal, after having entered into the merits of the case, has considered the evidence and adjudicated upon the merits in the manner required by s. 574, the mere circumstance that the conclusions at which the Court has arrived are erroneous or opposed to the weight of evidence, will not justify interference in second appeal, even though such conclusions proceed upon an improper conception of the exact effect and bearing of the case upon the merits. On the other hand, when the Court of First Appeal, while adjudicating with due compliance with the provisions of s. 574, arrives at conclusions upon the merits ignoring any steps essential for justifying those conclusions, or where such conclusions are based upon evidence inadmissible by law, or proceed upon an erroneous view of the legal effect of any material part of the evidence, or are arrived at under a misconception either of the rules of evidence or of any other law, such conclusions, though they purport to be distinct findings of fact, would lay the judgment of the Lower Appellate Court open to second appeal under cl. (c) of s. 584, so long as the error was substantial enough to have possibly affected the justice of the case upon the merits.

THE suit to which these appeals related was one to enforce a right of pre-emption in respect of the sale of a one pie share in each of two villages, by a deed dated the 23rd December 1882. The sale-consideration was stated in the deed to be Rs. 999, made up as follows:—The amount of a bond for Rs. 697, with interest, Rs. 899-1-0; Rs. 72-15-0, due on an old account; and Rs. 27 paid in cash. The plaintiff alleged in his plaint that the statement in the deed that the sale consideration was Rs. 999 was false, and that the real price of the property was Rs. 377. The Court of First Instance gave the plaintiff a decree for possession of the property, on payment of Rs. 999, which sum it found was the real price. The plaintiff appealed from this decree, his appeal being virtually confined to the finding as to the amount of the sale-consideration. The Lower Appellate Court stated the question requiring its decision in the following terms:—"The point for determination is, what is the actual amount of the purchase-money?" Upon this point it found as follows:—

"The sale-deed contains a detail as follows:—A bond, dated the 8th December 1877, for Rs. 697, with interest, Rs. 899-1-0; Rs. 72-15-0 former debt, and Rs. 27 cash. The plaintiff also states that the amount of the *zar-i-peshgi* lease is Rs. 350; hence it is necessary to examine the account of the former bond. That bond was not duly proved, nor was the money thereof paid in cash. Its detail is as follows:—Rs. 347 on account of *zar-i-peshgi* lease, dated 5th Baisakh badi 1279 fasli, Rs. 51 on account of the bond, dated 12th Jaith badi 1281 fasli, Rs. 127 of the account and Rs. 172 cash. In my opinion, Rs. 347 on account of *zar-i-peshgi* lease, and Rs. 51 on account of bond, total Rs. 398, are proper, and the items of Rs. 172 cash and Rs. 127 of account are wrong, inasmuch as these two items are simply for show. As the defendant was lease-holder from before, and had a mind to purchase the property, he used to take paper proceedings, otherwise no person can think that a property paying Rs. 4-8-0 as revenue will be worth Rs. 999. The plaintiff should pay Rs. 398, and the interest up to the date of the sale-deed to the extent of Rs. 120, total Rs. 518, and Rs. 27 now paid in cash; in all Rs. 545.

The amount of Rs. 72-15-0 is also nominal." The Lower Appellate Court accordingly modified the decree of the first Court by decreeing the plaintiff's claim to possession on payment of Rs. 545 instead of Rs. 999.

Both the plaintiff and the defendant vendee appealed to the High Court. The grounds on which the defendant vendee appealed were as follows:—

"(i) Because the lower Court has erred in deciding the case on conjectural grounds and ignoring the whole evidence.

"(ii) Because the lower Court has erred in reducing the amount covered by the registered bond of the 8th December 1877.

[652] "(iii) Because the lower Court has assigned no reasons for disallowing the item of Rs. 72-15-0."

The ground on which the plaintiff appealed was as follows:—

"Because the Lower Appellate Court has erred in law in awarding the sum of Rs. 168 compound interest, including other sums not lawfully due by the vendor to the respondent vendee of the share in suit."

The appeals were numbered respectively 169 of 1884 and 305 of 1884.

The Divisional Bench (PETHERAM, C.J., and BRODHURST, J.), before which the appeal came for hearing, referred to the Full Bench the following question:—"Whether the questions raised in these two cases can be made the subject of second appeals?"

Pandit *Ajudhia Nath* and *Munshi Kashi Prasad*, for the Appellant.

Mr. *J. Simeon*, for the Respondent, in No. 169.

Mr. *J. Simeon*, for the Appellant,

Pandit *Ajudhia Nath* and *Kashi Prasad*, for the Respondent, in No. 305.

The following judgments were delivered by the FULL BENCH:—

Petheram, C.J.—The question raised by this reference is, whether this Court is at liberty, in second appeal, to look into the evidence in the cause for the purpose of ascertaining whether the lower Courts have found the facts correctly.

I am of opinion that the question must be answered in the negative. I am aware that this opinion differs from many rulings of the High Courts in India, and from that of my brother Judges, but as I think the words of the statute are clear, and that if they are liable to create injustice, the remedy should be applied by the Legislature, I feel it to be my duty to disagree with the many authorities which I have mentioned. Section 585 of the Civil Procedure Code provides that no second appeal shall lie except on the grounds mentioned in s. 584, so that the question resolves itself into one of the construction of that section, and of that section alone. There are only three grounds of appeal mentioned in it, and it will be as well to examine them in detail.

[653] (A) The decision being contrary to some specified law or usage having the force of law. By "specified law," the Legislature would seem to mean the statute law, and by "usage having the force of law" the common or customary law of the country or community, and, in my opinion, the ground is confined to cases in which the Lower Appellate Courts have either misconstrued a statute or a written document, or have come to a wrong conclusion as to what is the customary law of the country or community with reference to questions at issue between the parties.

(B) The decision having failed to determine some material issue of law or usage having the force of law. The meaning of this is very obscure,

but, whatever it means, it can only refer to mistakes in law. Probably it was intended to meet cases in which the lower Courts had treated the question as one of fact, when it was really one of law, but my opinion is that it does not extend the operation of (A) and is included in it.

(C) A substantial error or defect in the procedure as prescribed by the Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits. Procedure is a perfectly well known word among lawyers, and means the practice followed by the Courts in the trial of cases which come before them, but, until it became necessary for the purpose of extending second appeals under the Code to questions of fact, I am not aware that the mental process by which a Judge and Jury came to a conclusion on a question of fact was ever called a matter of procedure, and, in my opinion, it is impossible to fix that meaning to the word.

This being my view of the meaning of the grounds of appeal provided by s. 584, it of course follows that no question of fact is included in either of them, and it would seem that the intention of the Legislature was that in small causes the finding of the lower Courts on questions of fact should be absolutely final; and, having regard to the fact that forty per cent. of the second appeals filed in the High Court relate to property of less value than Rs. 100, I cannot but think that the provision was a wise one. If a remedy is needed, the most useful one would probably be to abolish second appeals altogether, and to reduce the amount above which a first appeal would lie to the High Court to a much smaller sum than Rs. 5,000; but, if this were done, all appeals which did not come [654] to the High Court ought, of course, to be heard by the District Judge.

Straight, Oldfield, and Brodhurst, JJ.—The question raised by this reference is, whether it is competent for this Court to entertain pleas in second appeals which impeach the findings of fact recorded by the Lower Appellate Court, on the ground that such findings are conjectural, that they ignore the evidence, and that the Court has given no reasons for the conclusions at which it arrived. Assuming these allegations to be sustained, we are of opinion that our answer should be in the affirmative. By s. 584 of the Civil Procedure Code, it is provided that an appeal lies to this Court from an appellate decree when, among other matters, there has been "a substantial error or defect in the procedure prescribed by this Code or any other law, which may possibly have produced error or defect in the decision on the merits;" and by s. 574 it is enacted that the judgment of a first appellate Court shall contain "the reasons for the decision." We think that where a Lower Appellate Court has drawn strained or unreasonable conclusions from the evidence, or has discredited or disbelieved witnesses or documentary proof upon capricious or unsustainable grounds, or has perversely interpreted or shut its eyes to proved facts, or has stated no intelligible reasons for arriving at its findings of facts, this Court may take notice of all such matters in second appeal. Such has long been the view of this Court, as numerous rulings will show, and the same view has been held at Calcutta—*Futtehma Begum v. Mohamed Ausur*, I. L. R., 9 Cal., 309; *Assanullah v. Hafiz Mahomed Ali*, I. L. R., 10 Cal., 392, and *Lal Mahomed Bepari v. Shoila Bewa*, 11 Cal. L. Rep., 104. In the first of these cases WILSON, J., remarks:—"We are well within the scope of the authorities in holding that where the Lower Appellate Court has clearly misapprehended what the evidence before it was, and thus has been led to discard or not give sufficient weight to important evidence to which it is not entitled, and has thus been led, not into any mere incidental mistake, but totally to misconceive the case, this Court may interfere." It seems to us that if the

judgment of a Lower Appellate Court is marked by the defects we have already adverted [655] to, there have been defects in its procedure, which not only possibly but probably have produced error or defect in the decision of the appeal on its merits; or, in other words, that there has been no legal trial or determination of the appeal. For the expression "determine any question of fact," as used in section 566 of the Code must, we take it, be construed to mean "determine any question of fact in a legal manner," that is to say, by the Court exercising its judicial mind in a rational and legal manner, and not deciding out of mere caprice or a perverse and obtuse interpretation of evidence. If this Court had not the power in second appeal we hold it has, to remand a case to a Lower Appellate Court for the preparation of a legal judgment properly determining the question or questions of fact, we know by experience that great injustice might often be done, and it would come to this,—that we should be bound by the mere *ipse dixit* of a Lower Appellate Court in respect of the issues of fact, no matter how preposterous its findings might be. We cannot believe it was ever intended by the Legislature that in a such case there should be an absolute defect of jurisdiction in this Court to examine such findings in second appeal. Our answer to the reference therefore is that the questions raised in S. A. No. 169 of 1884 by the pleas in appeal were questions that might be made the subject of second appeal.

Mahmood, J.—In answering the reference in these cases I do not think we are concerned with the merits of the case, because that is a matter which would be disposed of by the Division Bench. Treating the question therefore purely as a matter of interpreting the law, I am of opinion that the grounds of appeal urged in these cases are such as could be entertained in second appeal, provided of course that they arise out of the circumstances of the case.

In considering this matter, the first section to which I would refer is s. 574 of the Civil Procedure Code. The powers conferred by the Code upon the Court of first appeal are very extensive, and in cases which involve no complicated question of law, the decision of that Court is practically final, because it cannot be interfered with by the Court of second appeal, except upon such grounds as fall within the purview of s. 584 of the Code. The conclusions upon the facts of the case at which the Court of first appeal arrives are binding upon the Court of second appeal, because of the provisions of s. 585 of the Code. This being the effect of the provisions of the law, it seems to me that the Legislature, by framing s. 574 of the Code, intended to guard against such failure of justice as might arise from the defective or arbitrary exercise of the extensive powers possessed by the Court of first appeal in cases which, with reference to their nature, would be proper subjects of second appeal. All that I have said so far is based upon the reasoning which I explained in *Ramnarain v. Bhawanidin*, Weekly Notes, 1882, p. 104, and in *Sheoambar Singh v. Lallu Singh*, Weekly Notes, 1882, p. 158, and which I need not repeat here. It is, however, a necessary corollary of the *ratio decidendi* adopted by me in those cases that a judgment of the Court of first appeal, which falls short of due compliance with the various clauses of s. 574, is essentially defective, and that such defect could properly be made the subject of complaint in second appeal within the purview of s. 584 of the Code. And it seems to me that any other view of the law would either render s. 574 inconsistent with s. 584, or reduce the former section to a mere superfluity or dead letter. I make this observation, subject of course to the effect which the provisions of s. 578 (read with s. 587) have upon the powers of the Court of second appeal, but we are not immediately concerned with that section in answering this reference.

The most important section of the Code to be considered for the purpose of this reference is naturally s. 584, which corresponds with s. 372 of the old Code (Act VIII of 1859), and a comparison of the two sections shows that the provisions of the law have undergone no important change. It is clear that in this case the ground urged in second appeal could not be entertained under either cl. (a) or cl. (b) of s. 584; but cl. (c) of the section seems to me to be wide enough to include such grounds. The clause lays down that a second appeal would lie on the ground of "a substantial error or defect in the procedure as prescribed by this Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits." The corresponding part of s. 372 of the Code of 1859 was very similarly worded, as it gave a right of second appeal on the ground "of a substantial error or defect in law in the procedure or investigation of the case which may have produced error or defect in the decision of the [657] case upon the merits." The absence of the phrase "*investigation of the case*" in the present section of the Code might lead to the inference that the right of second appeal was intended to be more restricted than it was under the old Code, but, on the other hand, the insertion of the word "*possibly*" would lead to the contrary inference. I am, however, of opinion that the change of language has introduced no material alteration in the law. Investigation, as I understand the word, simply means the process by which conclusions as to the merits of the case are arrived at; procedure means the rules by which that process is to be guided. The one is the subject of the other, and I take it that the law will presume that, where there is no defect of procedure, there is no defect of investigation. It follows therefore that the omission of the phrase "*investigation of the case*" in s. 584 implies no intention on the part of the Legislature to restrict the right of second appeal by rendering it narrower than what it was under the Code of 1859. On the other hand, the introduction of the word "*possibly*" does not go far to show that the present Code intended to extend the right of second appeal.

The reference therefore resolves itself into the simple question whether the grounds of appeal indicate any such substantial error or defect in the "*procedure*" as "may possibly have produced error or defect in the decision of the case upon the merits." I have emphasized the words which I think have to be considered in deciding the question. In my opinion the word "*procedure*" as used in cl. (c) of s. 584 must be understood in its most generic sense, including all the rules contained in the Civil Procedure Code, or any other law regulating the investigation of cases by the Civil Courts. The duties and powers of a Court of First Instance in trying a cause are laid down in the Code at full length, and the effect of s. 582 is to render the same rules, *mutatis mutandis*, applicable to the Court of first appeal; and it follows that, upon matters which are common to both the Courts, what would constitute a substantial error or defect in procedure for the Courts of First Instance, would also apply in the Court of first appeal. The latter Court not being primarily concerned either with the framing of issues or with taking of evidence in trying those issues, its duties in regard to appeals are limited to matters described in [658] s. 574 of the Code, so that when a Court of first appeal fails to consider the point for determination or to give reasons for its decision, its action or rather omission is tantamount to a defective trial of an issue by a Court of First Instance. The action of a Court of first appeal in not considering evidence upon any point, or in assigning no reasons for its conclusions, bears a strong analogy to the action of a Court of First Instance in declining to frame any issue, or omitting to take evidence upon any issue necessary for a proper decision of the case. Such cases, I think, constitute a substantial defect or

error in procedure, introducing the possibility of error or defect in the decision of the case within the meaning of cl. (c) of s. 584. And it seems to me that, under any other view, s. 566 of the Code could not be consistently employed by a Court of second appeal for the purpose of remanding issues of fact which it may consider necessary to ascertain for a proper adjudication upon the rights of the parties in second appeals. The uniform practice of this Court, as well as of the other High Courts, so far as I am aware, has been consistent with my view, and indeed the cases cited on behalf of the appellant go even further. The cases of *Lal Mohamed Bepari v. Shoila Bewa*, 11 Cal. L. Rep., 104; *Ram Prosad Das v. Rajo Koer*, 5 Cal. L. Rep., 94; *Huropershad Roy Chowdhry v. Umatarra Dabi*, 8 Cal. L. Rep., 449; *Mahesh Singh v. Masri Singh*, Weekly Notes, 1881, p. 14; *Behari Lal v. Sahu Bithal Das*, Weekly Notes, 1882, p. 6; *Raj Rani Kuari v. Manni Sahu*, Weekly Notes, 1882, p. 66, and the older case of *Shoobul Chunder Kulleah v. Koylash Chunder Mal*, 14 W. R., 23, all go to support the contention of the learned pleader for the appellant. But perhaps the strongest case in support of the appellants' contention is *Futtehma Begum v. Mohamed Ausur*, I. L. R., 9 Cal., 309, in which WILSON, J., laid down that in exceptional cases the High Court will interfere in second appeal with findings of fact which have been arrived at by the Lower Appellate Court under a total misconception of the merits of the case. The latest case, however, is *Assanullah v. Hafiz Mahomed Ali*, I. L. R., 10 Cal., 932, in which FIELD, J., laid down the rule that where the Lower Appellate Court omits to give reasons for its decisions, the High Court will retain the case in second appeal, [659] and either require the Judge to state his reasons, or, in the event of his absence, refer the question to his successor for fresh trial.

Without discussing the various cases, I wish to say that I am not prepared to go the whole length of the rule laid down in some of them. The application of the provisions of cl. (c) of s. 584 of the Civil Procedure Code must necessarily depend in a great measure upon the particular circumstances of each individual case; but I take it as a universal rule, applicable alike to all cases, that in acting under that clause the High Court cannot in second appeal deal with the lower Court's findings of facts as it could have done in first appeals. The law obviously aims at finality of decision upon questions of fact in cases which do not come up to the High Court in first appeal; and I should say that when the Court of first appeal, after having entered into the merits of the case, has considered the evidence and adjudicated upon the merits in the manner required by s. 574, the mere circumstance that the conclusions at which the Court has arrived are erroneous, or opposed to the weight of evidence, will not justify interference in second appeal, even though such conclusions proceed upon an improper conception of the exact effect and bearing of the case upon the merits. On the other hand, where the Court of first appeal, while adjudicating with due compliance with the provisions of s. 574, arrives at conclusions upon the merits ignoring any steps essential for justifying those conclusions, or where such conclusions are based upon evidence inadmissible by law, or proceed upon an erroneous view of the legal effect of any material part of the evidence, or are arrived at under a misconception either of the rules of evidence or of any other law, such conclusions, though they purport to be distinct findings of fact, would lay the judgment of the Lower Appellate Court open to second appeal under cl. (c) of s. 584, so long as the error is substantial enough to have possibly affected the justice of the case upon the merits. Beyond the rule which I have so endeavoured to enunciate, I am not prepared to go regarding the scope of second appeals, and as illustrating my view I may add that findings of fact which proceed upon no evidence at all, or upon ignoring the whole

evidence, or upon erroneous conception of the rules of *onus probandi*, admissions, estoppels, conclusive proof and other such matters [660] would, though findings of fact, be open to objection in second appeal.

Applying these principles to the cases to which this reference relates, I am of opinion that if the grounds urged can be substantiated, they form a proper subject of second appeal, and my answer to the reference is therefore in the affirmative.

NOTES.

[This case and 9 Cal., 309, were **overruled** by the Privy Council in (1890) 18 Cal., 23 P.C. See also another P. C. case following this, (1892) 20 Cal., 93 P. C.

Thus (1885) 7 All., 765 *infra* is also no longer law as regards the powers of the Second Appellate Court to go into questions of fact.]

[7 All. 660] APPELLATE CIVIL.

The 16th April, 1885.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE BRODHURST.

Binda Kuar.....Defendant

versus

Bhonda Das.....Plaintiff.*

Act IX of 1872 (Contract Act), ss. 69, 70—Payment of Government revenue by person wrongfully in possession of land.

B, who was in wrongful possession of land which by right belonged to *K*, collected rents and paid the Government revenue. *K* eventually established her title to the property, obtained possession, and recovered the rents from the tenants, and *B* was obliged to refund the same. Subsequently *B* sued *K* to recover the sum which he had paid on account of revenue.

Held, that the claim did not fall within the provisions of ss. 69† and 70‡ of the Contract Act, and the fact that the plaintiff had been a loser by his wrongful act, or that the defendant had been benefited by the payment he made, would give him no right of action against her. *Tiluck Chand v. Soudamini Dassi*, I. L. R., 4 Cal. 566, referred to.

THE facts of this case are sufficiently stated in the judgment of the Court for the purposes of this report.

The Senior Government Pleader (Lala Juala Prasad), for the Appellant.

Pandit Ajudhia Nath and Munshi Kashi Prasad, for the Respondent.

* Second Appeal No. 438 of 1884, from a decree of M. S. Howell, Esq., District Judge of Mirzapur, dated the 17th January 1884, reversing a decree of Munshi Madho Lal, Munsif of Mirzapur, dated the 6th July 1883.

Reimbursement of person paying money due by another in payment of which he is interested. † [Sec. 69:—A person, who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.]

‡ [Sec. 70:—Where a person lawfully does anything for another person, or delivers any thing to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.]

Obligation of person enjoying benefit of non-gratuitous act.

Oldfield and Brodhurst, JJ.—The plaintiff took wrongful possession of the property of his deceased brother, which by right was the inheritance of the defendant, who ultimately established her title and obtained possession. While the plaintiff held possession he collected rents, and paid the Government revenue on the property. The defendant recovered the rents from the tenants, and the plaintiff was obliged to refund the same, and he now sues defendant to recover the sum he paid on account of revenue. The first [661] Court dismissed the suit. The Lower Appellate Court has decreed the claim, and the defendant has appealed. We are of opinion that the appeal must prevail, and the Court of First Instance has rightly held that the plaintiff, under the circumstances has no right of action. The claim does not fall within the provisions of ss. 69 and 70, Contract Act. The plaintiff was in wrongful possession of the defendant's property, and paid the revenue for his own benefit and on his own account, and the fact that he has been a loser by his wrongful act, or that the defendant has been benefited by the payment he made, will give him no right of suit against her. The case of *Tiluck Chand v. Soudamini Das*, I. L. R., 4 Cal., 566, is very similar, and supports the view we take. We decree the appeal, and set aside the decree of the Lower Appellate Court, and restore that of the first Court, and dismiss the suit with all costs.

Appeal allowed.

[7 All. 661]

FULL BENCH.

The 18th April, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE STRAIGHT,
MR. JUSTICE OLDFIELD, MR. JUSTICE BRODHURST
AND MR. JUSTICE MAHMOOD.

Chattarpal Singh.....Petitioner

versus

Raja Ram.....Opposite Party.*

*Suit in forma pauperis—Rejection of application—Civil Procedure Code,
s. 407 (c)—“Right to sue”—Limitation.*

Where an application for leave to sue as a pauper was rejected with reference to s. 407 (c) of the Civil Procedure Code on the ground that the claim was barred by limitation and therefore the applicant had no right to sue,—*held*, by the Full Bench, that the Court had acted within its powers, and that, its jurisdiction not having been exercised illegally or with material irregularity, the High Court had no power of interference in revision under s. 622 of the Civil Procedure Code. *Amir Hassan Khan v. Sheo Baksh Singh*, I.L.R., 11 Cal., 6, referred to.

The terms of s. 407 (c) of the Code must not be read as limiting the Court's discretion to merely ascertaining whether the “right to sue” arose within its jurisdiction, but have a more extended meaning, namely, that an applicant must make out that he has a good subsisting cause of action, capable of enforcement in Court, and calling for an answer, and not barred by the law of limitation or any other law.

* Application No. 270 of 1884, for revision under s. 620 of the Civil Procedure Code of an order of Babu Abinash Chander Banerji, Subordinate Judge of Allahabad, dated the 3rd May, 1884.

Per MAHMOOD, J.—The word “case” as used in s. 622 of the Civil Procedure Code should be understood in its broadest and most ordinary sense, including all adjudications which might constitute the subject of appeal or revision, subject to the rules governing the exercise of the appellate and revisional jurisdictions respectively; and [662] it comprehends adjudications under s. 407, which fall under the same general category of adjudications as the rejection of an ordinary plaint under s. 53 or s. 54. *Phul Singh v. Jagan Nath*, Weekly Notes, 1882, p. 39; *Bhulneshri Dat v. Bidiadhis*, Weekly Notes, 1882 p. 69, and *Sital Sahu v. Bachu Ram*, Weekly Notes, 1882, p. 92, referred to.

Also *per MAHMOOD, J.*—The provisions of s. 407 must be interpreted strictly, inasmuch as they operate in derogation of the right possessed by every litigant to seek the aid of the Courts of justice; and an exercise of jurisdiction under that section, when such exercise of jurisdiction is open to the objection of illegality or material irregularity, would form a proper subject of revision by the High Court. *Har Prasad v. Jafar Ali*, ante, p. 345, and *Ammal v. Nayudu*, I. L. R., 4 Mad., 323, referred to.

THIS was an application to the High Court to revise, under s. 622 of the Civil Procedure Code, an order of the Subordinate Judge of Allahabad, dated the 3rd May 1884. The applicant, Chattarpal Singh, applied to the Subordinate Judge of Allahabad for leave to sue as a pauper for certain immoveable property. The Subordinate Judge rejected the application with reference to s. 407 (c) of the Civil Procedure Code, on the ground that the claim was barred by limitation, and therefore the applicant had no right to sue.

The Divisional Bench (OLDFIELD and MAHMOOD, JJ.) before which the application for revision of this order came for hearing, referred to the Full Bench the question “whether this Court has the power under s. 622, Civil Procedure Code, to revise an order passed under s. 407, Civil Procedure Code, rejecting an application for permission to sue *in forma pauperis*,” citing as cases which might be referred to—*Phul Singh v. Jagan Nath*, Weekly Notes 1882, p. 39; *Bhulneshri Dat v. Bidiadhis*, Weekly Notes, 1882, p. 69; *Sital Sahu v. Bechu Ram*, Weekly Notes, 1882, p. 92; *Moulvi Muhammad v. Syed Husain*, I. L. R., 3 All., 203, and *Amir Hasan Khan v. Sheo Baksh Singh*, I. L. R., 11 Cal., 6.

Babu Ram Das Chakarbaty, for the Applicant.

Mr. T. Conlan, the Junior Government Pleader (Babu Dwarka Nath Banarji,) and Munshi Ram Prasad, for the Opposite Party.

The following judgments were delivered by the FULL BENCH :

Petheram, C.J. and Straight, Oldfield, and Brodhurst, JJ.—It seems to us that the question put by this reference can scarcely be answered generally, and that our reply to it must be [663] limited to the particular case out of which it has arisen. Their Lordships of the Privy Council in a recent ruling—*Amir Hassan Khan v. Sheo Baksh Singh*, I. L. R., 11 Cal., 6, have laid down the following test to be adopted in deciding as to the powers of the High Court under s. 622 of the Civil Procedure Code:—“The question then is, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity? It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided rightly or wrongly, they had jurisdiction to decide the case, and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity.” In the case before us, it is conceded that the Subordinate Judge had jurisdiction to hear the application, that he did hear it, and that he has decided it. It is not enough to give us jurisdiction to revise his order under s. 622, to show that he has decided wrongly, but it must be made out that he acted illegally or with material irregularity. We must therefore look to the sections of Chapter XXVI of the Code,

under which the Subordinate Judge's proceedings were taken, to ascertain precisely what his powers were. By s. 403 it is provided that an application for permission to sue as a pauper must be in writing, that it is to contain all the particulars required by s. 50 to be given in ordinary plaints, that it shall be accompanied by a schedule of the petitioner's moveable and immoveable property, with an estimate of its value, and that it must be signed and verified in like manner as a plaint. Section 404 deals with the presentation of the petition, and s. 405 enacts that, if the application is not framed or presented in the manner prescribed, it shall be rejected. Section 406 provides for the examination of the applicant; and then we come to s. 407, which declares the grounds on which, after examination of the applicant, the Court shall reject the application. If none of these grounds appear, in other words, if the applicant makes out satisfactory *prima facie* grounds for calling on the proposed defendant to show cause against his application, then notices are to issue as provided in s. 408, and they pave the way to the formal hearing mentioned in s. 409, at which the question of the applicant's pauperism has to [664] be determined. It will thus be observed that the proceedings under ss. 405 and 407 are of a preliminary character, and a rejection under those sections is not, as in the case of s. 409, of a final kind, and a bar to a subsequent application. Examining s. 409 with advertence to the circumstances of the case out of which the reference has arisen, it appears to us that it was competent for the Subordinate Judge to reject the applicant's petition upon the ground that, as from his petition and his examination his cause of action was shown to have arisen "beyond the period of limitation allowed by law for instituting the suit" (s. 50, last para.), his allegations did not "show a right to sue" (s. 407, cl. c.). We cannot read these words of s. 407 as limiting the Court's discretion to merely ascertaining whether the "right to sue" arose within its jurisdiction, but they have in our opinion a more extended meaning, namely, that an applicant must make out that he has a good subsisting cause of action, capable of enforcement in Court, and calling for an answer, and not barred by the law of limitation or any other law. If it were not so, then the discretion of the Court, being limited to the matter of jurisdiction, would be of little value. Whether in the case before us we treat the Subordinate Judge's order as made under s. 407 or s. 405, it appears to us that he was acting entirely within his powers in holding that the applicant had no right to sue, his cause of action having accrued beyond the period of limitation provided by law for his proper suit. It has therefore not been shown that "he exercised his jurisdiction with illegality or material irregularity," and it follows that we have no jurisdiction to revise his orders under s. 622 of the Code. In these terms we answer the reference.

Mahmood, J.—Bearing in mind the rulings referred to by the Division Bench and the course which the argument before the Full Bench has taken, I am of opinion that the question raised by this reference has two distinct aspects; *first*, as a general question, whether orders under s. 407 of the Civil Procedure Code are subject to the revisional jurisdiction conferred upon this Court by s. 622 of the Civil Procedure Code; and *secondly*, whether the circumstances of this particular case furnish grounds for the exercise of such revisional jurisdiction. I will consider each of these points separately.

[665] Upon the first point, relating to the general principle upon which the revisional powers of this Court under s. 622 of the Civil Procedure Code, must be exercised, we are of course bound by the ruling of the Privy Council in *Amir Hassan Khan v. Sheo Baksh Singh*, I. L. R., 11 Cal., 6, and by the recent Full Bench ruling of this Court in *Magni Ram v. Jiwa Lal*, ante, p. 336,

which simply adopted the rule laid down by the Lords of the Privy Council. I was one of the Judges who concurred in the Full Bench ruling, but finding that the rule therein laid down was interpreted in a manner which was inconsistent with my reasons for concurring in the Full Bench ruling, I took it upon myself in the case of *Har Prasad v. Jafar Ali, Ante*, p. 345, to explain, at some length, the exact scope of the rule laid down by the Lords of the Privy Council, and which we had unanimously adopted in the Full Bench. I still adhere to the views which I then expressed, and I now pass to the special question whether orders under s. 407 of the Civil Procedure Code, rejecting applications for permission to sue *in forma pauperis*, can be revised by this Court under s. 622 of the Code. But before expressing my own views upon the matter, I wish to refer to certain rulings which were cited on either side at the hearing. The first of these is the case of *Phul Singh v. Jagan Nath*, Weekly Notes, 1882, p. 39, in which a Division Bench of this Court held that an order refusing permission to sue *in forma pauperis* did not fall within the term "case" in s. 622, and therefore could not be dealt with in revision. The same view appears to have been taken in *Bhulneshri Dat v. Bidiadhis*, Weekly Notes, 1882, p. 69, and also in *Sital Sahu v. Bechu Ram*, Weekly Notes, 1882, p. 92. It was principally in consequence of these cases that my brother OLDFIELD and myself made this reference to the Full Bench. The particular circumstances of these cases do not appear from the report, but I confess, and I say this with due deference, that I am unable to concur in the general form in which the rule was laid down in those cases. The word "case," as used in s. 622 of the Code, is nowhere defined; but adopting the general rule of construing statutes, I hold that the word should be understood in its most broadest [*sic*] and most ordinary sense, unless there were specific reasons for narrowing its meaning. I confess I am unaware of any such reasons, and limiting the arguments to orders under [666] s. 407 of the Civil Procedure Code, I should say as a general proposition that that which might constitute the subject of an appeal would necessarily be a "case." I say this because in the course of the argument it was suggested that the reason why an order rejecting an application under s. 407 was not a "case" within the meaning of s. 622, was that such an order constituted no adjudication, but only a preliminary proceeding taken before the appearance of the opposite party. So far as this argument is concerned, I have only to say that the Code itself provides cases in which adjudications do take place without the presence of the opposite party, and are regarded as adjudications furnishing matter for appeal. I need not refer to the Code at large, but only to such parts of it as afford the strongest analogy to the immediate question which I am now considering. Now s. 407 is a part and parcel of one distinct Chapter—XXVI of the Code—which provides rules for "suits by paupers," and begins with s. 401, which gives the general right to indigent persons to bring suits *in forma pauperis*, subject of course to the specific rules laid down in the Code. Section 403 provides that the pauper is to seek his remedy by a written application containing "the particulars required by s. 50 in regard to plaints in suits;" s. 404 lays down rules as to presentation of the application: s. 405 gives a summary power to the Court to reject the application if the rules contained in ss. 403 and 404 are not duly observed; s. 406 provides for examination of the applicant "regarding the merits of the claim;" and then comes s. 407, which confers upon the Court the power of rejecting the application after having ascertained the merits of the claim. This power is limited to the conditions prescribed by the various clauses of the section, but the clause with which we are immediately concerned is cl. (c), which lays down that one of the grounds for rejecting the application may be that the applicant's allegations do not "show a right to sue in such Court."

To proceed further with the main features of the rules contained in the Chapter :—s. 408 provides for the service of notice on the opposite party, fixing a day for receiving evidence as to the applicant's pauperism; s. 409 relates to the procedure to be adopted at the hearing; and s. 410 provides that "if the application be granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall [667] proceed in all other respects as a suit instituted under Chapter V." The only other section of the Chapter which I wish to notice is s. 413, which lays down that "an order of refusal made under s. 409 to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature, by him in respect of the same right to sue, but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right."

Now, reading these provisions of the law together, there is no doubt in my mind that the strongest possible analogy exists between an application to sue *in formâ pauperis* and an ordinary plaint in a suit under Chapter V of the Code—a view fully supported by the principle upon which ss. 403 and 410 have been framed. This being so, it seems to me to follow as a corollary that rejection of an application to sue *in formâ pauperis* under s. 405 or s. 407 falls under the same general category of adjudications as the rejection of an ordinary plaint under s. 53 or s. 54. In both cases the service of notice on the opposite side, or his appearance, is not a condition precedent to the exercise of the power of rejection, and it follows that if the rejection of a plaint is a "case," the rejection of an application to sue *in formâ pauperis* must also constitute a "case." Indeed, the Code in s. 2 has expressly given to "an order rejecting a plaint" the *status* of a "decree" for the purposes of appeal, and, going further in the same direction, cl. (b) of s. 588 gives the rights of appeal even from "orders *returning* plaints for amendment or to be presented to the proper Court," that is, from orders under s. 83 or s. 67 of the Code. Now, as I said before, it is not easy for me to conceive that an adjudication which might have constituted a "case" for appeal falls short of the meaning of that word as used in s. 622 of the Code; and I may say broadly that that which is a case for appeal must also be a case for revision, subject, of course, to the rules which govern the exercise of the appellate and revisional jurisdictions respectively. I might carry the analogical argument further by saying that the illegal rejection of a pauper's application to sue has for him the same effect as the erroneous rejection of the plaint has for an ordinary plaintiff; and though for obvious reasons the policy of the law is to differentiate between the two with reference to the right of appeal, the legal conceptions of an order rejecting [668] an application to sue *in formâ pauperis* and an order rejecting the plaint, must necessarily fall under the same category so far as the interpretation of the term "case" in s. 622 is concerned. As to the policy of the law itself, I have to say, with reference to an observation made in the course of the argument, that I have long held the opinion that the only justification in the eye of legislative science for imposing taxes upon litigation in the shape of court-fees can be the check which they have upon frivolous and vexatious litigation, and that though such checks may be necessitated by the exigencies of the administration of justice, they must not be regarded as affording ground for the hypothesis that the Courts of Justice in British India have been established only for the rich, and that the law is intended to give less protection to the poor than to the wealthy. It is in this light, and this light alone, that I can interpret the rules of our law as to pauper litigants, whether such rules be contained in the Court-Fees Act or in the Civil Procedure Code. Something to this effect was said by me recently in disposing of an

application under s. 549 of the Civil Procedure Code; and, applying the spirit of the same principle to the present case, and whilst fully aware of the policy of the law in connection with suits *in formâ pauperis* as distinguished from ordinary suits, I hold that the provisions of s. 407 must be interpreted *strictly*, because they operate in derogation of the right which every litigant has to seek the aid of the Courts of Justice. There is of course no appeal from an order rejecting a pauper's application under s. 407 of the Code; but what I have already said satisfies me that such an order would be a "case" within the meaning of s. 622. It may, indeed, as was said in the course of the argument, be a "hard case," furnishing grounds for interference in revision according to the rules provided by the law. The question must of course depend upon the circumstances of each case, and where jurisdiction has been exercised "illegally or with material irregularity," the case would of course be a proper one for the exercise of revisional powers by this Court. In *Har Prasad v. Jafar Ali*, *Ante* p. 345, to which I have already referred, my brother OLDFIELD and myself concurred in holding that an obviously wrong exercise of jurisdiction in opposition to the rules of the limitation law [669] constituted a ground for interference in revision. In the same case, in concurring with my learned brother, I illustrated my views by supposing other cases which would demand such interference, and, in the case of *Raghunath Das v. Raj Kumar*, *Ante*, p. 276, I held, though I had the misfortune of dissenting in the result from the opinion of my brother OLDFIELD, that the power of amending decrees under s. 206, when exercised "illegally or with material irregularity," would furnish grounds for revision. And here I wish to point out that my learned brother differed with me, not because he did not think that an order under s. 206 would constitute a "case" within the meaning of s. 622, but because he was of opinion that the amended decree could be made the subject of appeal under s. 540, and therefore by reason of s. 622, which provides revision in appealable cases, the order could not be considered in the exercise of this Court's revisional jurisdiction. Upon the exact point which I am now considering, there was therefore no difference of opinion between my learned brother and myself.

Returning once more to orders rejecting, under s. 407, applications to sue *in formâ pauperis*, I have to cite the case of *Ammal v. Nayudu*, I. L. R., 4 Mad., 323, which supports my view of the law, and shows that an exercise of jurisdiction under that section, when such exercise of jurisdiction is open to the objection of illegality or material irregularity, would form a proper subject of revision by the High Court. Other rulings of the Madras High Court, which are consistent with the same view, were also cited by the learned pleader for the petitioner in this case, but I need not refer to them because they do not bear directly upon the point now under consideration. But in order to illustrate my view, I will suppose an extreme case in which the exercise of revisional jurisdiction would be necessitated in connection with orders under s. 407. Suppose a case in which the lower Court, under serious misapprehension of the law, summarily rejects an application to sue *in formâ pauperis* for reasons other than those presented in ss. 405, 406, or 409, without examining the applicant, and without making any attempt to investigate the merits of the claim or the facts as to pauperism. Would such a case not be a proper subject for revision under s. 622? The order though manifestly illegal and open to the objection of [670] material irregularity could, of course, not be the subject of appeal, and if the argument of the learned counsel for the opposite party, in this case were to be accepted, such an order could not be made the subject of revision either. And it was said that the order was not a final adjudication, because the latter part of s. 413

leaves it open to the applicant to institute a suit in the ordinary manner—a provision similar to that of s. 56 regarding ordinary plaints. But how is such a suit to be instituted by a man who is an absolute pauper, who, whilst having a right, has suffered an injury, and when he has gone into Court to seek redress, is turned out of it by a summary order rejecting his application in the most arbitrary manner, without any adjudication as to the merits of his claim, and without any trial as to the fact of his pauperism? The law gives him no right of appeal, his indigence disables him from paying the Court-fees, and if the revisional powers of this Court in such an extreme case as I have supposed could not be exercised, the necessary conclusion is that there may exist in British India cases in which there is a right which has been infringed, but for which there is virtually no remedy. But in my opinion our law contemplates no such results, and when it conferred the revisional powers upon this Court, it intended that those powers should be so exercised as to prevent such failure of justice. What I have said furnishes an answer in the affirmative to the general question which was referred to the Full Bench by my brother OLDFIELD and myself.

I now proceed to discuss the second aspect of the question which has been involved in the course of the argument before the Full Bench—a question which goes behind the reference, and relates to the merits of the case itself. In this aspect the present case is not an extreme case of the kind which I have supposed in illustrating the question of principle originally referred to the Full Bench. I have already said that the exercise of the Court's power to reject pauper applications under s. 407 is limited to the grounds specified in the various clauses of that section itself, and the question then which arises here is, whether the learned Subordinate Judge acted legally in rejecting the application in the present case on the ground of limitation. He could have acted only under cl. (c) of s. 407 in rejecting the application, because his judgment [671] contains no finding as to the applicant's pauperism, and proceeds entirely upon the view "that the applicant's allegations show that he has no right to sue for the property,"—a phrase which adopts almost *verbatim* the language of the clause to which I have referred. I confess that, at the hearing before the Full Bench I entertained doubts as to whether the expression "*right to sue*," coupled with the phrase "*in such Court*," did not limit the clause to questions relating to cause of action and jurisdiction. I, however, formed no definite opinion, and by the courtesy of the learned Chief Justice I was allowed time to consider the point, and I have arrived at the same conclusion as he and my other learned colleagues have adopted with reference to this particular point. I agree with them in thinking that these phrases must be understood in their broad sense, so as to include, not only questions of jurisdiction, but also such as fall within the purview of clause (c), s. 54, which lays down that plaints shall be rejected "if the suit appears from the statement in the plaint to be barred by any positive rule of law." The law of limitation constitutes "a positive rule of law" barring civil actions, and s. 28 of the Limitation Act (XV of 1877) lays down that "at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished." In the present case, which was a suit for possession of property, the learned Subordinate Judge has found that the suit was barred by limitation, and bearing in mind the rule of the limitation law to which I have just referred, I am of opinion that he acted rightly in holding that the applicant's allegations did not show "*a right to sue*" in his Court within the meaning of cl. (c), s. 407 of the Civil Procedure Code. Whether his conclusions upon the merits of the case were correct or erroneous is another matter, but he had jurisdiction to adjudicate upon the case, and in the exercise of his jurisdiction

he did not act "illegally or with material irregularity" within the meaning of s. 622 of the Code. If he had acted with such illegality or material irregularity, the case would, in my opinion, for the reasons already stated, have been a fit one for interference in revision. But here the learned Subordinate Judge appears to have observed all the rules of law provided for such matters, and his judgment shows that he considered the merits of the claim, and [672] disposed of the application after having heard the defendant or the opposite party.

For these reasons I formulate my answer to this reference in the following terms:—

The Court has powers under s. 622, Civil Procedure Code, to revise an order passed under s. 407, Civil Procedure Code, rejecting an application for permission to sue *in forma pauperis*, in cases where such rejection has been made by exercising jurisdiction "illegally or with material irregularity" within the meaning of s. 622, but in the present case the jurisdiction vested in the lower Court, having been exercised without being open to either of such objections, the present is not a fit case for revision under s. 622, Civil Procedure Code.

NOTES.

SUIT IN FORMA PAUPERIS—

I. In an application to sue as a pauper, enquiry must be made whether there is a *prima facie* case calling for an answer:—(1898) 20 All., 299.

II. Preliminary questions such as limitation, *res judicata*, etc. can be decided finally on such application:—(1891) 20 Bom., 86 (*res judicata*); (1895) 5 M. L. J., 193 (leave was granted after enquiry); (1888) 13 Bom., 126 (want of jurisdiction as the alleged agreement on which the suit was based was immoral and against public policy).

III. But in (1902) 13 M. L. J., 292, it was held, *overruling* (1895) 19 Mad., 197, that enquiry under s. 409 (C. F. C.) must be directed to pauperism but not to merits of the case. But it was observed that it did not clash with the ruling in the main case (7 All., 661) as regards the enquiry into the existence of the cause of action itself.]

[7 All. 672]

CRIMINAL REVISIONAL.

The 23rd April, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE AND
MR. JUSTICE BRODHURST.

Queen-Empress
versus
Durga Charan

Review of judgment—Criminal case—Criminal Procedure Code, s. 369.

The High Court has no power under s. 369* of the Criminal Procedure Code, to review an order dismissing an application for revision made by an accused person, and the only remedy is by an appeal to the prerogative of the Crown as exercised by the Local Government.

Per BRODHURST, J.—The Legislature has not conferred in express words upon a High Court the power of reviewing its judgments in all criminal cases as it has done under the

* [Sec. 369 :—No Court, other than a High Court, when it has signed its judgment shall alter or review the same, except as provided in Section 395 or to correct a clerical error.]

Civil Procedure Code in civil cases; and the provisions of s. 369 of the Criminal Procedure Code, so far as they affect the High Court, apply merely to questions of law arising in its original criminal jurisdiction, and which are reserved and are subsequently disposed of under the provisions of s. 434 of the Criminal Procedure Code and ss. 18 and 19 of the Letters Patent for the High Court of the North-Western Provinces. *Queen v. Godai Raout*, 5 W. R., Cr. 61, referred to.

ON the 18th March 1884, a pleader was convicted by a Magistrate of cheating, and was fined Rs. 200. This conviction and sentence were affirmed by the Court of Session, on appeal, on the 7th May 1884. The pleader then applied to the High Court for revision. This application was rejected on the 12th August 1884, by DUTHOIT, J. Subsequently, with reference to this conviction, the District Judge, under Act XVIII of 1879 (Legal Practitioners' Act), reported the case to the High Court for orders, expressing [673] his opinion that the pleader was unfit to be allowed to practice. The case came for disposal before the Full Bench. With the permission of the Bench, the pleader's counsel was allowed to argue that his client had committed no offence at law. After hearing argument on this point, the Full Bench was of opinion that the pleader should not be either suspended or dismissed under s. 12 of Act XVIII of 1879, *Ante*, p. 290.

The pleader then applied to the High Court for a review of its former judgment of the 12th August 1884.

Mr. T. Conlan, for the Appellant.

Petheram, C.J.—In my opinion this Court has no power to review the order of Mr. Justice DUTHOIT, by which he dismissed the application for revision made by the accused, and therefore the only remedy is by an appeal to the prerogative of the Crown as exercised by the Local Government.

Brodhurst, J.—This is an application that this Court will, under the provisions of s. 369 of the Criminal Procedure Code, review an order passed, on revision, on the 12th August 1884, by DUTHOIT, J., who is no longer a Judge of this Court.

The question now arises whether a High Court in India can in any criminal case—i.e., as a Court of Original Jurisdiction, or as a Court of Appeal, or as a Court of revision—review its judgment or order.

A Full Bench of the High Court of Calcutta, in the case of *Queen v. Godai Raout*, 51 W. R., C. R., 61, held that a review of judgment will not lie from a sentence or judgment pronounced by the High Court in a criminal case upon appeal, and the learned Judges were of opinion that "it was the intention of the Legislature that the Court should not exercise the power of reviewing its own judgment in criminal cases."

That Full Bench judgment was delivered on the 15th February 1866, when Act XXV of 1861 was the Code of Criminal Procedure in force; but the following extract from the judgment is still in point, even though the Code of Criminal Procedure has since then been more than once amended.

[674] "The Code of Criminal Procedure does not contain any section expressly authorizing a review of judgment in a criminal case after the judgment has been recorded. The Code of Criminal Procedure was passed after the Code of Civil Procedure. The latter contains a section expressly authorizing a review of judgment, but the former contains no corresponding section. From this it may reasonably be inferred that the Legislature did not intend to confer in criminal cases a power similar to that which they had given in civil cases."

The Legislature has not, even under the Criminal Procedure Code now in force, conferred, in express words, upon a High Court, the power of reviewing

its judgments in all criminal cases as it has done under the Civil Procedure Code in civil cases; and, in my opinion, the provisions of s. 369 of the Criminal Procedure Code, so far as they affect a High Court, apply merely to questions of law arising in its original criminal jurisdiction, and which are reserved and are subsequently disposed of under the provisions of s. 434 of the Criminal Procedure Code and the corresponding sections of Letters Patent, which, for the North-Western Provinces, are ss. 18 and 19.

Under these circumstances, I concur with the learned Chief Justice in rejecting the application.

Application refused.

NOTES.

[See for similar decisions the following cases :—(1885) 10 Bom., 176 ; (1886) 14 Cal., 42 F. B.; (1897) 23 Bom., 50 (case of refusal to revoke sanction by a Session Judge) ; 12 C., 81.]

[7 All. 674]

APPELLATE CIVIL.

The 23rd April, 1885.

PRESENT :

MR. JUSTICE STRAIGHT AND MR. JUSTICE TYRRELL.

Ajudhia.....Defendant

versus

Baldeo Singh.....Plaintiff.*

Pre-emption—Profits of property accruing between purchase and transfer to pre-emptor.

B purchased a share in a mahal on the 3rd January 1880 (Pus, 1287 fasli). *A* sued *B* and the vendor to enforce his right of pre-emption, and, on the 24th March 1882 (Chait, 1289 fasli), obtained a final decree enforcing the right. Subsequently *B*, as a co-sharer in the mahal, during 1288 fasli, claimed from *A*, as lambardar of the mahal, the profits of the share for 1288 fasli.

Held, that the pre-emptive right which was declared in the suit instituted by *A*, when it was once established, existed, and must be presumed to have taken [675] effect on the date when the subsequently awarded sale to *B* took place, and therefore there was no period of time during which *B* was properly in possession of the share and entitled to profits from *A* in his character of lambardar, but *A* must be presumed to have been in possession and entitled to the profits from the date of the sale to *B*.

THE plaintiff in this suit purchased a share in a mahal on the 3rd January 1880, (Pus, 1287 fasli). The defendant sued him and the vendor to enforce the right of pre-emption, and, on the 24th March 1882, (Chait, 1289 fasli), obtained a final decree enforcing the right. In this suit the plaintiff, as a co-sharer in the mahal, during 1288 fasli, claimed from the defendant, as lambardar of the mahal, the profits of the share for 1288 fasli. The Court of First Instance dismissed the suit, holding that, as the defendant had obtained a decree enforcing his right of pre-emption in respect of the sale of the share

* Second Appeal No. 935 of 1884, from a decree of W. Barry, Esq., District Judge of Banda, dated the 29th April 1884, affirming a decree of Muhammad Fazal Azim, Assistant Collector, 1st class, of Hamirpur, dated the 21st February 1884.

to the plaintiff, he must be considered to have been in proprietary possession from the date of such sale, and not merely from the date of the final decree or the date he obtained possession thereunder, and therefore the plaintiff had no right to sue. The Lower Appellate Court, referring to *Baldeo Pershad v. Mohan*, N.-W. P. H. C. Rep., 1866, R. C. A., p. 30, reversed this decision, and remanded the case for trial on the merits. The Court of First Instance accordingly tried the case on the merits, and gave the plaintiff a decree, which the Lower Appellate Court affirmed.

In second appeal, the defendant contended that the plaintiff was not entitled to the profits for 1288 fasli, and his suit was therefore not maintainable.

Babu Baroda Prasad Ghose, for the Appellant.

Munshi Hanuman Prasad and *Babu Oprokash Chandar Mukerji*, for the Respondent.

Straight, J.—I am of opinion that the appeal must prevail, and that the decision of the lower Courts must be reversed. It does not appear to me that the argument put forward in support of the plaintiff's claim will bear examination. The pre-emptive right which was declared in the suit instituted by the defendant against the plaintiff, when it was once established, existed, and must be presumed to have taken effect on the date when the subsequently awarded sale to the plaintiff took place, and therefore [676] there was no period of time during which the plaintiff was properly in possession of the share, and entitled to profits from the defendant in his character of lambardar. It seems to me that the defendant must be presumed to have been in possession and entitled to the profits from the date of the sale to the plaintiff. The appeal is therefore decreed, and the suit dismissed with costs.

Tyrrell, J., concurred.

Appeal allowed.

NOTES.

[See the modification of the principle of this case in (1889) 12 All., 234 F. B., where (1886) 8 All., 502 is also considered by *Mahmood, J.*]

[7 All. 676]

The 20th April, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND
MR. JUSTICE BRODHURST.

Chedami Lal.....Judgment-debtor
versus

Amir Beg.....Purchaser.*

Execution of decree—Sale—Property sold before advertized time—Sale invalid.

A sale by public auction in execution of a decree, which is conducted at a time and place other than those properly notified, is not a sale at all within the meaning of the Civil Procedure Code.

The time to be notified for a sale by public auction in execution of a decree must be the time of the commencement of the sale, in order that all intending purchasers may be

* First Appeal No. 1 of 1885, from an order of Babu Baij Nath, Munsif of Agra, dated the 27th November 1884.

enabled to be present during the whole of the proceedings, and that all who are interested in the property sold may see that there is a fair competition and a good sale.

Where property which was advertized for sale by public auction in execution of a decree at 11 A.M. was sold at 7 A.M.,—*held* that the mistake was more than a mere irregularity in conducting the sale, and that the whole of the proceedings were invalid.

THIS was an appeal from an order refusing to set aside a sale of a house in execution of a decree. The judgment-debtor applied to have the sale set aside on the ground that the property had been advertized to be sold at 11 A.M., whereas it had been sold at 7 A. M., whereby the property was sold for much below its proper value. The Court executing the decree refused the application. The judgment-debtor appealed to the High Court.

Babu Ratan Chand, for the Appellant.

Shah Asad Ali, for the Respondent.

Petheram, C. J.—I think that this appeal must be allowed, and the sale set aside. It may be—I am not in a position to say whether it is so or not—that in this particular case no harm has been done. Whether that is so or not, this way of dealing with [677] property is, in my opinion, a dangerous one, and such as should not be allowed by the Court. The statute says that when the immoveable property of a judgment-debtor is to be sold in execution of a decree, the time and place of the sale are to be notified, in order that the whole of the neighbourhood may be made aware of it, so that the debtor's property may be sold to the best advantage. Further, the time to be notified must be the time of the *commencement* of the sale, in order that all intending purchasers may be enabled to be present during the whole of the proceedings, to see how the biddings go, and that all who are interested in the property sold may see that there is a fair competition and a good sale. This being so, I consider that a sale which was advertized to begin at 11 A. M., but in fact began at 7 A. M., was vitiated by more than a mere irregularity in conducting the sale, for the mistake went to the very root of the whole proceeding. The statute authorizes a sale which is to be conducted at a time and place properly notified, and a sale otherwise conducted is not a sale at all within the meaning of the statute. I am therefore of opinion, not merely that there was an irregularity in the sale, but that there was, practically speaking, no sale at all. The whole proceeding must therefore be set aside, and the parties will revert to the rights which they had before. The appeal is allowed, but without costs, as the purchaser was wholly innocent.

Brodhurst, J., concurred.

Appeal allowed.

• [7 All. 677]

The 6th May, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE
AND MR. JUSTICE STRAIGHT.

Radha Prasad Singh.....Plaintiff

versus

Bhajan Rai and others.....Defendants.*

*Limitation—Burden of proof—Instalment bond—Indorsement
of payment of instalments.*

Where a defendant sets up the defence of limitation, he must plead it, and show that the claim is barred. If, when the plaintiff has proved his case, the facts show that the cause

* First Appeal No. 13 of 1884, from a decree of Babu Mritonjoy Mukerji, Subordinate Judge of Ghazipur, dated the 27th September, 1883.

of action accrued at a date earlier than the period of limitation, and the plea of limitation has been set up by the defendant, they will be entitled to take advantage of the plaintiff's evidence that the claim is barred, and to have judgment given in his favour.

[678] The obligee of a bond, by which the obligor covenanted to pay the sum of Rs. 3,800 by annual instalments of Rs. 200, and in which it was also agreed that payments of the instalments should be indorsed on the bond, brought a suit against the obligor alleging default in payment, and claiming to recover the amount of the bond. He gave credit for payment of the instalments for seven years, and alleged that his cause of action arose upon default in payment of the eighth instalment. The bond showed on its face indorsements of the payments for which credit was given. The obligor alleged that no instalments were paid after the third year, that therefore the debt became due at an earlier date than that stated by the plaintiff, and that the claim was barred by limitation.

Held, that inasmuch as the defendant adduced no evidence to show that the later instalments were not paid, and inasmuch as the evidence produced by the plaintiff did not show that the debt accrued at a date earlier than the limitation period, the plea of limitation failed.

THE suit in which this appeal arose was based on a bond for Rs. 3,800, payable by instalments of Rs. 200, dated the 19th September 1864. This bond had been given in adjustment of the balance due on a decree. It provided that the first instalment should be paid on the 15th Bhadon Sudi 1272 fasli (5th September 1865), and the remaining instalments on the 15th Bhadon Sudi of every succeeding fasli year up to 1290 fasli, and that in the event of default in payment of any instalment on the due date, the whole amount of the bond should be payable. It further provided that the obligors would have payments of instalments indorsed on the bond. The plaintiff, alleging that the first default had occurred on the 15th Bhadon Sudi 1279 fasli (17th September 1872), when only one-half of the eighth instalment due on that date had been paid, claimed to recover the balance of that instalment and the amount of remaining eleven instalments. His cause of action was stated to have arisen on the 15th Bhadon Sudi 1279 fasli (17th September 1872), when the eighth instalment fell due and was not paid. He sought to recover the amount claimed by the sale of property alleged to be mortgaged by the bond. The bond contained the following indorsements:—

" Paid on 15th Bhadon Sudi	1272	...	Rs. 200
" " " "	1273	...	" 200
" " " "	1274	...	" 200
" " " "	1275	...	" 200
" " " "	1276	...	" 200
" " " "	1277	...	" 200
" " " "	1278	...	" 200
" " " "	1279	...	" 100 "

[679] The suit was instituted on the 9th July 1883. The defendants alleged in defence of the suit, *inter alia*, that no instalments had been paid after the third instalment, that of the 15th Bhadon Sudi 1274 fasli (13th September 1867), and the suit was barred by limitation. With reference to indorsements on the bond, which showed that the instalments had been duly paid up to the 15th Bhadon Sudi 1279 fasli (17th September 1872), when only one-half of the instalment due on that date had been paid, the defendants alleged as follows:—"All payments indorsed by the plaintiff on the bond were indorsed of his own authority: such indorsements cannot save time, unless they are acknowledged by the defendants or are in their handwriting and bear their signatures."

The plaintiff called witnesses who deposed to the payment of the instalments for 1275, 1276, 1277; he produced no evidence to show by whom and

under what circumstances the indorsements on the bond were made. The defendants produced evidence showing that the first instalment had been paid by them to the plaintiff's agent, and the second and third into the Court executing the decree in adjustment of which the bond had been given. They did not call witnesses to prove that no instalments had been paid after the third instalment.

The Court of First Instance held that the plaintiff had failed to prove that any instalment had been paid after the third instalment, and, applying art. 132, sch. ii of the Limitation Act, 1877, held that the suit was barred by limitation.

The plaintiff appealed to the High Court.

Mr. T. Conlan and Lala Lalta Prasad, for the Appellant.

Mr. G. T. Spankie, for the Respondent.

It was contended for the appellant that the bond was a mortgaged-bond and the suit one by a mortgagee for sale of the mortgaged property, and the limitation applicable to the suit was therefore that provided by art. 147 of the Limitation Act, 1877, and not art. 132. It was further contended that the plaintiff had proved that the instalments had been duly paid up to 15th Bhadon Sudi 1279 fasli (15th September 1872), and therefore, assuming art. 132 was applicable, the suit was within time.

[680] For the respondent it was contended that the bond created a charge and not a mortgage, and art. 132 of the Limitation Act, 1877, and not art. 147, was applicable to the suit; that assuming that the bond created a mortgage and not a charge, yet the suit could not be governed by art. 147 of the Limitation Act, 1877, as the suit was barred by art. 132 of the Limitation Act, 1871, when the latter Act was repealed and the former Act came into force, and, therefore, under s. 2 of the former Act, the right to sue could not be revived by anything contained in the former Act. Further, it was contended that the lower Court had rightly held that the plaintiff's witnesses had not proved that any instalments had been paid after the third instalment, and the plaintiff having undertaken the burden of proving that his suit was within time, and having failed to prove that fact, his suit had been properly dismissed. With reference to the indorsements on the bond, it was contended that they were not admissible against the defendants as evidence that the instalments had been paid.

Petheram, C. J.—I think that this appeal must be allowed, and my conclusion is based upon the simple ground that the defendant has not proved the plea of limitation which he set up. It is a well known rule that if a defendant sets up the defence of limitation, he must plead it, and show that the claim is barred. No doubt, if when the plaintiff proves his case, it appears from the facts that the debt accrued at a date earlier than the period of limitation, and the defendant has set up the plea of limitation, in that case the defendant will be entitled to judgment; that is to say, he will be entitled to take advantage of the plaintiff's evidence that the claim is barred, when he has given notice that such a defence will be made. That, however, is not the state of things existing in this case. The facts are, that in 1864, the defendant entered into a bond with the plaintiff, and covenanted to pay a large sum of money by yearly instalments, and one term of the agreement was that receipts or memoranda of payments should be indorsed upon the bond, which, of course, remained in the possession of the creditor. The plaintiff now sues for the money which he says is due to him. He puts in the bond, and says that he does not claim for the whole amount but gives credit for certain payments. The bond shows what would be due if these instalments

[681] had been paid, and shows upon its face the indorsements of these payments. The defendant met this case with no evidence whatever. His case now is, that the later instalments were never paid, and that therefore the debt became due at an earlier date than that alleged by the plaintiff. But in support of this he adduces no evidence. The only question therefore is, whether the plaintiff's evidence shows that the debt accrued at a date earlier than the limitation period. I am of opinion that it does not show this, and therefore, the defendant not having proved it, and it not having been proved for him by the plaintiff's evidence, and the plaintiff's claim having been admitted on every other point except that of limitation, the appeal must be allowed with costs.

Straight, J.—I concur in the order passed by the learned Chief Justice and upon the same grounds.

Appeal allowed.

NOTES.

[This case was referred to in (1889) 11 All., 438, but distinguished as not being applicable to the facts of that case.]

[7 All. 681]

CIVIL REVISIONAL.

The 9th May, 1885.

PRESENT:

MR. JUSTICE BRODHURST AND MR. JUSTICE TYRRELL.

Raynor.....Plaintiff

versus

The Mussoorie Bank, Limited.....Defendant.*

Transfer of interest pending suit—Lis pendens—Application to bring transferee upon the record—Civil Procedure Code, ss. 244, 372—High Court's powers of revision—Civil Procedure Code, s. 622.

A decree of the High Court, giving possession of certain shares in a bank to the plaintiff *R*, was reversed on appeal by the Privy Council. The defendant then applied to the Court of First Instance to order restitution of the shares, which had been realized by the plaintiff. Upon being ordered to produce the shares, *R* made an application to the Court, professedly under s. 244 of the Civil Procedure Code in which he alleged that, pending the appeal to the Privy Council, he had transferred the shares to *G*, his counsel in the case, who had failed to restore them, and he prayed "that the said person might be brought upon the record, and that execution for recovery of the said shares might be given against him." The Court passed an order upon this application, calling on *G* to show cause why he should not be called upon to restore the shares made over to him by *R*, and he thereupon filed an answer denying that he was the custodian of the shares, and alleging that he was their purchaser for value. The Court passed an order directing that *G*'s name should be placed on the record, so that the decree might be executed against him.

[682] *Held*, that the question being one between two judgment-debtors *inter se*, and not between the parties arrayed against each other as decree-holders of the one part, and judgment-debtors or their representatives of the other, the provisions of s. 244 of the Civil Procedure Code were not applicable to the case; that *G* could not be regarded as a "representative" of *R* within the meaning of that section; that the application by *R* was meant to be and actually was one praying that, in respect of the scrip, restitution of which was

* Application No. 33 of 1885 for revision of an order, under s. 622 of the Civil Procedure Code, of G. J. Laidman, Esq., Judge of the Court of Small Causes of Dehra Dun, dated the 25th November 1884.

being enforced against him, the person to whom some interest in it, more or less, had come pending the suit, might, in addition to himself, in so far as such interest had passed from him, be brought under the operation of the execution proceedings; that this was an application under s. 372 * of the Civil Procedure Code; and the order passed on it, being appealable under s. 588 (21), was not open to revision by the High Court under s. 622.

THIS was an application to the High Court for the exercise of its powers of revision under s. 622 of the Civil Procedure Code. It appeared that by virtue of an appellate decree of the High Court, dated the 22nd August 1878, A. C. Raynor, the plaintiff in a suit against the Mussoorie Bank, Limited, instituted in the Court of the Subordinate Judge of Dehra Dun, and numbered 24 of 1877, recovered twenty-four shares in the Delhi and London Bank, Limited. On the 21st March 1882, the appellate decree of the High Court was reversed by Her Majesty in Council. In July 1882, the Mussoorie Bank made an application to the Subordinate Judge, "under s. 244, Act XIV of 1882," in which it prayed that the Court would cause the shares unduly realized in execution of the decree of the High Court to be restored. The Subordinate Judge eventually made an order directing the plaintiff, A. C. Raynor, to produce the shares, and, on his failing to do so, issued a warrant for his arrest. In March 1884, the plaintiff made an application to the Subordinate Judge in which he stated as follows:—

"That a warrant was issued by this Court against the plaintiff to compel him to restore twenty-four Delhi and London Bank, Limited, shares numbered 7371 to 7394 that he had forced defendant to deliver to him, in execution of decree No. 89 of 1878 of the High Court of Judicature, North-Western Provinces, which decree had been reversed by Her Majesty in Council.

"2. That this Court's proceedings proved ineffectual for the reason that, while the litigation was going on, plaintiff had transferred the shares to one of his counsel in the case, Mr. H. B. [683] Goodall, Barrister, who has failed to restore them and is now in England.

"3. In respect of these shares the said H. B. Goodall is plaintiff's representative, and applicant desires that he should be brought upon the record, and that execution for recovery of the said shares may be given against him.

"4. The plaintiff has made over the documents specified in the annexed list in support of his statement that Mr. Goodall holds the shares in suit, and professes himself willing to submit to re-examination by the Court on the subject."

On this application the Subordinate Judge directed notice to issue to H. B. Goodall to show cause why he should not be called on to restore the shares. Goodall filed an answer in which he stated, among other things, as follows:—

"My reply is that I am not, and never was, the custodian of those shares, but their purchaser for value. I bought them out and out, more than five years ago. This was fully recognized at the time, and there never was any suggestion of transferring them temporarily."

The Subordinate Judge made an order directing that Goodall's name should be placed on the record, so that the decree might be executed against him. He observed as follows:—

"The facts of this case are as follows:—Some years ago the Mussoorie Bank, in executing a decree against Mr. M. A. Raynor, attached twenty-four

* [Sec. 372:—In other cases of assignment, creation or devolution of any interest pending the suit, the suit may, with the leave of the Court, given either

Procedure in case of assignment pending suit. with the consent of all parties or after service of notice in writing upon them, and hearing their objections, if any, be continued by or against the person to whom such interest has come either in addition to or in substitution for the person from whom it has passed, as the case may require.]

shares in the Delhi and London Bank. An objection was made to the attachment, but the objection was disallowed by this Court on 5th December 1876. On 16th March 1877, Mr. A. C. Raynor, son of Mr. M. A. Raynor, brought a regular suit to set aside the order disallowing the objection. He lost the suit, but appealed to the High Court, which reversed the decision of this Court, and decreed him possession of the twenty-four shares, Nos. 7371-7394. In execution he got possession of the shares. The bank then preferred an appeal to the Privy Council, and eventually the decision of the High Court was reversed, and that of this Court maintained. But this was not till 1882, and meantime Mr. Raynor had disposed of the shares to Mr. H. B. [684] Goodall, from whom the Bank now seeks to get them. The question that arises is: "Can Mr. Goodall's name be brought into the suit in execution of the decree, or will the Bank have to proceed against him by a regular suit?" The case has been argued by Mr. Quarry for the Bank, and Mr. H. Vansittart for Mr. Goodall. The former urges the doctrine of *lis pendens*. The latter in his arguments lays great stress on the fact that the decree of the Privy Council merely ordered that Mr. Raynor's suit should be dismissed, not that the shares should be restored by him to the bank: this, however, in the opinion of the Court, is a quibble hardly worth notice; the decree certainly implied restitution of the shares. In the Court's opinion, a stronger argument in Mr. Goodall's favour is the fact that in March last year, Mr. Justice OLDFIELD, in *Jagat Narain v. Jagrup*, I. L. R., 5 All. 452, held that the word "representative" in s. 244, Civil Procedure Code, has no more extended meaning than heir, devisee and executor, and does not include purchasers of a judgment-debtor's property. But there is a difference of opinion on the point, and the Court does not see how a separate suit can be required against Mr. Goodall. Otherwise suits would be interminable, if one party pending the suit could by conveying to others create a necessity for introducing new parties. The doctrine of *lis pendens* is held to apply to India, and the law is that he who accepts a purchase from a defendant *pendente lite* does so subject to the decree which may be made in the suit. And a recent decision of the High Court of these Provinces—"Hukm Singh v. Zanki Lal," I. L. R., 6 All., 506, decided 30th June last, —confirms the Court in its opinion that Mr. Goodall can be proceeded against in execution of the decree."

Goodall applied to the High Court for revision of the Subordinate Judge's order on the following grounds:—

1. That the said order was made without jurisdiction.
2. That it was not competent to the Court to place the name of the applicant upon the record for the purposes of execution of the said decree.
3. That the Court has misapplied the law relative to *lis pendens*.

[685] 4 That the Court has misunderstood the effect of the decree of Her Majesty in Council.

Mr. C. H. Hill, for the Applicant.

Mr. G. E. A. Ross, for the Bank.

The Court (BRODHURST and TYRRELL, J.) delivered the following judgment:—

Tyrrell, J.—A preliminary objection has been taken to this application by the learned counsel for the respondent, on the ground that it is not cognizable by us in the exercise of the revisional jurisdiction of this Court. It appears that an application had been made to the Civil Court at Mussoorie, by a party entitled under a Privy Council decree to the benefit of some scrip, by way of restitution to be made to such party by one Raynor, who had been plaintiff in the suit, but was respondent and judgment-debtor under the Privy Council decree (s. 583 of the Civil Procedure Code). The Court at Mussoorie

has unquestioned jurisdiction to execute this decree, and is competent to enforce or execute it in the manner and according to the rules applicable to the execution of its original decrees (s. 610). In the exercise of this jurisdiction the Mussorie Court, by virtue of the rule of s. 647 of the Code, is authorized to follow in these proceedings the procedure provided by Chapter XXI (of Incidental Proceedings) for suits. By the last section (372) of that chapter, it is provided that in cases of assignment, creation, or devolution of any interest, pending a suit, *other than* devolution to a "legal representative," that is to say, an heir, devisee or executor, the proceedings may, with the leave of the Court, given after the service of notice in writing on all parties and hearing their objections, if any, be continued against the person to whom such interest has come, either in addition to, or in substitution for, the person from whom it has passed. Let us see now what the application made by Raynor really was, and what part of the Court's legal machinery he proposed thereby to put in motion. He applied, stating that a warrant of the Court executing the Privy Council decree had been issued against him, presumably under s. 259 or 261 of the Civil Procedure Code, for the surrender by him of twenty-four Delhi and London Bank shares (paragraph 1 of the petition), [686] that obedience on his part had been obstructed by the circumstance that "while the litigation was going on" he had "transferred the shares to one of his counsel in this case, who has failed to restore them" (paragraph 2), and he therefore prayed that the said person "might be brought upon the record, and that execution for the recovery of the said shares may be given against him" (paragraph 3). And in the last paragraph (4) of his petition, Raynor tendered and filed in the Court documentary proof that "Goodall holds now the shares in suit." This application purported to be made under s. 244 of the Civil Procedure Code. But apart from other considerations showing that s. 244 is not applicable to a proceeding of this character, it is sufficient here to observe that an application cognizable under that section must be an application *between* the parties, that is to say, between the parties arrayed against each other as decree-holder of the one part, and judgment debtors or their representatives of the other. But this is not such a question. It is a controversy of two judgment-debtors *inter se*, and the provisions of s. 244 do not apply to the determination of such questions.

Moreover, the allegations of Raynor were sufficient of themselves to show that no real or *bonâ fide* plea of "representation" of him (Raynor) by Goodall in the sense of s. 244 (c) was raised, or meant to be made in the application; for Goodall is therein described as a limited, temporary transferee or depository only—a "holder"—who "has failed to restore," and the documents produced in proof are intended to show that the proprietary interest in the scrip never passed from Raynor to Goodall, who is a wrong-doer in continuing to hold it.

This view is further fortified by a consideration of the order issued by the Court on this application, and of Goodall's answer thereto. The Court did not call on Goodall to show cause why he should not be made liable under the decree as a representative of Raynor; but to show cause why he "should not be called upon to restore the twenty-four Delhi and London Bank shares *made over to him* by Raynor." To which Goodall replied:—"My reply is, that I am not, and never was, the custodian of these shares, but their purchaser for value." The question thus raised is not [687] a question between the decree-holder and a "representative" of his judgment-debtor.

It appears to us that the application was meant to be, and actually was, an application on the part of Raynor, praying that, in respect of the scrip, restitution of which was being enforced against him, the person to whom

some interest in it, more or less, had come pending the suit, might, in addition to himself, in so far as such interest had passed from him, be brought under the operations of the execution proceedings. With the merits of this application and the propriety of the order passed on it, we have nothing to do. For it is an application under s. 372 of the Civil Procedure Code, and an appeal is allowed [s. 588, (21)] to a person whose objection under it has been disallowed. We therefore allow the preliminary objection, and reject the application with costs.

Application refused.

NOTES.

(I. REPORT OF THIS CASE, INCORRECT:—

In (1887) 10 All., 97 at p. 100, the mistakes in the report of this case have been pointed out and noted as follows:—

"...The report of that case contains mistakes which may conveniently be corrected here. The title of the case should be *Goodall v. The Mussoorie Bank, Limited*, Raynor not having been a party. Both in the judgment and in the statement of facts it is made to appear that the Subordinate Judge's order under revision was passed on Reynor's application of the 12th December 1882; and the judgment proceeds to a considerable extent upon the supposition that the case was "a controversy between two judgment-debtors *inter se*" and that the decree-holder was not a party to it. In point of fact, the order was as above stated, passed on the application of the decree-holder the Musoorie Bank, of the 3rd March 1884, against Goodall only; and Reynor's application of the 12th December 1882, was rejected, and not granted, by an order dated the 14th of the same month."

II. APPLICATION OF S. 244, EXTENT OF—

S. 244 does not cover cases in which the question is between auction-purchaser and judgment-debtor:—

In (1908) 30 All., 379 the auction-purchaser was held to be a representative of the judgment-debtor and *not* of the decree-holder.

In (1908) 31 All., 82, F. B., on the same principle, sec. 244 was held not to apply to a case of dispute after confirmation of sale, between the decree-holder auction-purchaser and the judgment-debtor.]

[7 All. 687]

APPELLATE CIVIL.

The 10th June, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND
MR. JUSTICE STRAIGHT.

Masuma Bibi and another.....Plaintiffs
versus

The Collector of Ballia on behalf of the Court of Wards.....Defendant.*

Court of Wards—Disqualified proprietor—Release of property from superintendence of Court—Act XIX of 1873 (N.-W. P. Land-Revenue Act), ss. 194, 195—Act VIII of 1879 (N.-W. P. Land Revenue Act), s. 20.

M, a female proprietor, brought a suit to recover possession of certain lands which were in the hands of the Collector, as manager of the Court of Wards, on the allegations that she had placed the property in the hands of the Court some years previously because she was not at that time in a position to manage it herself, but that she was now capable of managing it, and desired to get it back. The suit was dismissed, and the plaintiff appealed on the ground, *inter alia* that inasmuch as she was not a "disqualified proprietor" within the meaning of Act XIX of 1873 (N.-W. P. Land Revenue Act), the Court of Wards had no

* First appeal No. 90 of 1884, from a decree of Babu Mrittonjoy Mukarji, Subordinate Judge of Ghazipur, dated the 5th February 1884.

jurisdiction to take the property, and that its possession was merely the result of an arrangement to which she was a consenting party, and which she now desired to terminate.

Held that, with reference to the provisions of Act XIX of 1873, and Act VIII of 1879 (N.-W.P. Land Revenue Acts), the suit as brought was not maintainable, inasmuch as there was no evidence that the plaintiff had obtained the [688] previous sanction of the Local Government to the release of the property from the superintendence of the Court of Wards, as required by s. 20 of the latter Act.

Held also that the plaintiff could not be allowed in appeal entirely to change the nature of the grounds upon which she alleged herself to be entitled to claim relief, and that hence she could not now raise the plea that the Court of Wards, in taking the property under its management, had acted without jurisdiction.

The expression "Local Government" in ss. 194 and 195 of Act XIX of 1873, and s. 20 of Act VIII of 1879, means the Lieutenant-Governor of the North-Western Provinces.

THE plaintiffs in this case, Masuma Bibi and Nawab Ahmad Hasan Khan, sued the Collector of the Ballia district, as Manager on behalf of the Court of Wards, for possession of an estate called taluqa Sunwani and of certain houses. It was alleged in the plaint that the property in suit belonged to the plaintiff, Masuma Bibi; that, not being competent to manage her property, she had, in 1869, made the whole of it over to the Court of Wards; that the management of the property by the Court of Wards had not proved beneficial to it; that Masuma Bibi had therefore transferred the taluqa and the houses to Nawab Ahmad Hasan Khan, by an oral gift, made in October 1882; that Masuma Bibi had applied to the Board of Revenue to confirm the gift, but that authority had declined to do so; that Nawab Ahmad Hasan Khan was qualified to manage the property; and that therefore there was no longer any necessity for the property to remain under the management of the Court of Wards. The Collector set up as a defence to the suit, *inter alia*, that under s. 205, Act IX of 1873, as amended by Act XII of 1879, the plaintiff, Masuma Bibi, was not competent to bring any suit, except, on behalf of and in the name of the Collector of the district; that Ahmad Hasan Khan had no right to the property, the gift to him being void, Masuma Bibi being, under s. 205 of Act XIX of 1873, as amended by Act XII of 1877, incompetent to make a gift, and the gift being further void under the Muhammadan Law and s. 123 of the Transfer of Property Act; and that "the property, which has been taken under the management of the Court of Wards, under s. 194, clauses (a) and (g), Act XIX of 1873, cannot be released from its superintendence without the sanction of the Local Government,—*vide* s. 195, Act XIX of 1873, as amended by s. 20, [689] Act XII of 1879." At the hearing of the case it was contended for the defendant that under s. 241 (k) of Act XIX of 1873, the Civil Courts had no jurisdiction to entertain the suit. The lower Court held that the suit was cognizable in the Civil Courts; that the plaintiff, Ahmad Hasan Khan, had no title to the property; and therefore could not maintain the suit; and that the plaintiff, Masuma Bibi, would be entitled to recover possession of the property, if she could show the Court of Wards had committed waste. On this last point, it held that there was no proof that the Court of Wards had committed waste, and it therefore dismissed the suit.

The plaintiffs appealed to the High Court. The second ground of appeal was as follows:—"Because, appellant, Masuma Bibi not being a 'disqualified proprietor,' the assumption of management by the Court of Wards did not disable her from dealing with her property in the manner adopted by her."

Mr. T. Conlan, and Mr. C. H. Hill, for the Appellant.

Mr. G. E. A. Ross and the Senior Government Pleader (Lala Juala Prasad), for the Respondent.

Petheram, C.J.—I am of opinion that this appeal should be dismissed as it stands. This was a suit brought by Masuma Bibi and Nawab Ahmad Husain Khan to recover possession of the property which, at the time when the suit was instituted, was in the hands of the Collector as Manager of the Court of Wards. The suit was brought on a statement that the plaintiff, Masuma Bibi, had placed the property in the hands of the Court of Wards some years ago, and had done so because she was not in a position to manage the property herself. She alleged that the Court had managed the property badly, and that its condition had become worse, and that she, having given it to her grandson, was now capable of managing it, and desired to get it back. Upon this state of things the case went to trial, and the plaintiff gave no evidence. The defendant did give some evidence, of which it is not necessary to say more than that its effect was to show that the estate had been managed properly. If this is the true state of things, and the plaintiff did hand over the property to the Court of Wards, and the property could be so handed over, I am [890] of opinion that the action could not be maintained with reference to the provisions of Act XIX of 1873 and Act VIII of 1879. If she could hand over the property, it could only be on the ground that she, as a female, was incapable of managing it properly herself, and it would be necessary that she should be deemed incapable of the management by the Local Government, which, in my opinion, means the Lieutenant-Governor. The statement of claim was all that she put before the Court, and that says that she herself made over the property to the Court of Wards, and therefore she must have satisfied the Lieutenant-Governor that she was incapable of managing it. Then we come to s. 20 of Act VIII of 1879. The suit was in the form of an action for ejectment, and it is said that the Court of Wards properly had charge of the property, but was now desirous to release it to the persons entitled to it. Section 20 of Act VIII of 1879 enacts, by way of proviso to s. 195 of Act XIX of 1873, giving the Court power to release property under its management, that "the property of a proprietor who has been held disqualified under the same section [(s. 194), cl. (a), cl. (e), cl. (f), or cl. (g)] shall not be released from the superintendence of the Court of Wards without the previous sanction of the Local Government." Now there is no evidence of this sanction having been obtained, and I am therefore of opinion that the suit as brought and the appeal must both be dismissed.

It has been suggested during the argument before us that Masuma Bibi may be entitled to bring the action upon a different ground altogether, which is that this is property which the Court of Wards had no jurisdiction to take, that the Court's possession was merely the result of an arrangement to which the plaintiffs were consenting parties, and which they now desire to terminate. If this view is correct, and it is not necessary for me to express any opinion upon that point, they would be entitled to get back the property. But they cannot do so in the present suit. They cannot, now at least, contend that the Court of Wards should be compelled to release the property. Whether it is legally under the Court's management or whether the defendant-vendee is legally in possession, we need not now decide. The appeal is dismissed with costs.

[691] **Straight, J.**—I concur in what has fallen from the learned Chief Justice, but I wish to add that the main ground upon which I hold that this appeal should be dismissed is, that the case which is now put forward by Mr. Hill, the nature of which was shadowed forth by the second plea in the

memorandum of appeal, is not the case upon which his client came into Court, or that which is presented on the face of the plaint. It is an entirely new case which has been stated in this Court for the first time in appeal, and raises an issue, which necessarily was not considered by the Court below, nor did the plaintiff give any evidence in support of it.

Under such circumstances, I do not consider that we should allow the plaintiff in appeal entirely to change the nature of the grounds upon which she alleges herself to be entitled to relief, and for this reason I concur in dismissing this appeal with costs.

Appeal dismissed.

[7 All. 691]

The 2nd February, 1885.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Debi Prasad.....Plaintiff

versus

Har Dayal.....Defendant.*

Occupancy tenant—Suit for ejectment—Act by tenant inconsistent with purpose for which land was let—Mortgage of occupancy-holding—Cancellation of mortgage before institution of suit for ejectment—Act XII of 1881 (North-Western Provinces Rent Act), ss. 9, 93 (b), 149.

An occupancy tenant made a usufructuary mortgage of his holding, and afterwards had the land and the mortgage deed returned to him, and the mortgage was cancelled. Subsequently, the landlord instituted a suit for ejectment, on the ground that by the mortgage the tenant had committed an act inconsistent with the purpose for which the land was let, within the meaning of Act XII of 1881 (N.-W. P. Rent Act), s. 93 (b).

Held by OLDFIELD, J., that, apart from the question whether executing a mortgage of his holding was an act within the meaning of s. 93 (b) of the Rent Act, the mortgage having been cancelled, there was no cause of action left, and the penalty should not be enforced, with reference to s. 149.

Held by MAHMOOD, J., that the occupancy tenure could not be brought to an end except on grounds clearly provided by the law ; and the execution of the mortgage, though illegal and void, was not "any act or omission detrimental to the land" or "inconsistent with the purpose for which the land was let" within the meaning of s. 93 (b) of the Rent Act, and furnished no ground for ejectment. *Gopal Pandey v. Parsotam Das*, I. L. R., 5 All., 121, and *Naik Ram Singh v. Murlidhar*, I. L. R., 4 All., 371, referred to.

[692] Also *Per* MAHMOOD, J.—The terms of s. 93 (b) of the N.-W. P. Rent Act apply, *exempli gratia*, to cases in which land is given to a tenant for purposes of cultivation, and is used by him for building or other purposes.

THIS appeal was heard under s. 551 of the Civil Procedure Code. It appeared that an occupancy-tenant made a usufructuary mortgage of his holding, and the

* Second Appeal No. 88 of 1885, from a decree of G. J. Nicholls, Esq., District Judge of Azamgarh, dated the 10th September 1884, affirming a decree of Babu Jagmohan Singh, Deputy Collector of Azamgarh, dated the 21st July 1884.

zamindar instituted a suit for ejectment, on the ground that by the mortgage the tenant had committed an act inconsistent with the purpose for which the land was let, within the meaning of s. 93 (b) of the North-Western Provinces Rent Act (XII of 1881). Prior to the institution of the suit, however, the tenant had the land and the mortgage-deed returned to him, and the mortgage was cancelled. The Court of First Instance and the Lower Appellate Court dismissed the suit. The plaintiff appealed to the High Court.

Munshi *Kashi Prasad*, for the Appellant.

The Respondent was not represented.

Oldfield, J.—There is no case for appeal. Apart from the question whether executing a mortgage of his holding was an act within the meaning of s. 93 (b) of the Rent Act, on which it is not necessary to express an opinion, the finding is that the mortgage has been cancelled, and there is no cause of action left, and the penalty should not be enforced, with reference to s. 149. The appeal is dismissed.

Mahmood, J.—I concur in the order proposed by my learned brother **OLDFIELD**, and I am anxious to state my reasons for doing so, because I am aware of several cases in which an occupancy-tenancy has been brought to an end on account of erroneous views prevailing in the Mufassal Courts in regard to the meaning of cl. (b), s. 93 of the Rent Act. But assuming that the use of land by an occupancy-tenant in a manner inconsistent with the nature of his lease would put an end to his tenure, I am of opinion that the execution of a mortgage, such as that in the present case, is not "any act or omission detrimental to the land in his occupation, or inconsistent with the purpose for which the land was let." Under s. 9 of the Act, occupancy-rights cannot be transferred; and I have before now said in *Gopal Pandey v. Parsotam Das*, I. L. R., 5 All., 121, that [693] the term "transfer" as used in the section includes all kinds of mortgage, and hypothecation amongst others, and that the mortgage, being prohibited, is null and void. In this case we have a usufructuary mortgage, and this comes within the principle of the ruling of the Full Bench in *Nalk Ram Singh v. Murli Dhar*, I. L. R., 4 All., 371. For the same reason, the mortgage, being illegal, would have no effect as against the zamindar, being a transaction opposed to the policy of the statute. What s. 93 (b) means by "any act or omission detrimental to the land" in a tenant's occupation, "or inconsistent with the purposes for which the land was let," may be thus illustrated. If an acre is given to a tenant for the purpose of cultivation, and he turns it into a tank, or builds upon it, that, in the view of the law, is an act "inconsistent with the purpose for which the land was let." But the execution of a mortgage, as in the present case, is not such an act. It would be illegal and void, but it would furnish no ground for ejectment. The Act does not give authority to end a tenure on any grounds other than those mentioned in the statute itself: in other words, I do not think that the occupancy-tenure can be brought to an end, except upon grounds clearly provided by the law. The appeal should therefore be dismissed.

Appeal dismissed.

NOTES.

[Following this case, it was held in (1889) 12 All., 419 F. B., that mortgage by an occupancy tenant in spite of the prohibition contained in s. 9 of the Rent Act (XII of 1881), is not an act detrimental to the land and inconsistent with the purpose for which the land was let, within cl. (b) of s. 93 of the Rent Act in force then.

(1897) 9 All., 244, is a similar decision. See also (1886) 8 All. 467; (1887) 10 All., 15.]

[7 All. 693]

FULL BENCH.

The 21st February, 1885.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE
STRAIGHT, MR. JUSTICE OLDFIELD, MR. JUSTICE
BRODHURST, AND MR. JUSTICE MAHMOOD.

Narain Das and others.....Defendants
versus
Lajja Ram.....Plaintiff.*

*Appeal, abatement of—Death of plaintiff-respondent—No application for
substitution of deceased's representative—Civil Procedure Code, ss. 368,
582—Act XV of 1877 (Limitation Act), sch. ii, No. 171 B.*

Held by the Full Bench (MAHMOOD, J., dissenting), that s. 582† of the Civil Procedure Code does not make the provisions of Chapter XXI, relating to the death of a defendant in a suit, applicable to the death of a plaintiff-respondent in an appeal, so as to render it obligatory on the defendant-appellant to make an application to the Court praying that the legal representatives of the deceased be [694] made parties to the appeal; and that, where there has been no such application, the appeal does not abate.

Per PETHERAM, C.J.—The words “so far as may be,” in the second clause of the first paragraph of s. 582, must be construed as meaning “so far as may be necessary to carry into effect the remedies contemplated by Chapter XXI.”

Per MAHMOOD, J., *contra*, that the object of s. 582 of the Civil Procedure Code is to obviate the necessity of repeating the provisions of Chapter XXI, so as to make them applicable to appeals, and the words “appellant” and “respondent” as used in the section include both plaintiffs and defendants in an appeal; that the whole Code maintains the analogy between the position of a respondent and that of a defendant for the purposes of being impleaded and brought before the Court: that Chapter XXI applies to cases where a plaintiff-respondent has died; and that, in such a case, and where no application has been made, within the period prescribed therefor, praying that the legal representatives of the deceased be made parties in his place, the appeal abates.

Also *per* MAHMOOD, J.—The word “defendant” as used in art. 171 B of the Limitation Act (XV of 1877) must be taken to include a respondent, whether plaintiff or defendant in the suit.

Lakshmibai v. Balkrishna, I. L. R., 4 Bom., 654; *Rajmonee Dabes v. Chunder Kant Sandel*, I. L. R., 8 Cal., 440, and *Bai Javer v. Hathising Kesrising*, I. L. R., 9 Bom., 56, referred to.

* Second Appeal No. 634 of 1884, from a decree of C. F. Hall, Esq., District Judge of Bareilly, dated the 1st February 1883, modifying a decree of Maulvi Muhammad Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 6th September 1882.

† [Sec. 582:—The Appellate Court shall have, in appeals under this chapter, the same powers, and shall perform as nearly as may be the same duties, as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted under Chapter V; and, in Chapter XXI, so far as may be, the words “plaintiff,” “defendant” and “suit” shall be held to include an appellant, a respondent and an appeal, respectively, in proceedings arising out of the death, marriage or insolvency of parties to an appeal.

The provisions hereinbefore contained shall apply to appeals under this chapter so far as such provisions are applicable.]

THIS was a reference to the Full Bench by PETHERAM, C. J., and DUTHOIT, J., arising out of the following facts. One Lajja Ram brought a suit against certain persons in the Court of the Subordinate Judge of Bareilly. The Subordinate Judge dismissed the suit, and the plaintiff appealed from his decree to the District Judge. The District Judge altered the decree, and thereupon the defendants appealed to the High Court, making the plaintiff, Lajja Ram, respondent to the appeal. On the 19th November 1883, the respondent Lajja Ram having in the meantime died, the appellants applied to the High Court to have the names of the three sons of the deceased substituted in his place. It was alleged in this application that Lajja Ram had died on the 5th June 1883, but that the appellants had not received notice of his death until sixty days after it had taken place. On this application, an order was made directing notices to issue to the sons. These notices were returned unserved, as those persons were minors. On or about the 21st January 1884, the appellants applied to the High Court that the minor sons of the deceased respondent should be substituted for him, and their mother appointed guardian *ad [695] litem*. On the 14th February 1884, the High Court made an order directing that the minors should be brought on the record under the guardianship *ad litem* of their mother, and that notice should issue to her. Notice was accordingly issued to the mother of the minors. On the 5th March 1884, she made an application on behalf of her minor sons, in which she stated that Lajja Ram had died on the 2nd June 1883, and prayed that, as the application of the appellants for the substitution of his legal representatives as respondents had been made after the time allowed by law, and the appeal had in consequence abated, the appeal should be dismissed. She subsequently supported this application by an affidavit showing that the appellants were aware of the death of Lajja Ram on the 5th June 1883, and that their statement to the contrary was unfounded. At the hearing of the appeal, it was contended on behalf of the respondents that the appeal had abated, the application for the substitution of their names not having been made within the time allowed by law, and there being no sufficient cause for not making the application within such time. The Divisional Bench (PETHERAM, C. J., and DUTHOIT, J.) hearing the appeal referred the matter to the Full Bench, the order of reference being as follows :—

“We refer to a Full Bench the following question :—Assuming for the purposes of argument that there has been no valid application within the period prescribed therefor, specifying the name, description, and place of abode of any person whom the appellants allege to be the legal representative of the deceased respondent Lajja Ram, and that the appellants had not sufficient cause for not making the application within such period, has the appeal, or has it not, abated ? ”

Babu Dwarka Nath Banerji, and Babu Jogindro Nath Chaudhri for the Appellants.

Munshi Hanuman Prasad, for the Respondent.

The following judgments were delivered by the Full Bench :—

Petheram, C. J.—This reference raises the question whether, in the case of an appeal by the defendant from the decree, the provisions of Chapter XXI of the Civil Procedure Code, with reference to the death of a defendant in a suit, are made applicable by s. 582 [696] of the Code, so as to render it obligatory on the defendant-appellant to ascertain who are the personal representatives of the deceased plaintiff, and to make them parties to the suit ; and whether, if he does not do so, the appeal abates.

In order to answer this question, it is necessary to examine the provisions of Chapter XXI, and to ascertain whether they can have any application to such a state of things. Sections 363, 364, 365, 366 and 367 relate to cases in which the *plaintiff* has died, and provide a machinery by which, when this has happened and the remedy survives,—i. e., when his estate is entitled to the amount claimed—his personal representatives, or, in other words, the persons entitled to receive and give a receipt for the debt or damages, shall *make themselves* parties to the suit before it can proceed. These provisions are for the protection of the defendant, to ensure that the payment by him shall be made to the proper person, and that no future claim shall be made against him in respect of the same matter. Section 368 provides for the death of the defendant, where the cause of action survives, and provides a machinery by which a *plaintiff* who has made a claim and brought an action against a person who has died pending the suit, may enter the name of some person who represents the property of the defendant, in the place of the name of the original defendant, and with a view of ultimately getting execution against the property of the deceased in the hands of the new defendant. The object of this legislation is obvious. The plaintiff by his suit seeks to recover something, and it would be ridiculous for the suit to proceed unless there was some person from whom the subject-matter of the suit could be recovered.

The question then is—Are these provisions applicable to the case of a defendant-appellant, who claims no debt or damages, but only to have a decree which has been passed against him reversed? In my opinion they are not. All the provisions of Chapter XXI relate to the addition of parties by the plaintiff, who would have the means of knowing who were the proper persons to add, and who, for the reasons I have before stated, is bound in the interests of justice to make the additions. But none of these reasons relate to the case of a defendant-appellant who did not set the litigation on foot, and is only interested in getting rid of the decree against him.

[697] It appears to me, therefore, that the words "so far as may be" in s. 582 must be construed as meaning "so far as may be necessary in order to carry into effect the remedies contemplated by Chapter XXI." And this view appears to me to be strongly supported by the terms of the Limitation Act. Art. 171 of sch. ii of that Act prescribes a period of limitation for applications made under s. 363 or s. 365 of the Civil Procedure Code, and this period runs from "the date of the plaintiff's or *appellant's* death." Now ss. 363 and 365 relate to the death of a plaintiff. Then art. 171B provides the limitation period for applications, under s. 368 of the Code, "to have the representative of a deceased *defendant* made a defendant," and this period runs from "the date of the *defendant's* death." Now, if the contrary opinion to that which I hold were correct, this provision would correspond with the other, and the period would run from "the date of the *defendant's* or *respondent's* death." But we find that the Legislature has taken care to say nothing of the sort; nor, in my opinion, could it have been said without results which would be not only meaningless but mischievous. For these reasons, my answer to the reference is in the negative.

Straight, J.—At the hearing of this reference I was disposed to think that the question put by it ought to be answered in the affirmative. But a more careful consideration of the terms of s. 368 of the Civil Procedure Code has brought my mind to the opposite conclusion. The whole question which we have to consider is whether, in a case where a plaintiff-respondent has died, and the defendant-appellant has failed to make an application that the name of the plaintiff's legal representative be entered on the record as respondent in

his place, the appeal, in consequence of such failure, abates. It will, I presume, be generally conceded that a rule so stringent as one laying down that in certain circumstances an appeal shall abate, must be strictly construed. Now, s. 368 provides that "when the *plaintiff* fails to make such application within the period prescribed therefor, the suit shall abate, unless he satisfies the Court that he had sufficient cause for not making the application within such period." And we are asked to read this rule as if it were that "when a *defendant-appellant* fails to make such application within the period prescribed therefor, the [698] appeal shall abate, unless he satisfies the Court that he had sufficient cause for not making the application within such period." It is important here to notice the manner in which both s. 368 and the existing provisions of the Limitation Act have been brought into their present form. In Act X of 1877, there was no provision corresponding to that contained in the last paragraph of s. 368 of the present Code. That clause was introduced into the law of Civil Procedure by s. 60 of Act XII of 1879; and the same Act also contained provisions amending the Limitation law. By s. 108, the words in art. 171 of Act XV of 1877, "or appellant" were added in the first column, and in the third, the words "or appellants" were inserted. Section 582 of Act X of 1877 was amended by s. 88 of Act XII of 1879, which substituted for the first paragraph of the former section the following words:—"The Appellate Court shall have in appeals under this chapter the same powers, and shall perform as nearly as may be the same duties, as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted under Chapter V, and in ss. 363 and 365 the word '*plaintiff*' shall be held to include an appellant." In other words, it is obvious that, at the time when the last clause of s. 368 was introduced, the rule that an appeal should, in certain circumstances, abate, was confined to cases in which a plaintiff or an appellant or a defendant had died; and this view is supported by the omission in the third column of art. 171B of the Limitation Act, relating to applications made under s. 368 of the Civil Procedure Code, of any reference to the death of a respondent. It therefore appears to me impossible to say that the appellant in the present case has failed to make the application "within the period prescribed therefor," because no period for making such an application is in fact prescribed at all; and, for this reason, I concur with the learned Chief Justice in answering the question referred to the Full Bench in the negative.

Oldfield, J.—I am of the same opinion.

Brodhurst, J.—I am of the same opinion.

Mahmood, J.—I regret to say that I have been obliged to come to a different conclusion from that of the majority of the Court. It is necessary, in the first place, to consider what was [699] the policy of the Legislature in passing s. 582 of the Civil Procedure Code. I do not think that I shall be violating any rule of judicial etiquette if I say that I am responsible for the latter part of the first paragraph of that section, because it was at my suggestion that the Legislature adopted those words, and I mention this circumstance because it appears that the principle underlying those words still meets with the approval of the Legislature. Now, the meaning of the terms used in the statute appears to me clear enough. Chapter XXI relates to proceedings which arise out of the death, marriage, and insolvency of parties to a suit. The object of s. 582 is to obviate the necessity of repeating the provisions of Chapter XXI, so as to make them applicable to appeals. The part of s. 582 which we now have to consider is the following:—"In Chapter XXI, so far as may be, the words '*plain'iff*,' '*defendant*,' and '*suit*,' shall be held to include an appellant, a respondent, and an appeal, respectively, in proceedings arising out of the death,

marriage, or insolvency of parties to an appeal." I confess that, applying the recognized principles of the construction of statutes, I am altogether unable to hold that the word "appellant" in the passage I have just read means a *plaintiff-appellant* only, any more than I can hold that by "respondent" a *plaintiff-respondent* alone is meant. It has been said that the position of a *defendant-appellant* is materially different from that of a *plaintiff-appellant* in reference to the purposes for which Chapter XXI was enacted. I confess that I am unable to take this view. I understand one of the principles of jurisprudence to be this—that no man is entitled to come into Court without some cause of action, which means the existence of a right, and some injury or violation of that right. But for the purpose of coming into Court, it is necessary for one who complains that his right has been violated, to implead those whom he accuses. If he cannot do this, his suit will not lie, for the presumption of law is, that everything has been done rightly, or rather rightfully, till the contrary is shown. The law does not presume wrong in the conduct of the parties any more than in the judgments of the Courts, and it follows that where the "injury," if I may call it so, is a wrong judgment, or a judgment by which a party to the suit is aggrieved or injured, it is only going one step more in the same [700] direction, and reasoning upon a close analogy, to hold that those against whom the proceedings in appeal are taken should be impleaded by the person taking the proceedings, that is, the appellant. The principle of *audi alteram partem* applies equally to suits and to appeals. Indeed, the express provisions of s. 553 of the Code leave no doubt in my mind that the provisions prescribed for bringing a respondent before the Court are identical with those provided for a defendant. It is not only in that section that analogy exists between the position of a respondent and that of a defendant for the purposes of being impleaded and brought before the Court. The whole Code seems to me to maintain the analogy, which was natural as a matter of drafting, for the purpose of obviating unnecessary repetition of rules. And I think I can safely say that there is not a single clause in the Code which, in this respect, distinguishes the position of a defendant-appellant from that of a plaintiff-appellant or the position of a defendant-respondent from that of a plaintiff-respondent. It therefore appears to me that where a defendant against whom a decree has been passed, says that the decision is wrong, and appeals against it, he is bound, in the first place, to bring the necessary parties before the Court by impleading them as respondents, and in the event of the respondent's death, to apply that the name of the legal representative of the respondent be brought upon the record.

As to the difficulty which has been suggested with reference to the use of the word "defendant" only, in art. 171B, sch. ii of the Limitation Act, the explanation seems to me to be simple. The clause was introduced by s. 108 of Act XII of 1879, which also amended the Civil Procedure Code of 1877. The reference then to s. 368 of the Code was no doubt to the section of the Code of 1877 as amended, and the word "defendant" was no doubt to be interpreted in the sense of that section. But by the passing of the present Code, Act XIV of 1882, the word "defendant" as used in the clause of the Limitation Act must, by reason of the second paragraph of s. 3 of the Code, be understood in the sense in which it is used in s. 368 of the *present* Code, which must, of course, for the purposes of proceedings in appeal, be read with s. 582. The word "defendant" therefore, as it occurs in art. 171B of the Limitation Act, must be taken to include a respondent, [701] and there is nothing to suggest that any distinction is intended between a *plaintiff-respondent* and a *defendant-respondent*. Now, there is one more consideration in favour of my view. There is nothing, either in the Civil Procedure Code or in the Limitation Act,

which provides for or imposes the duty on, the legal representative of a deceased respondent (whether plaintiff or defendant in the original suit) to apply to the Court for having his name placed on the record in substitution for the deceased party. It is unnecessary to determine whether such an application could be entertained, and, if so, what limitation would govern such an application. The Bombay Court in *Lakshmbai v. Balkrishna*, I. L. R., 4 Bom., 654, held that no such application should be made against the wish of the appellant; but, be that as it may, the question remains how an appeal is to proceed when the defendant-appellant fails or declines to make such an application as is contemplated by s. 368, to bring some one upon the record to represent the deceased plaintiff/respondent. I say, with due deference, that, according to the opinion of the majority of the Court, there can be only two alternatives—either the appeal must be heard and determined in the absence of the opposite party, or it must remain for ever upon the appellate file without being subject either to dismissal or to abatement. But it seems to me that the Code contemplates no such results, and a close comparison of the language of s. 582, as it stood in the Code of 1877, with the amendments introduced by s. 88 of Act XII of 1879, and again with the language of the section as it stands in the present Code, goes to support my view.

I am consequently of opinion that, under the circumstances contemplated by the present reference, the appeal would abate, and that the answer which we should give is the affirmative. I may add in conclusion that, among the cases cited during the argument, I regard *Lakshmbai v. Balkrishna*, I. L. R., 4 Bom., 654, and *Rajmonee Dabee v. Chunder Kant Sandel*, I.L.R., 8 Cal., 440, as authorities supporting the view which I have expressed, and I do not regard the decision of the Bombay Court in *Bai Javer v. Hathusing Kesrising*, I. L. R., 9 Bom., 56, as inconsistent in principle with what I have said.

NOTES.

[See Notes under 7 All., 734, *infra*.]

[702] APPELLATE CIVIL.

The 23rd February, 1885.

PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Ganga Din and others.....Defendants

versus

Khushali.....Plaintiff.*

Execution of decree—Imperfect attachment of immoveable property—Private alienation after such attachment not void—Civil Procedure Code, ss. 274, 276, 295 sch. IV., No. 141.

A judgment-debtor whose property had been attached in execution of a money decree, sold the property, and out of the price paid into Court the amount of the decree, and prayed

* Second Appeal No. 329 of 1884, from a decree of A. Sells, Esq., District Judge of Cawnpore, dated the 20th December 1883, affirming a decree of Moulvi Farid-ud-din, Subordinate Judge of Cawnpore, dated the 26th June 1883.

that the attachment might be removed. While the attachment was subsisting, and prior to the sale, the holders of other money decrees against the same judgment-debtor preferred applications, purporting to be made under s. 295 of the Civil Procedure Code, and praying that the proceeds of the sale of the property might be rateably divided between themselves and the attaching creditor. The Court refused to remove the attachment until these creditors had been paid. It was found that the sale by the judgment-debtor was a *bond fide* transaction, entered into for valuable consideration.

Held, that, inasmuch as no order for attachment of the property was passed in favour of the decree-holders in manner provided by s. 274* of the Civil Procedure Code, their claims were not entitled to the protection conferred by s. 276† against private alienations of property under attachment; that these claims were not enforceable under the attachment which was made; that the sale by the judgment-debtor was valid; and that execution of the decrees could not take place.

Per MAHMOOD, J.—That s. 276 of the Civil Procedure Code, being a restriction of private rights of alienation, should be strictly construed; that before property can be subjected to such restriction, there must be a perfected attachment; that the orders passed under s. 295 did not amount to such attachment; and that, even assuming them to amount to such attachment, they, not having been duly intimated and notified, could not make the prohibition of s. 276 applicable to the case. *Mahadeo Dubey v. Bhola Nath Diclut*, I. L. R., 5 All., 86; *Anand Lall Dass v. Jullodhur Shaw*, 14 Moo. I. A., 543; *Rameswar Singh v. Ramtanu Ghose*, 4 B. L. R. A. C., 24, *Indro Chunder Baboo v. Dunlop*, 10 W. R., 264; *Gobind Singh v. Zalim Singh*, I. L. R., 6 All., 33, and *Gumani v. Hardwar Pandey*, I. L. R., 3 All. 698, referred to.

Also *per* MAHMOOD, J.—While s. 295 of the Code gives a special right to judgment creditors as distinguished from simple creditors, it is an essential condition precedent to the exercise of that right that there should be a sale in execution, and that its result should appear in assets realized by the sale, and therefore, until the sale takes place, no such right can be enforced. *Bishen Chunder Surma Chowdhry v. Mun Mohmee Dabee*, 8 W. R., 501, referred to.

[703] ONE Manni Ram, the holder of a decree for money against one Chhubba, dated the 17th May 1881, applied on the 19th August 1881, for the attachment and sale in execution of the decree of certain immoveable property belonging to his judgment-debtor, and an order for the attachment of the property was made in September following. On the 3rd January 1882, Chhubba executed a deed of sale of the property in favour of Khushali, the plaintiff in this suit, and, out of the price paid for the property, paid into Court the amount of Manni Ram's decree, and prayed that the attachment might be removed. The Court executing the decree refused to remove the attachment until the holders of certain other money-decrees against Chhubba had been paid. One of these

* [Sec. 274 :—If the property be immoveable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from receiving the same from him by purchase, gift or otherwise.]
Attachment of immoveable property.

The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be fixed up in a conspicuous part of the property and of the Court-house.

When the property is land paying revenue to Government, a copy of the order shall also be fixed up in the office of the Collector of the District in which the land is situate]

† [Sec. 276 :—When an attachment has been made by actual seizure or by written order duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, mortgage or otherwise, and any payment of the debt or dividend, or a delivery of the share, to the judgment-debtor during the continuance of the attachment, shall be void as against all claims enforceable under the attachment.]
Private alienation of property after attachment to be void.

decree-holders, Ganga Din, had, on the 31st August 1881, after Manni Ram had applied for the attachment and sale of the property in execution of his decree, preferred an application, purporting to be made under s. 295 of the Civil Procedure Code, and praying that the proceeds of the sale of the property might be rateably divided between him and Manni Ram, the attaching creditor. The other decree-holders had subsequently made similar applications. In consequence of the Court's refusal to release the property from attachment, Khushali brought this suit against the decree-holders in question to have it declared that the sale to him was valid, and that the property was not liable to be sold in execution of their decrees.

Both the lower Courts concurred in decreeing the claim, holding that the deed of sale executed by Chhubba was a valid transaction; that it conveyed all his rights in the property; that therefore the holders of the decrees against Chhubba could not treat the property as still his; and that consequently execution could not take place.

The defendants appealed to the High Court, contending (*inter alia*) that the sale-deed executed by Chhubba on the 3rd January 1882, was invalid, with reference to the provisions of s. 276 of the Civil Procedure Code.

Pandit *Ayudhia Nath* and Munshi *Sukh Ram*, for the Appellants.

Munshi *Hanuman Prasad* and Pandit *Bishamber Nath*, for the Respondent.

[704] **Oldfield, J.**—The *bona fide* character of the sale to the plaintiff of the property in suit on the part of Chhubba, the judgment-debtor of the appellants, has been found by the Lower Appellate Court, and is not open to the objections taken in appeal.

The question that remains for determination is whether, at the time of the sale to the plaintiff, the property was under attachment in execution of the appellants' decrees, and, under the provisions of s. 276 of the Civil Procedure Code, the sale to the plaintiff is void as against the appellants' claims under their decrees.

It appears that the property had been attached on the application of one Manni Ram in execution of his decrees against Chhubba on the 17th May 1881, and some of the appellants who held decrees against Chhubba applied to attach the property in execution of their decrees while the attachment under Manni Ram's decree was subsisting and prior to the auction-sale; and further asked that, under s. 295 of the Civil Procedure Code, the proceeds of the sale might be rateably divided among the decree-holders. No order, however, for attachment was made, as required by the provisions of s. 274, on their applications.

Now, s. 276 provides that when an attachment has been made by actual seizure or written order duly intimated and made known in the manner aforesaid (that is, as required by s. 274), any private alienation of the property attached, whether by sale, gift, mortgage or otherwise, during the continuance of the attachment, shall be void as against all claims enforceable under the attachment.

What is here contemplated is the protection of claims which are enforceable under an attachment made according to the provisions in s. 274,—that is, in the case of immoveable property, which is that in dispute here, by written order duly prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from receiving the same from him by purchase, gift or otherwise, the order being proclaimed by beat of drum, and in other manner as directed by the section; and, with reference to the form 141 in sch. iv of the Act, the particulars of the claim of the attaching creditor must be set out in the proclamation.

It is the claim of the attaching creditor who has made the attachment set out in the order of attachment which is enforceable [705] under the attachment, and which is protected; and to enable creditors to have the advantage of an attachment there must be separate attachments in each case by written order duly intimated and made known as required by s. 274, giving the particulars of the claims of the attaching creditors.

The reason is obvious, to enable those dealing with the property to become acquainted with the claims which are protected by the attachment.

For instance, as in this case, a person buys property with the knowledge of the attaching creditor's claim, which he satisfies, but it would be inequitable to make him liable for claims which were not promulgated at the attachment, and of which he knew nothing.

The plaintiff has satisfied the claim of Manni Ram, and is in a position to resist the sale of the property to satisfy the claims of the appellants, which, for the reasons given, are not claims enforceable under the attachment which was made.

The appeal is dismissed with costs.

Mahmood, J.—Five pleas have been raised in appeal; but when I first heard what these were, I was convinced,—and I adhere to the opinion—that the last four are not such as could properly be entertained at this stage, since they only raise questions as to the evidence and as to the merits of the case. Both the Courts have found that the sale-deed of the 3rd January 1882, now in question, was entered into *bona fide* for valuable consideration, and conveyed the vendor's rights in the property, and that no fraud, collusion or *mala fides* of any kind had been established. So far as regards this part of the case, we cannot interfere with the decrees of the lower Courts. There is, however, one part of the appeal—that brought forward by the first plea—which raises a question of law, namely, whether, even assuming the deed to have been a *bona fide* document, it was not void with reference to the provisions of s. 276 of the Civil Procedure Code. Before entering upon this question, I wish to observe that all the decrees held by the present defendants are simple money-decrees.

Now, in passing any judgment in connection with the construction to be placed on s. 276, it is important to refer to an earlier section in the Code—s. 274,—which provides for the attachment [706] of immoveable property, when it is the first step in execution of a simple money-decree against the person owning the property. It is as follows:—"If the property be immoveable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from receiving the same from him by purchase, gift or otherwise." This section corresponds to s. 235 of the old Code of 1859, and to the last part of s. 239 of the same. I wish to refer to these sections because they are interpreted by several rulings, to some of which I shall presently refer. Then we have s. 276 of the present Code, which is the most important provision for the purposes of this case. It says:—"When an attachment has been made by actual seizure or by written order duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, mortgage or otherwise, and any payment of the debt, or dividend, or a delivery of the share, to the judgment-debtor during the continuance of the attachment, shall be void *as against all claims enforceable under the attachment.*" The language of this section is practically the same as that of s. 240 of the Code of 1859, the words which I have emphasized being added to the present section. But notwithstanding the change of language, I do not think, so far as the present point is concerned, the law has been altered by the present Code. And I say this

because my view is supported by a ruling of the Privy Council which, as I understand it, is as much applicable in principle to s. 276 of the present Code as it was to s. 240 of the old Code to which it related. Indeed, the words which I have emphasized were most probably inserted in consequence of that ruling. But before considering the effect of that ruling, I wish to refer to a somewhat recent Full Bench decision of this Court in *Mahadeo Dubey v. Bhola Nath Dichit*, I. L. R., 5 All., 86. The judgment in that case was delivered by my brother STRAIGHT, and concurred in by the rest of the Court, including myself. It was there ruled that a regularly perfected attachment is an essential preliminary to sales in execution of simple decrees for money, and, where there has been no such attachment, any sale that may have taken place is not simply voidable, but *de facto* void. I understand this ruling to apply as well to the old as to the present [707] Code, because a simple money claim seems to me as, so to speak, "floating," until the attachment of some particular property belonging to the debtor fixes the debt to some specific part of the debtor's property—a fixation which can be effected only by making the attachment according to law; and that I take to have been the reasoning of the Full Bench. I now go back to s. 274 of the Code, in order to bring out the most important question in this case. What was the object of the Legislature in enacting s. 274 in these three separate paragraphs, and in these specific terms, and what bearing has this object upon the question now before us? Section 274 provides for the attachment of immoveable property. The attachment is to be made in certain particular ways, and one important direction is, that notice be given not only to the judgment-debtor not to alienate the property, but also to the *public* not to accept any alienation from him. The object of the provisions is two-fold; and this view of the matter is supported by the provisions of s. 644 when considered with the fact that No. 141 of the fourth schedule of the Civil Procedure Code correctly provides an exact form to be employed for the purpose of carrying out the requirements of s. 274. It says:—"Whereas you (the judgment-debtor) have failed to satisfy a decree passed against you.....it is ordered that you be, and you are hereby, *prohibited and restrained*, until the further order of this Court, *from alienating the property* specified in the schedule hereunto annexed, by sale, gift or otherwise,"—so far the words are a repetition of s. 274,—"*and that all persons be, and that they are hereby, prohibited from receiving the same by purchase, gift or otherwise.*" I have emphasized the words bearing upon the present point. Now, it is clear to my mind that s. 276 is a distinct interference with private rights of alienating property, and I believe it is a fundamental principle relating to the interpretation of statutes, that where the Legislature interferes in this manner, the provisions enabling it to do so must be not only carefully but *strictly* construed. Their Lordships of the Privy Council in *Anand Lal Dass v. Jullodhur Shaw*, 14 Moo. I. A., 543, in construing the corresponding s. 240 of the Code of 1859 which I have already cited, made the following observations:—"The question is whether those words—'any private alienation of the property attached, whether by sale, gift or [708] otherwise, shall be null and void'—are to be taken in the widest possible sense as null and void against all the world, including even the vendor, or to be taken in the comparatively limited sense attached to them by the Courts in India? Their Lordships adopt the language of the Chief Justice, who, in the judgment of the Court, expresses his opinion that the object was to make the sale null and void, so far as it might be necessary to secure the execution of the decree, relates *only* to alienation which would affect *the creditor who obtained the attachment*. That appears to their Lordships to be the true meaning of the section. It could scarcely be held—in fact, it was scarcely

maintained in argument—that a sale made to a *bond fide* purchaser by the vendor could be set aside by the vendor himself; the words must therefore necessarily be read with some limitation. It appears to their Lordships that their construction must be limited in the manner indicated by the Chief Justice, on the ground that they were intended for the protection of the creditor who had obtained an execution, and not for the protection of all persons who at any future time might possibly obtain execution." I have emphasized the important words, and applying these observations to this case, I must now consider whether such conditions existed as could invalidate the deed of the 3rd January 1882. I have already said that a perfected attachment is necessary to render these restrictions upon private rights effective so as to prevent the owner from dealing with his property as he might have done before attachment. In support of this view, I may refer to two cases—*Rameswar Singh v. Ramtanu Ghose*, 4 B. L. R. A. C., 24, and *Indro Chunder Baboo v. Dunlop*, 10 W. R., 264. I need not refer to them at length, but they are authorities for the view that before property can be made liable to these restrictions, there must be a perfected attachment. They amount practically to an enunciation of the same principle as was laid down by this Court in *Mahadeo Dubey v. Bhola Nath Dicit*, 1. L. R., 5 All., 86, to which I have already referred.

Now, if a sale in execution of decree, without a previous attachment is *ab initio* void, it follows that a private sale, where there has been no such perfected attachment, is valid. Of course, as a matter of logic, the truth of a proposition does not involve the [709] truth of what may be called its converse; but in a case of this description, I think that the two propositions depend upon the same principle, and that if one of them is true, the other must be true also. Indeed, the judgment of my brother TYRRELL in *Gobind Singh v. Zalim Singh*, 1. L. R., 6 All., 33, goes almost a greater length to support my view; for there the private alienation by the judgment-debtor, though made during the subsistence of a valid attachment, was upheld, on the ground, that although the interests of the auction-purchaser, who sought to avoid the private alienation, originated in an attachment made in execution of the same decree, yet as the former attachment had been infructuous, and the latter attachment, which resulted in the auction-sale, was made subsequent to the private alienation, such alienation could not be avoided by such auction-purchaser.

In connection with this part of the case, if it could be shown that the present defendants had by reason of their applications obtained a valid and perfected attachment in execution of their decrees before the sale of the 3rd January 1882, there would be no difficulty. But I concur in the reasoning of my brother OLDFIELD in *Gumani v. Hardwar Pandey*, 1. L. R., 3 All., 698, where he held that the prohibition provided by s. 276 could not have effect unless there had been a regular attachment, and that an alienation made after attachment not "*duly intimated and made known*" as required by s. 276, would not be vitiated. The rule seems to me to rest upon a foundation similar in principle to the equitable doctrine of "*notice*" when applied to *bond fide* transferees for value. And applying this rule to the present case, it has to be considered whether the application made by Ganga Din on the 31st August 1881, and the order passed thereon, amounted to such an attachment as my brother OLDFIELD had in view in the case which I have just mentioned. There can be no doubt that neither the application nor the order amounted to such an attachment. The application was made under s. 295, and so were the other subsequent applications by the decree-holders—the defendants in the present litigation.

That section provides for the state of things which was formerly met by ss. 270 and 271 of the Code of 1859. The provisions of the former of these sections, which gave priority to the [710] attaching creditor for satisfaction of his decree as against other decree-holders, have not re-appeared in s. 295 of the present Code; the material effect of the change, so far as this point is concerned, being that, whilst under the old Code the first attaching creditor was to be paid in full, and the others rateably, under the rule of distribution provided by the present Code, no such priority exists, and any decree-holder who applies to the Court is entitled to participate rateably, subject, of course, to the other rules provided by the section. The substantial provisions of s. 271 of the old Code have, however, re-appeared in an *amplified* form, in s. 295 of the present Code, and whatever the change of law may have been in other respects, the principle, so far as the matter now under consideration is concerned, has certainly undergone no change. I can explain this in the best manner by quoting another passage from the judgment of the Lords of the Privy Council in the case which I have already cited:—"Reference has been made to s. 271, which is to this effect—"If, after the claim of the person on whose application the property was attached has been satisfied in full from the proceeds of the sale, any surplus remain, such surplus shall be distributed rateably amongst any other persons who, prior to the order for such distribution, may have taken out execution of decrees against the same defendant, and not obtained satisfaction thereof." This section only applies where there has been a judicial sale, and appears to their Lordships to have little or no bearing on the question in the present case, which is, whether or not, under the circumstances, a private sale was valid."

Now, reading s. 295 of the present Code in the light of these observations, there can be no doubt that whilst the section gives an especial right to judgment-creditors as distinguished from simple creditors, it is an essential condition precedent to the exercise of that right that there should be a sale in execution, that its result should appear in assets realized by the sale, and so, until the sale takes place, no such right can be enforced. Now the first Court, in dealing with the defendant's application, issued no proclamation under s. 274: no order was passed prohibiting the judgment-debtor from alienating the property. The public were not warned against accepting a conveyance from the judgment-debtor, and under these circumstances there was neither a perfected attachment nor [711] any such prohibition as could render s. 276 applicable to the case. In support of what I have just said, I may mention the case of *Bishen Chunder Surma Chowdhry v. Mun Mohinee Dabee*, 8 W. R., 501, in which it was held that s. 270 of the old Code, corresponding to a part of the present s. 295, did not apply to a case in which property had *not* been sold in execution of a decree.

I hold therefore that because the application of the 31st August 1881, was not an application for execution by attachment of the property in suit, because it did not end in an order for attachment, because the order passed, even supposing it were an order for attachment, was never duly intimated and notified, there was no such attachment of the property as could render the prohibitions of s. 276 available to the present defendants for the purposes of executing their decrees against the property sold under the sale-deed of 3rd January 1882.

There was Manni Ram's decree under which the property was attached; but that attachment could only invalidate such alienations as could be taken to be in derogation of his rights, so far as the decree, in execution whereof he attached the property, is concerned. But since the defendants never properly attached the property in execution of the decrees which they now seek to execute against that property, since that property has by a valid sale

passed from the hands of their judgment-debtor and become the property of the plaintiff—a *bona fide* purchaser for value—they cannot either avoid the deed of sale or execute their decrees against the property. For these reasons, the appeal must be dismissed with costs.

Appeal dismissed.

NOTES.

[The following cases adopt the ruling of this case :—(1888) 15 Cal., 771 ; (1903) 25 All., 431, where it was held that a sale to an attaching creditor was not barred by an application by another creditor for rateable distribution out of the proceeds of the attached property. (1900) 23 All., 106, was a similar decision. So also (1903) 28 Bom., 264. See this latter case distinguished in (1905) 28 Mad., 380. Note also (1891) 16 Bom. 91.]

[7 All. 711]

The 18th March, 1885.

PRESENT :

MR. JUSTICE BRODHURST AND MR. JUSTICE MAHMOOD.

Rodh Mal.....Defendant

versus

Ram Harakh and another.....Plaintiffs.*

Mortgage—Purchaser of part of mortgaged property without notice—

Suit for sale of whole property in satisfaction of mortgage—

Marshalling—Apportionment.

The equities which apply to a puisne incumbrancer in the marshalling of securities apply also to a *bona fide* purchaser for value, without notice, of a portion of property the whole of which was subject to a prior incumbrance. *Tulsi [712] Ram v. Munnoo Lal*, 1 W. R., 353, *Nowa Koer v. Abdul Raham*, W. R., January to July 1864, p. 374, *Bishonath Mookerjee v. Kisto Mohun Mookerjee*, 7 W. R., 483, and *Khetoosee Cherooria v. Banee Madhub Doss*, 12 W. R., 114, referred to.

The mortgagees of two properties, one of which had, subsequently to the mortgage, been purchased for value *bona fide* by one who had no notice of the incumbrance, brought a suit to enforce their lien against both the properties originally owned by the mortgagor, impleading as defendants both the mortgagor and the purchaser.

Held that, while there was no doubt that, if the purchaser was compelled to pay more than the share of the mortgage debt apportioned on the property purchased by him, he would be entitled to contribution, yet, in a suit so framed, and having regard to the array of parties, such an apportionment could not be made at the stage of second appeal.

THE facts of this case were as follows :—Jaipal, Bindraban, Parmanand, and Ramanand owned a three annas two pies and eight karants share in a village called Misarpura, and a one anna seven pies and four karants share in a village called Bhawalpura. The four persons owned these shares in the following proportions :—Jaipal was owner of one-third only, Bindraban was owner of one-third only, Parmanand and Ramanand owned the remaining one-third. These persons, on the 17th July 1875, made a simple mortgage of their rights and interests in the above-named villages to the plaintiffs in this case, Ram Harakh and Sheo Prasad. Subsequently, on the 20th July 1877, the rights and interests of Jaipal in Bhawalpura were sold in execution of a simple money-

* Second Appeal No. 1590 of 1883, from a decree of G. E. Knox, Esq., District Judge, Mizapur, dated the 31st August 1883, affirming a decree of Munshi Madhofal, Munsif of Mirzapur, dated the 23rd January 1883.

decree, and purchased by Rodh Mal, defendant in this case, the equity of redemption in the other village, namely, Misarpura, remaining in the hands of Jaipal. On the 15th April 1878, Bindrabai made a simple mortgage of his third share in both the villages to the same mortgagees. On the same day, Parmanand and Ramanand made a similar mortgage of their share in both the villages in favour of the same mortgagees. The effect of these mortgages was to pay off the money due by them on account of the mortgage of the 17th July 1875. The present suit was instituted by Ram Harakh and Sheo Prasad, with the object of enforcing the mortgage of the 17th July 1875, to the extent of the third share originally owned by Jaipal in both the villages. To this suit were impleaded Jaipal himself and Rodh Mal as the purchaser of his rights and interests in mauza Bhawalpura. There were various pleas set up by the defendant [713] Rodh Mal, but it is necessary to notice only the second and fourth, which related to the questions which required determination in second appeal. These pleas, in substance, were—(1) that the defendant-appellant having purchased the property for value and without notice of the prior mortgage, it (the property) was not liable to be sold again to satisfy the mortgage of 1875; (2) that even if it were liable to be so sold, it was only liable to the extent of the mortgage-debt that might be apportioned on the property purchased by the defendant-appellant. Upon this state of things, the Court of First Instance decreed the claim, and the Lower Appellate Court dismissed the appeal of the defendant Rodh Mal, and confirmed the decree. The defendant appealed to the High Court.

Pandit *Ajudhia Nath*, for the Appellant.

Munshi *Hanuman Prasad*, and Munshi *Kashi Prasad*, for the Respondents.

Mahmood, J.—In the second appeal before us, two questions have been argued, the first one relates to marshalling, and the second relates to contribution or apportionment. It is admitted that when this property was brought to sale, the mortgage of the 17th July 1875, was not notified, and no evidence was adduced by the plaintiff to show that the defendant-appellant had notice of the aforesaid mortgage. Is the defendant-appellant then entitled to a decision in his favour on the two questions? In the first place, I refer to the formulation of the rule in s. 81 of the Transfer of Property Act (IV of 1882), not because the rule is literally applicable to this case (which it is not), but because the principle of this rule applies equally to the facts of the present case. Now s. 81 runs as follows:—"If the owner of two properties mortgage them both to one person, and then mortgages one of the properties to another person, who has not notice of the former mortgage, the second mortgagee is, in the absence of a contract to the contrary, entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee, so far as such property will extend, but not so as to prejudice the rights of the first mortgagee, or of any other person having acquired for valuable consideration and interest in [714] either property." This of course relates only to a puisne mortgage of a portion of the property, the whole of which was subject to a prior mortgage; but there is no reason why this doctrine should not be applied to the case of the defendant-appellant. The rule has been followed in several cases, and I now proceed to refer to some of the cases which are important. The first case I would refer to is the case of *Tulsi Ram v. Munoo Lal*, 1 W. R., 353. In this case the mortgagor, a few days after hypothecating a village as security to the Government, mortgaged the same village with other property to the plaintiff in that case. The deed of mortgage was immediately registered, but the security-deed was not registered till long afterwards, and under the Registration Act, XIX of 1841, the Court in that

case considered that the mortgage-deed had priority over the security-bond. The village having been sold by the Collector on account of a sum due under the security bond, it was held by MORGAN (now Sir WALTER MORGAN) and SHUMBOO NATH PANDIT, JJ., that though the purchaser took subject to a prior mortgage yet the mode in which the property had been dealt with by the mortgagor entitled the purchaser to require that the other property should first be applied in satisfaction of the mortgage-debt. The second case that I would refer to is the case of *Nowa Koer v. Abdul Rahim*, W. R., January to July, 1864, p. 374. In that case Mr. Justice JACKSON is reported to have said as follows:—"It appears that the plaintiff in this case had a lien on three estates belonging to the debtor, and that a third party, having obtained a decree for money due from the same debtors, recovered the money by the sale of one of the plaintiff's three mortgaged estates. This sale does not release that estate from the mortgage, but it forces the plaintiff to take measures, in the first place, to recover the amount due to him from the remaining estates included in his mortgage-deed. If any balance remains after he has realized all which he can realize from these two remaining estates, he can then return to the third estate to recover the balance. No injustice is done to the plaintiff by requiring him to take satisfaction out of funds which are within his power for this purpose, and so placed by the deed; while, on the other hand, very great injustice might be done to other parties by allowing the plaintiff to proceed against the estate which has [715] been already sold." And then, referring to facts very similar to those that exist in this case, the learned Judge went on to say:—"If, then, the plaintiff has entered into any new and subsequent contract, varying the terms of the first contract, he cannot thereby injure the rights of parties who have succeeded to the interest of his debtor prior to the subsequent contract." The principle of equity on this subject is very clearly laid down in the text-books (chap. XII, Story's *Equity Jurisprudence*). There is another case—*Bishnath Mookerjee v. Kisto Mohun Mookerjee*, 7 W. R., 483,—but I wish to rely principally on the judgment of NORMAN, J., in that case, who has taken the same view as I take in this case. After laying down this rule with reference to a puisne mortgagee, that learned Judge proceeds to observe (p. 484)—"Of course, a subsequent purchaser of one of the estates has just as great an equity as an incumbrancer." There is another case—*Rhetoosee Cherooria v. Bane Madhub Doss*, 12 W. R., 114, in which the learned Judges doubted whether the doctrine of marshalling of securities should be introduced in this country. There is, however, no authority which goes the other way. I hold that the equities which apply to a puisne incumbrancer in the marshalling of securities apply also to a *bonâ fide* purchaser for value without notice, such as the defendant-appellant in this case.

In Mr. Justice STORY'S work on *Equity Jurisprudence*, vol. I, there is a note at page 613 to the following effect:—"Where a judgment-debtor owned two tracts, subject to the lien of the judgment, and sold one tract, the vendee had a right to have the other tract first applied to the judgment, and this right is paramount to that of subsequent creditors having a lien only on the unsold property, to have the prior creditor, who had a lien on both, satisfy himself from the estate which had been sold.—*McCormick's Appeal* 57, Pem. St. 54. And that *bonâ fide* purchasers from judgment-debtors have a right to have the debts satisfied from the unsold estate or that last sold."

I have not been able to refer to the authorities upon which this proposition is based, but this view of the law, as I have already shown, has been taken in various cases in this country. It is clear to me that the decree of the lower Courts cannot stand in [716] the present form. I must now consider

the second question—as to apportionment. There is no doubt that if the defendant is compelled to pay more than the share of the debt apportioned on the property, he is entitled to contribution. But the question in this case is, whether in a suit framed like the present, in which the plaintiff sues to recover a certain sum of money, and having regard to the array of parties, such a question can be determined? I am of opinion that such an apportionment cannot be made in this case at this stage after the manner in which it has been tried. In my opinion, the appeal should be partially decreed, and the decrees of the lower Court modified to the effect that the rights and interests of the defendant-appellant in mauza Bhawalpura should not be brought to sale till the plaintiff has, in the first instance, resorted to the share of Jaipal in Misarpura for recovering the mortgage-money, and that the share of the defendant-appellant be brought to sale for the purpose of recovering such balance as may remain due after the sale of Jaipal's rights in Misarpura. I would modify the decree of the lower Courts accordingly, but make no order as to costs.

Brodhurst, J.—I concur in modifying the decree of the Lower Appellate Court as proposed by my learned colleague.

NOTES.

[The right of a grantee for value to claim marshalling has been recognized in several cases:—(1885) 7 All., 711; (1893) 18 Bom., 160; (1896) 22 Bom., 304 F.B.; (1903) 31 Cal., 95; (1905) 29 Mad., 217; (1907) 7 C.L.J., 271.

See also the recent decision of the Madras High Court in (1908) 31 Mad., 419; 18 M.L.J., 299 on the point. But see (1885) 11 Cal., 258; (1897) 24 Cal., 746; (1895) 17 All., 494.

A full and clear analysis is given by *Ghose* in his *Law of Mortgages*, Ed. IV, Vol. I, p. 361—363.]

[7 All. 716

The 23rd March, 1885.

PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Muhammad Awais.....Plaintiff

versus

Har Sahai.....Defendant.*

Muhammadan Law—Inheritance—Devolution not suspended till payment of deceased ancestor's debts.

A creditor of *A*, a deceased Muhammadan, under a hypothecation bond, obtained a decree on the 20th December 1876, for recovery of the debt by enforcement of lien against *M*, one of *A*'s heirs, who alone was in possession of the estate; and, in execution of the decree, the whole estate was sold by auction on the 21st March 1878, and purchased by the decree-holder himself. *J*, another of *A*'s heirs, was not a party to these proceedings. On *J*'s death, her son and heir *A. H.* conveyed to *M. A.* the rights and interests inherited by him from his mother, namely, her share in *A*'s estate. The purchaser of the share thereupon brought a suit against the decree-holder for its recovery.

[717] *Held*, that, immediately upon the death of *A*, the share of his estate claimed in the suit devolved upon *J*; that, she being no party to the decree of the 20th December 1876, her share in the property could not be affected by that decree, nor by the execution sale of the 21st March 1878; that upon her death that share devolved upon her son, who conveyed his rights to the plaintiff; that the plaintiff was therefore entitled to recover possession of the

* Second Appeal No. 736 of 1884, from a decree of Muhammad Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 5th April 1884, affirming a decree of Manvi Ahmad Hasan, Munsif of Amroha, dated the 21st September 1883.

share which he had purchased; but that he could not do so without payment to the defendant of his proportionate share of the debts of A which were paid off from the proceeds of the auction-sale of the 21st March 1878. *Jafri Begam v. Amir Muhammad Khan*, Weekly Notes, 1885, p. 248, followed.

THE facts of this case are sufficiently stated for the purposes of this report in the **judgment** of the Court.

Mr. *Amiruddin* and *Shaikh Maula Bakhsh*, for the Appellant.

The *Junior Government Pleader* (*Babu Dwarka Nath Banarji*) and *Babu Jogindro Nath Chaudhri*, for the Respondent.

Oldfield and Mahmood, JJ.—The property to which this litigation relates formed part of the estate of one Ahmaduddin, who died in September 1871, leaving heirs whose names appear in the following table :—

Ahmaduddin.

Mumtazunnissa, (daughter.)	Jeoni Begam, (sister.)	Shahabuddin, (brother.)	Intiazunnissa, (widow.)
	Ahmad Husain, (son.)		

Under the Muhammadan law of inheritance, the estate of the deceased, being divided into 32 *sehams*, devolved upon the heirs in the following proportions :—

Mumtazunnissa	...	...	16 <i>sehams</i> .
Jeoni Begam	...	...	4 ..
Shahabuddin	...	...	8 ..
Intiazunnissa	...	...	4 ..

But it appears that, on account of an alleged will executed by the deceased in favour of his daughter Mumtazunnissa, her name alone was entered with reference to the property, and she alone obtained possession of her father's estate, to the exclusion of his other heirs. The deceased and his brother Shahabuddin appear to have been indebted to the defendant under a hypothecation-bond, dated the 8th May 1867, and subsequent to his death he instituted a suit against Mumtazunnissa alone as representing Ahmaduddin, [718] and against the heirs of Shahabuddin. The suit was decreed on the 20th December 1876, for recovery of the money by enforcement of lien; and, in execution of that decree, the property in suit, along with the shares of other parties—defendants in that suit—was sold by auction on the 21st March 1878, and purchased by the defendant himself, and under that purchase he is in possession. To none of these proceedings was Jeoni Begam, a party, and she died, leaving Ahmad Husain her son and heir, who, on the 19th November 1882, executed a deed of sale, whereby he conveyed to the present plaintiff the rights and interests in the property inherited by him from his mother, namely, the 4 *sehams* in the estate of Ahmaduddin. This share represents the property in dispute in this litigation. Such being the plaintiff's title, the object of the suit was to recover possession of the share which he had purchased. The defendant, without disputing the question of inheritance and the extent of the rights purchased by the plaintiff, resisted the suit mainly upon the ground that the execution-sale of the 21st March 1878, having taken place in execution of a decree passed against the estate of the deceased Ahmaduddin for his debts, in a suit to which his daughter Mumtazunnissa, the heir in possession, was a party, the auction-sale at which he purchased conveyed to him absolute ownership of the property, as, under the Muhammadan law, the debts of the deceased ancestor took precedence over the rights of the heirs, and inheritance did not therefore open

up in favour of Jeoni Begam till the payment of the debts of the deceased,—the payment of such debts being a condition precedent to the devolution of property upon the heirs.

Both the lower Courts have concurred in accepting this defence and in dismissing the suit, and the plaintiff has appealed upon the ground that, as representing the interests of Jeoni Begam, he was not bound by the decree of the 20th December 1876, to which she was no party: that Mumtazunnissa could not in that litigation represent so much of the estate of Ahmaduddin as had devolved upon Jeoni Begam, and therefore all that the plaintiff purchased in the auction-sale of the 21st March 1878, was the rights and interests of those who were parties to the decree, without affecting the rights which the plaintiff had purchased from the son and heirs of Jeoni Begam.

[719] We are of opinion that this contention has force. The question of law involved in this case arose in the case of *Jafri Begam v. Amir Muhammad Khan*, Weekly Notes, 1885, p. 248, which was referred to the Full Bench, and the answers given by the whole Court in that case dispose of the contentions of the parties in this litigation. Following the ruling in that case, we hold that, immediately upon the death of Ahmaduddin, the share of his estate claimed in this suit devolved upon his sister Jeoni Begam; that, she being no party to the decree of the 20th December 1876, her share in the property could not be affected by that decree, nor by the auction-sale of the 21st March 1878, which took place in execution of that decree; that upon her death that share devolved upon her son Ahmad Husain, who conveyed his rights to the present plaintiff under the sale-deed of the 9th November 1882, which, upon the findings of the lower Courts, was a *bonâ fide* transaction. The plaintiff is therefore entitled to recover possession of the share which he has purchased; but, according to the Full Bench ruling to which we have already referred, he cannot do so without payment to the defendant of his proportionate share of the debts of Ahmaduddin, which were paid off from the proceeds of the auction-sale of the 21st March 1878. But no decree giving effect to this view can be framed here without ascertaining—(1) What was the amount for which Ahmaduddin would have been liable under the bond of the 18th May 1867, at the date of the auction-sale of the 21st March 1878? (2) How much of the proceeds of that sale went to pay off Ahmaduddin's debt? (3) What is the exact amount which the plaintiff, according to the view above expressed, is bound to pay the defendant before obtaining possession of the share claimed by him in the estate of Ahmaduddin?

We remand the case under s. 565 of the Civil Procedure Code for clear findings upon these issues, and ten days will be allowed to the parties for objections under s. 567* of the Civil Procedure Code.

Issues remitted..

NOTES.

[See also (1888) 10 All., 289 ; (1894) 21 Cal., 311.]

Finding and evidence to be put on record.

Objections to finding.

Determination of appeal.

* [Sec. 567 :—Such finding and evidence shall become part of the record in the suit ; and either party may, within a time to be fixed by the Appellate Court, present a memorandum of objections to the finding.

After the expiration of the period fixed for presenting such memorandum, the Appellate Court shall proceed to determine the appeal.]

[720] The 26th March, 1885.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Jai Ram.....Defendant

versus

Mahabir Rai.....Plaintiff

Raghunandan Rai and others.....Plaintiffs

Parmanand Rai and another.....Plaintiffs

Raghunandan Rai and others.....Plaintiffs.*

Mahabir Rai.....Plaintiff

versus

Raghunandan Rai and others.....Defendants.*

Mahabir RaiDefendant

versus

Raghunandan Rai and others.....Plaintiffs.*

Raghunandan Rai and others.....Defendants

versus

Mahabir Rai and others.....Plaintiffs.*

Raghunandan Rai and others.....Plaintiffs

versus

Mahabir Rai and others.....Defendants.*

Pre-emption—Wajib-ul-arz—Partition of mahal—Mode of division of property where there are several pre-emptors equally entitled.

The *wajib-ul-arz*, framed in 1856, of a village consisting of several pattis or thokes, gave a right of pre-emption to the owners of each thoke in respect of property situate in every other thoke, when such property was sold to any one having no share in the village co-parcenary. The mahal subsequently became the subject of perfect partition under the N.-W.P. Land Revenue Act (XIX of 1873), and one of the pattis was constituted a separate mahal, and a new *wajib-ul-arz* was framed for it. Prior to the partition, a proprietor of land both in the pattis which remained in the original mahal, and in the patti which formed the new mahal, sold property in both to a stranger. Thereupon a co-sharer in the original mahal brought a suit for pre-emption in respect of the property situate therein which had been sold, excluding the property situate in the new mahal.

Held that the effect of the partition was to exclude property situate in the new mahal from the operation of the *wajib-ul-arz* framed in 1856, and to place it under new conditions as to the right of pre-emption ; that the plaintiff could, after the separation, exercise no such right against and in respect of shareholders and property so separated, nor could the separate shareholders exercise any right of pre-emption against the plaintiff and his property remaining in the mahal from which they had separated ; and that the suit to pre-empt that portion

* Second Appeals Nos. 496, 497, 498, 525, 526, 635 and 636 of 1884 from a decree of J. W. Power, Esq., District Judge of Ghazipur, dated the 15th December 1883, modifying a decree of Hakim Shah Rahat Ali, Additional Subordinate Judge of Ghazipur, dated the 31st March 1883.

only of the property sold which was situate in the original mahal was maintainable. *Durga Prasad v. Munsif*, I. L. R., 6 All., 423, *Hulas v. Sheo Prasad*, I. L. R., 6 All., 455, *Kashi Nath v. Mukhta Prasad*, I. L. R., 6 All. 370, *Motee Sah v. Musammatt Goklee*, N.-W. P. S. D. A. Rep., 1861, p. 506, *Ram Prasad v. Bulzeet Singh*, N.-W. P. H. C. Rep., 1867, p. 252, *Oomur Khan v. Moorad Khan*, N.-W. P. S. D. A. Rep., 1865, p. 173, and *Salig Ram v. Debi Prasad*, N.-W. P. H. C. Rep., 1875, p. 38, referred to.

Per MAHMOOD, J.—The rule of the Muhammadan Law that where more persons than one owning the property in virtue of which the pre-emptive right exists [721] appear for the purpose of suing, their rights are to be taken as equal *per capita*, with reference to the number of pre-emptors, and not with reference to the number of the shares of each pre-emptor in such property, is so consistent with justice, equity and good conscience, that it must be followed in cases of rival suits for pre-emption under the *wajib-ul-arz*, where there is nothing to show that the rival pre-emptors are not equally entitled.

THE facts of these cases are sufficiently stated for the purposes of this report in the judgment of Mahmood, J.

Mr. T. Conlan and the Senior Government Pleader (*Lala Juala Prasad*), for the Appellants in Nos. 496 and 499.

The Senior Government Pleader (*Lala Juala Prasad*) for the Appellants in Nos. 497 and 498.

Munshi *Kashi Prasad*, for the Respondent in No. 496.

Mr. G. E. A. Ross, Mr. W. M. Colvin, Munshi *Hanuman Prasad* and Munshi *Sukh Ram*, for the Respondents in No. 497.

Mr. G. E. A. Ross and Munshi *Sukh Ram*, for the Respondents in No. 498.

Mr. W. M. Colvin and Munshi *Hanuman Prasad*, for the Respondents in No. 499.

Munshi *Kashi Prasad*, for the Appellant.

Mr. G. E. A. Ross, Mr. W. M. Colvin, Munshi *Hanuman Prasad*, Munshi *Sukh Ram* and *Lala Lalla Prasad*, for the Respondents in No. 525.

Munshi *Kashi Prasad*, for the Appellant.

Mr. G. E. A. Ross, Mr. W. M. Colvin, Munshi *Hanuman Prasad* and Munshi *Sukh Ram*, for the Respondents in No. 526.

Mr. W. M. Colvin and Munshi *Hanuman Prasad*, for the Appellants.

Lala Lalla Prasad and Munshi *Kashi Prasad*, for the Respondents in Nos. 635 and 636.

Mahmood, J.—The facts of this case and of the connected cases, so far as they are necessary for the purposes of disposing of them, are as follows:—Harbans Lal and Rajkali Kuar, by a deed of sale dated the 27th October 1881, sold their rights and interests in certain properties to Jai Ram Ojha (defendant) in lieu of a price purporting to be Rs. 24,000. One of these properties is situate in patti Thakur Das, one in patti Akbar Husain, one in patti Ram Ghulam, and the fourth is a cultivatory holding to which no right of pre-emption applies. On the 5th October 1882, Raghunandan Rai, Bhajna Rai, and Jageshar Das, instituted a suit against the vendee and the two vendors for enforcement of the right of pre-emption in respect of the sale of the rights in patti Akbar Khan and patti Ram Ghulam only, asserting that their right of pre-emption did not extend to the other properties included in the sale.

This suit was numbered 195 by the Court of First Instance.

A similar suit was instituted by another co-sharer, Mahabir Rai, for pre-empting the same property as that included in the former suit, on the 14th March 1882, and the suit was numbered 201 by the Court of First Instance. On the same day, two other co-sharers, Parmanand Rai and Sheotahal Rai,

applied to be made plaintiffs in suit No. 195, and their application having been granted, their names were entered upon the record as plaintiffs Nos. 4 and 5 respectively. On the 16th December 1882, the Court of First Instance added the name of Mahabir Rai (plaintiff in suit No. 201) as defendant to the first suit No. 195, and similarly added the names of all the five plaintiffs-pre-emptors as defendants to suit No. 201.

The two suits were tried together, and the Court decreed suit No. 195 to the extent of three-fourths of the property in suit, conditional upon payment of a proportionate amount of the purchase-money, and dismissed the suit as to the remaining one-fourth of the property, to which it held Mahabir Rai (defendant in that suit and plaintiff-pre-emptor in suit No. 201) to be entitled. The decree was made subject to the further condition that in case the plaintiffs-pre-emptors in suit No. 195 omitted to execute their decree in the time fixed by the decree, the defendant-pre-emptor Mahabir Rai was to be entitled, upon deposit of the purchase-money, to obtain possession by pre-emption of the three-fourths share decreed to the plaintiffs in that suit. A similar decree was passed by the Court in Mahabir Rai's suit No. 201, decreeing his claim to the extent of one-fourth of the property in suit on payment of a proportionate amount of the purchase-money, subject to [723] the condition that, upon his failure to make the deposit within time, the defendants who were plaintiffs-pre-emptors in suit No. 195, would be entitled, upon deposit, to obtain possession by pre-emption of the one-fourth share decreed to Mahabir Rai, plaintiff-pre-emptor in suit No. 201.

Both these decrees are based upon the grounds contained in the judgment passed in Mahabir Rai's suit No. 201; and it appears from the judgment that the reason why the Court allowed the claim in suit No. 195 only to the extent of three-fourths of the property was, that Parmanand and Sheotahal not having joined as original plaintiffs in that suit, their action in subsequently joining the suit was interpreted by the Court to be *mala fide*, and prompted by a desire to reduce the pre-emptive share of Mahabir Rai (plaintiff in suit No. 201), and on this ground the Court did not take their existence as plaintiffs in the suit into account in apportioning the amount of property to be decreed in that suit.

From these two decrees, all parties appealed to the District Judge.

Jai Ram Ojha preferred appeal No. 33 from the decree in suit No. 195, and appeal No. 34 in suit No. 201, the scope of the appeals covering the whole ground included in the two suits. Both these appeals were, however, dismissed by the Judge, the plaintiffs-pre-emptors in both the suits being held entitled to pre-emption against Jai Ram Ojha, defendant-vendee. Raghunandan, Bhajna, and Jageshar also preferred appeals (appeals Nos 37 and 38) from both the decrees; and similarly their follow-pre-emptors, Parmanand and Sheotahal, who had joined the three persons above-named as plaintiffs to suit No. 195, and were impleaded as defendants to suit No. 201, appealed from both the decrees (appeals Nos. 39 and 40). Mahabir, plaintiff-pre-emptor in suit No. 201 also appealed from the decree in that suit, and thus these various appeals (Nos. 37, 38, 39, 36, and 40), related to the contention between the rival pre-emptors in the two suits Nos. 195 and 201. All these appeals were disposed of by the District Judge in his judgment in appeal No. 40, whereby he modified the decrees in both the suits by allowing to each pre-emptor a share in the property in suit in proportion to the extent of such pre-emptor's share in the village, by virtue whereof he had the right of pre-emption, [724] rendering such modified decree subject to the payment of a proportionate amount of the purchase-money by each pre-emptor.

From the decrees of the District Judge, Jai Ram Ojha, defendant-vendee has preferred second appeals Nos. 496, 497, 498, and 499, and the pre-emptors have preferred second appeals No. 525, 526, 635, and 636. All these appeals were heard together, and the questions raised by them cover the whole scope of the decrees in the two original suits Nos. 195 and 201. With reference to the various contentions raised in this appeal, it will be convenient to deal with them in the same judgment; but the questions raised by Jai Ram Ojha's four appeals (Nos. 496, 497, 498 and 499) must be disposed of first, because if his contention prevails, the effect would be the dismissal of both the original suits, rendering it unnecessary to dispose of the contentions raised by the contending pre-emptors *inter se* in the other four appeals. It appears that the village wherein the property in suit is situate, originally constituted one mahal, governed by the terms of a *wajib-ul-arz* framed on the 26th July 1856, and to which all the co-sharers in the village were parties. The mahal consisted of various pattis or *thokes*, and the seventh clause of the *wajib-ul-arz* distinctly gave the right of pre-emption to the owners of each *thoke* in respect of property situate in every other *thoke* when such property was sold to a "stranger," that is, a person having no share in the village co-parcenary. Subsequently, about the year 1878, the mahal appears to have been the subject of a "perfect partition," as defined in s. 107 of the Land Revenue Act (XIX of 1873), and patti Thakur Das (in which a portion of the property sold under the sale-deed of the 27th October 1881, is situate) was constituted a separate mahal, and a new *wajib-ul-arz* was framed for the new mahal on the 30th January 1879, which also contains a pre-emptive clause in favour of the co-sharers of the new mahal *inter se*. Both the suits with which we have to deal in these appeals were brought, however, for pre-emption on the basis of the *wajib-ul-arz* of 1856, and it has been necessary to mention these circumstances in order to render intelligible the first and second grounds of Jai Ram's four appeals, wherein he contends that, notwithstanding the partition of the original mahal and the constitution Thakur Das's patti into a new mahal, the plaintiffs in both the suits were entitled to pre-empt, [725] not only the property situate in the remnant of the old mahal, but also that situate in the new mahal, and that the property situate in both mahals having been conveyed to him by one and the same deed of sale, the plaintiffs could not break up the sale by pre-empting only a portion of the subject of the sale. This plea appears to be based upon the rule explained by me in *Durga Prasad v. Munsif*, I. L. R., 6 All., 423, and again in *Hulasi v. Sheo Prasad*, I. L. R., 6 All., 455, which followed the view of law taken in *Kashi Nath v. Mukhta Prasad*, I. L. R., 6 All., 370, and in older cases. There can be no doubt that every suit for pre-emption must necessarily include the whole of the property, subject to the plaintiff's right of pre-emption, conveyed by one bargain of sale to one stranger, and that a suit which does not include within its scope the whole of such pre-emptional property, is not maintainable, because it is inconsistent with the very nature and essence of the right of pre-emption itself. But before this rule can be applied to the two suits which we are now considering in these appeals, it is necessary to determine whether the plaintiffs in these two suits had any right of pre-emption in respect of so much of the property conveyed by the sale-deed of the 27th October 1881, as is included in Thakur Das patti which constitutes the new mahal. And in order to determine this point, it is necessary to decide the question what was the effect of the perfect partition of the mahal in 1878-79, which resulted in the new *wajib-ul-arz* of the 30th January 1879, which, whilst providing in itself a right of pre-emption, governs only the new mahal, namely, that which constituted patti Thakur Das in the original mahal. Bearing in mind the provisions of

the law as contained in ss. 111 and 112 of the Land Revenue Act, and other sections of the same enactment relating to the subject, and considering also the fact that there is nothing in the present cases to prove that the perfect partition of the Mahal and the constitution of patti Thakur Das into a new mahal was effected irrespective of the wishes or consent either of the defendants-vendors or the plaintiffs-pre-emptors, I hold that the effect of the partition was to exclude patti Thakur Das from the operation of the terms of the *wajib-ul-arz* of 1856, and that the new *wajib-ul-arz* of 1879 created rights of pre-emption among the co-sharers of the new mahal *inter se*, irrespec-[726]tive of the provisions of the *wajib-ul-arz* of 1856. The plaintiffs, therefore, in the present two suits, had no right of pre-emption in respect of the property included in the new mahal, because the custom of pre-emption recognized, *consensu omnium*, in the *wajib-ul-arz* of 1856 could, as a matter of principle, be naturally varied by the perfect partition of 1878-79, which resulted in the new *wajib-ul-arz* of 30th January 1879—the separation of Thakur Das patti and the constitution of it into a separate mahal having the effect of separating it from the conditions of tenure which governed the old co-parcenery, and of placing it under new conditions as to the right of pre-emption. This view is consistent with the *ratio decidendi* on which a portion of the judgment of the late Sudder Dewany Adawlat in *Motee Sah v. Musammatt Goklee*, N.-W. P. S. D. A. Rep., 1861, p. 506, and of this Court in *Ram Prasad v. Buljeet Singh* N.-W. P. H. C. Rep., 1867, p. 252, proceeded. In the former of these cases the learned Judges observed that “an essential condition of the existence of a right of pre-emption is, that the parties claiming such a right shall be co-parceners in the same estate as those against whom the claim is made—a relation between the parties which is extinguished by the very operation of partition and the separate proprietorship thereby established.” The scope of these two suits was therefore co-extensive with the pre-emptive right of the plaintiffs, and the suits were maintainable. This view is supported by the ruling of the Sudder Dewany Adawlat in *Oomur Khan v. Moorad Khan*, N.-W. P. S. D. A. Rep., 1865, p. 173, which, although a case governed by Muhammadan Law, laid down the rule which must by equitable analogy be applied to the present case. Indeed the *ratio decidendi* adopted by a Full Bench of this Court in *Salig Ram v. Debi Prasad*, N.-W. P. H. C. Rep., 1875, p. 38, proceeds upon the same principle, and the right of pre-emption in that case arose out of the terms of the *wajib-ul-arz*.

The second ground of appeal urged on behalf of Jai Ram relates to the question whether the entry in the *wajib-ul-arz* of 1856, regarding the existence of the custom of pre-emption in the village, is correct, and the third ground relates to the proportionate amounts payable by the pre-emptors as price of the shares in res-[727]pect of which their suits have been allowed. Both these pleas raise questions of fact which have already been determined by the lower Courts, and which cannot be considered in second appeal. I may, however, add, with reference to the effect of the pre-emptive clause in the *wajib-ul-arz* of 1856, that the argument of the learned pleader for the appellant regarding the status of such entries is materially refuted by the reasons upon which the ruling of the Full Bench of this Court in *Isri Singh v. Ganga*, I. L. R., 2 All., 876, proceeded. The effect of this view will be that the four appeals of Jai Ram (S. A. Nos. 496, 497, 498, 499) will be dismissed. I now proceed to consider the remaining four appeals (S. A. Nos. 525, 526, 635, 636), which have been preferred by the various pre-emptors. The grounds of appeal in S. A. Nos. 525 and 526 are identical, and similarly the pleas in S. A. Nos. 635 and 636 are

the same. Reading all these grounds of appeal together, they raise only three main questions for determination:—

(1) Whether the right of pre-emption possessed by Mahabir (plaintiff-pre-emptor in suit No. 201) is inferior to that of the plaintiffs in the rival suit No. 195.

(2) Whether Mahabir instituted his suit No. 201 in collusion with the vendee, and whether Parmanand and Sheotahal joined as plaintiffs in suit No. 195 by reason of collusion with the original three plaintiffs, and with the object of reducing the pre-emptive share of Mahabir.

(3) Whether the apportionment of the pre-emptive shares of the various pre-emptors should be apportioned in the two rival suits according to the extent of the shares possessed by each in the village, or *per capita*, that is, equally among all the pre-emptors.

A fourth point is raised in S. A. No. 635 and No. 636, relative to the amount of the purchase-money found by the lower Courts; but as the question relates only to the merits, it cannot be considered in second appeal.

Upon the first point I am of opinion that there is no evidence, and there has been no finding upon the record, to show that Mahabir, plaintiff-pre-emptor in case No. 201, is either inferior or [728] superior to the rival pre-emptors in the other suits, and therefore the rights of all co-sharers who have appealed as pre-emptors should be taken as being equal, and should not be estimated in proportion to the shares possessed by the pre-emptors in the village. In all questions of pre-emption there are three important points for consideration.—The first is the property which, by analogy, may be called the dominant tenement, that is to say, the property in virtue of which the pre-emptor's right exists. The second is the pre-emptors themselves. The third is the pre-empted property, which may, by analogy, be described as the servient tenement. It is a well-known rule of the Muhammadan Law as to pre-emption, that where more persons than one owning the pre-emptive tenement appear for the purpose of suing, their rights are to be taken as equal *per capita*, with reference to the number of the pre-emptors, and not with reference to the number of the shares of each pre-emptor in the pre-emptive tenement. The question then is, whether this rule of Muhammadan Law applies to the present case, which is one of pre-emption under the *wajib-ul-arz*. I am of opinion that the rule of Muhammadan Law is so consistent with justice, equity, and good conscience, that it must be followed in cases like the present. The reason upon which the law of pre-emption is framed is, that the intrusion of a stranger is disagreeable to the owners of the pre-empted property. This disagreeableness is not to be estimated in reference to the share in the property possessed by each pre-emptor, but in reference to each pre-emptor personally, and I hold that the equitable rule is to apportion the rights of the pre-emptors *per capita*. The decision of the District Judge upon this point is therefore overruled.

The second question is, whether the suit of Mahabir, on the one hand, and the application of Parmanand and Sheotahal on the other, were suggested by collusion with the vendee or the pre-emptors in suit No. 195. There is no evidence and no finding to this effect; and even if such collusion existed, it is necessary in framing a decree in such pre-emptive suits, to obviate the effects of any such collusion. This point, therefore, I regard as unimportant. There is one more point raised in S. A. Nos. 635 and 636, namely, as to the amount of the purchase-money found by the lower Courts to have been paid. This, however, is a question as to the merits which [729] cannot be considered in second appeal. I would therefore

pass the following order in these cases:—Following the *ratio decidendi* adopted in *Mahabir Parshad v. Debi Dial*, I. L. R., 1 All., 291, and in *Kashd Nath v. Mukhta Prasad*, I. L. R. 6 All., 370, I would partially allow appeals Nos. 525, 526; 635, and 636, and set aside the decrees of both the lower Courts in both suits, and in substitution thereof order and decree that, in suit No. 195 the plaintiffs-pre-emptors, Raghunandan, Bhajna Rai, Jageshar Das, Parmanand Rai, and Sheotahal Rai, do jointly obtain proprietary possession of five-sixths of the property in suit on payment into Court of a proportionate amount of the purchase-money found by the lower Courts, on or before the 31st May 1885; that, on such payment being duly made, they do recover from all the defendants five-sixths of the costs incurred by them in all the Courts, but that in default of such payment the suit do stand dismissed with costs in all Courts: provided always that if the defendant Mahabir does not on or before the day above-mentioned duly deposit into Court one-sixth of the purchase-money above-mentioned in enforcement of his decree in suit No. 201, the plaintiff shall be entitled to obtain proprietary possession of the remaining one-sixth of the property in suit on payment of the proportionate amount of purchase-money into Court on or before the 15th June 1885, and then the whole suit will stand decreed with costs in all the Courts; but that in default of either of the two payments aforesaid being duly made by the plaintiffs, the whole suit will stand dismissed with costs in all the Courts:

And for the same reasons a similar decree, *mutatis mutandis*, will be substituted for the decree in suit No. 201, namely, that in suit No. 201 the plaintiff-pre-emptor Mahabir do obtain proprietary possession of one-sixth of the property in suit on payment into Court of a proportionate amount of the purchase-money found by the lower Courts, on or before the 31st May 1885, that on such payment being duly made, he do recover from all the defendants one-sixth of the costs incurred by him in all the Courts, but that in default of such payment, the suit do stand dismissed with costs in all the Courts: provided always that if the defendants, Raghunandan Rai, Bhajna Rai, Jageshar Das, Parmanand Rai, and Sheotahal Rai do not, on or before the day above-[730]mentioned, duly deposit into Court five-sixths of the purchase-money above-mentioned in enforcement of their decree in suit No. 195, the plaintiffs shall be entitled to obtain proprietary possession of the remaining five-sixths of the property in suit on payment of the proportionate amount of the purchase-money into Court on or before the 15th June 1885, and then the whole suit will stand decreed with costs in all the Courts; but that in default of either of the two payments aforesaid being duly made by the plaintiffs, the whole suit will stand dismissed with costs in all the Courts.

Oldfield, J.—The mauza consisted of two mahals: one of the latter held twelve pattis, and one of these, Thakur Das patti, was divided and constituted into a separate mahal. The *wajib-ul-arz* for the mahal, as the mahal originally was constituted prior to partition of patti Thakur Das, contained a condition for pre-emption in favour of the shareholders of the mahal, that the right accrued first to the shares in the thoke in which the property sold was situated, and then to shareholders in other thokes. It appears that Harbans Rai, vendor, who holds property both in the pattis which remain with the original mahal and in the patti of Thakur Das forming the new mahal, has sold property in both to Jai Ram, a stranger; and the plaintiff, who is a sharer in a patti in the original mahal, sues for pre-emption in respect of the property in it which has been sold, excluding that sold in the new mahal Thakur Das's patti, which he does not claim. The claim has been decreed, and the vendee in appeal contends that the plaintiff cannot pre-empt a portion of the property

sold to the exclusion of the property in mahal Thakur Das. The contention is not valid. The condition as to pre-emption only affected the shareholders of the mahal as long as they remained shareholders, and ceased to have effect upon those shareholders and their property who separated themselves and their property by forming a separate mahal. The plaintiff could after the separation exercise no right of pre-emption against and in respect of shareholders and property as so separated, nor could the separated shareholders exercise any right of pre-emption against the plaintiff and his property remaining in the mahal from which they had separated. The next plea refers to the method by which the consideration payable by the pre-emptor has been determined, but on this point the judgment [731] does not appear open to objection. The appeal fails and is dismissed. This decision affects appeals Nos. 497, 498, and 499. The decree in the suit will be in the terms proposed by my learned colleague.

NOTES.

[Applying the principle of this case, it was held in (1905) 27 All., 465 that a second pre-emptor, bringing a suit for pre-emption during the pendency of another suit for the same relief in respect of the same sale was entitled to equal rights with the pre-emptor of the first suit.]

See also other decisions following the main case —(1899) 22 All., 1 F.B., (1888) 11 All., 161, 257, (1893) 15 All., 110, (1895) 17 All., 226.]

[7 All 731]

The 30th March, 1885

PRESENT

MR JUSTICE OLDFIELD AND MR JUSTICE MAHMOOD.

Rai BalkishenDecree-holder

versus

Rai Sita Ram and anotherJudgment-debtor.*

Execution of decree—Joint ancestral property—Execution against deceased son's interest in hands of the father—Death of judgment-debtor after attachment and before sale—Charge in favour of decree-holder—Civil Procedure Code, s. 274—Copy of order for attachment not fixed up in Collector's office.

In execution of a money decree, an order was issued under s. 274 of the Civil Procedure Code, for the attachment of property which was the joint ancestral estate of the judgment-debtor and his father. A copy of this order was not fixed up in the office of the Collector of the district in which the land was situate, as required by s. 274. The sale was ordered and a day fixed for sale, but in consequence of postponements made at the judgment-debtor's request, no sale took place. In the meantime the judgment-debtor died, and the decree-holder applied for execution against the father as representative of the judgment-debtor, whose interest had survived to him.

Held that the decree holder had, by the proceedings taken in execution during the son's lifetime, obtained right over his interest which could not be defeated by his death before sale. *Suraj Bansi Koir v. Sheo Persad Singh*, I. L. R., 5 Cal. 148. L. R., 6 Ind. Ap., 108, followed.

Held also that, though the defect in the manner in which the attachment was made might render the attachment ineffectual for the purpose of voiding alienations made, the

* First Appeal No. 118 of 1884, from an order of Babu Kashi Nath Biswas, Subordinate Judge of Benares, dated the 17th May 1884.

attachment was effectual against the judgment-debtor, and the defect did not afford a ground for declaring the execution-proceedings ineffectual.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Oldfield, J.

Mr. T. Conlan and Pandit Bishambar Nath, for the Appellant.

Mr. W. M. Colvin, Mr. N. L. Paliologus, Pandit Nand Lal and Munshi Kashi Prasad, for the Respondents.

Oldfield, J.—The appellant, Rai Balkishen, held a money-decree against Lachmi Chand, son of the respondent Rai Sita Ram. He took out execution in Lachmi Chand's lifetime against him for attachment and sale of a revenue-paying estate, which [732] was the joint ancestral property of father and son. An order for attachment under s. 274, Civil Procedure Code, was issued by the Court, but there was this defect in the manner in which the attachment was made, that the copy of the order was not fixed up in the office of the Collector of the district in which the land was situate, as required by s. 274. The sale was ordered, a day was fixed for sale, but in consequence of adjournments made at the request of Lachmi Chand, no sale took place. In the meantime Lachmi Chand, the judgment-debtor, died on the 16th April 1881, and on the 24th February 1883, the decree-holder applied for execution against Rai Sita Ram as the representative of the judgment-debtor, as survivor of the judgment-debtor's family, the interest of the son having survived to him. The execution has been disallowed, and the decree-holder appeals. The question raised is whether the interest which the son had in the joint ancestral property, can be reached by the decree-holder in the hands of the father, and it is a question which seems covered by the authority of the Privy Council ruling in *Suraj Bansi Koer v. Sheo Persad Singh*, I. L. R., 5 Cal., 148 : L. R., 6 Ind. Ap., 108. The decree-holder holds only a money-decree against Lachmi Chand, and his interest could not be reached by the decree-holder in the hands of the debtor's father, to whom his son's interest has survived ; but the question is, whether the proceedings taken in execution in the son's lifetime constitute a valid charge on the property which cannot be defeated by his death. In the case of *Suraj Bansi Koer* it was held that when property has been attached and proceedings towards sale have been taken in the lifetime of the judgment-debtor by the creditor, a valid charge is created in favour of the creditor, which will not be defeated by the death of the judgment-debtor before sale. I think such has been the case here. An attachment of the judgment-debtor's interest was made by order under s. 274, Civil Procedure Code, prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from receiving the same from him by purchase, gift or otherwise, and the order was proclaimed as required in the second paragraph of the section. This attachment was acted on and accepted by the judgment-debtors as a valid attachment, and the sale was ordered, and [733] would have taken place in the judgment-debtor's lifetime but for postponements made at his request, when, also at his request, the attachment continued in force.

I consider that the creditors had by these proceedings obtained rights over the judgment-debtor's interest which cannot be defeated by his death, and that the defect in the manner in which the attachment was made—the copy of the order not having been fixed up in the office of the Collector of the district in which the land is situate—will not make any difference. The defect might render the attachment ineffectual for the purpose of voiding alienations made, but the property was attached, and the attachment was expressly continued in force at the request of the judgment-debtor, who obtained repeated postponements of the sale ; it was effectual against him, and the respondent

cannot take hold of this defect so as to have the execution proceedings declared ineffectual.

I would decree the appeal, and set aside the order refusing execution, and remand the case for disposal. Costs to be costs in the cause

Mahmood, J.—I concur

Cause remanded.

NOTES.

[I As regards the decree holder's right to attach property in the hands of other members of a joint family subsequent to the death of one member as against whom a personal decree had been passed in his favour, see (1886) 8 All., 495, (1888) 11 All., 302.

II. See (1906) 5 C. L. J. 80 as regards the binding nature of an attachment against the judgment-debtor even though there might be some irregularity in the procedure.]

[7 All. 733]

The 30th March, 1885.

PRESENT

MR JUSTICE OLDFIELD AND MR JUSTICE MAHMOOD

Sita Ram.... . Objector

versus

Bhagwan Das Decree-holder.*

Civil Procedure Code, s. 244—Question for Court executing decree—Party to suit—Representative.

Where, certain property having been attached in execution of a decree, the representative of the judgment-debtor objected that the property had been acquired by himself and not inherited from the judgment debtor, and was therefore not liable in execution,—*held* that the question was one which must be decided in the execution department under s. 244 of the Civil Procedure Code *Ram Ghulam v. Hazaru Koer ante*, p 547, referred to

THE facts of this case are sufficiently stated in the **judgment** of **Oldfield, J.**

Mr *W. M. Colvin*, Mr *N L Palvologus*, *Lala Jokhu Lal*, *Pandit Nand Lal*, and *Munshi Kashi Prasad*, for the Appellant

The Senior Government Pleader (*Lala Juala Prasad*), for the Respondent.

[734] Oldfield, J.—The question raised is, whether certain property which the decree-holder has attached in execution of a decree against *Lachmi Chand*, is liable to be attached and sold under the decree, the appellant, who is the representative of the judgment-debtor, having objected that the property was the self-acquired property of himself, and not property inherited from the judgment-debtor, and therefore not liable in execution. This is a question which must be decided in the execution department under s. 244, Civil Procedure Code—*Ram Ghulam v. Hazaru Koer, ante*, p 547, may be referred to—and the Court was in error to refuse to entertain and dispose of the objection. This order is set aside, and the case will be remanded for disposal. Costs to be costs in the cause

Mahmood, J.—I concur.

Cause remanded.

NOTES.

[See the Notes to 7 All., 547 *supra*.]

* First Appeal No. 128 of 1884, from an order of *Babu Kashi Nath Biswas*, Subordinate Judge of Benares, dated the 17th May 1885.

[7 All. 734]

The 30th March, 1885.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Rameshar Singh.....Judgment-Debtor

versus

Bisheshar Singh.....Decree-holder.*

Abatement of appeal—Application for declaration of insolvency—Appeal from order rejecting application—Death of decree-holder-respondent—No application by appellant for substitution—Act XV of 1877 (Limitation Act), sch. ii, No. 171 B—Civil Procedure Code, ss. 344-348, 350, 351, 368, 553, 582, 590.

The decree-holder respondent in an appeal from an order refusing an application by the judgment-debtor for declaration of insolvency under s. 344 of the Civil Procedure Code, died, and the judgment-debtor-appellant took no steps to have the legal representative of the deceased substituted as respondent in his place.

Held, that art. 171B, sch. ii, of the Limitation Act (XV of 1877) applied to the case, and that, as no one had been brought on the record to represent the deceased respondent within the period prescribed, the appeal must abate.

Per MAHMOOD, J., that whatever the position of the parties might have been in the regular suit, in the insolvency proceedings the judgment-debtor occupied a position analogous to that of a plaintiff, and the decree-holder occupied the position of a defendant.

Narain Das v. Lajja Ram (*ante*, p. 693) distinguished.

THIS was an appeal from an order of the District Judge of Benares, dated the 17th May 1884, refusing an application under s. 344 of the Civil Procedure Code, for declaration of insolvency. [735] The respondent having died, the appellant was allowed time to take proper steps in the matter, but he took no steps. The son of the deceased respondent subsequently applied to be substituted, and an order was made substituting him. At the hearing of the appeal it was contended for the respondent that the appeal should abate.

Munshi Hanuman Prasad, for the Appellant.

Munshi Kashi Prasad, for the Legal Representative of the deceased Respondent.

Mahmood, J.—In my opinion this appeal must abate. The decree-holder-respondent, Bisheshar Singh, is stated by the learned pleaders for the parties to have died on the 4th September 1884, and no application for the substitution of his legal representatives has been made by the appellant, nor is there anything stated on his behalf as a sufficient cause for not making the application. Pershid Narain, the son of the deceased respondent, has, however, applied to be substituted as the legal representative of the deceased, and, by an order of the 26th March 1885, his name has been substituted. The learned pleader who appears for him, however, argues that, the application not having been made within the time provided by art. 171B of sch. ii of the Limitation Act (XV of 1877), we are bound by law to order that the appeal shall abate. For this contention the learned pleader relies on the last part of s. 368 of the Civil Procedure Code (read with ss. 647, 582 and 590), and s. 4

* First Appeal No. 87 of 1884, from an order of D. M. Gardener, Esq., District Judge of Benares, dated the 17th May 1884.

of the Limitation Act. On the other hand, the learned pleader for the appellant, whilst conceding that the period provided by art. 171B, sch. ii of the Limitation Act, has expired, contends, with reference to the recent Full Bench ruling of this Court in *Narain Das v. Lajja Ram* (ante, p. 693) that the appellant should be regarded as a "defendant," and that his appeal must therefore be held to be absolutely free from liability to abatement, whether he impleaded any one as representative of the deceased respondent or not, and the only effect of his omission to implead the respondent's heir should be, to allow the appeal, and to set aside the order of which the appellant complains, or, failing this, to dispose of this appeal on the merits.

[786] I confess that I cannot understand the Full Bench ruling of the majority of the Court to have any other effect; but the ruling is not, in my opinion, applicable to the present case.

Whatever the position of the parties may have been in the regular suit, the judgment-debtor-appellant in the insolvency proceedings, under Chapter XX of the Civil Procedure Code, occupied a position analogous to that of a plaintiff.

Section 344 of the Civil Procedure Code allows the judgment-debtor, who may, of course, have been either plaintiff or defendant in the regular suit, to make an application for declaration of insolvency; s. 345 states the contents which must form the application, and, among these, clause (f) relates to the creditors who would be affected by such declaration of insolvency; s. 346 lays down that "the application shall be signed and verified by the applicant in manner hereinbefore prescribed for signing and verifying plaints;" and ss. 347 and 348 provide that a copy of the application and notice must be served upon creditors, &c., who occupy a position analogous to that of defendants. Section 350 provides for a hearing of the case in the presence of the contending parties, and s. 351 lays down rules for adjudication either in favour of the applicant or the opposing parties.

Reading these provisions of the law together, I am of opinion that the position of an applicant for a declaration of insolvency is sufficiently analogous to that of a plaintiff in a regular suit. I arrive at this conclusion, especially, not only because the applicant is the person who moves the Court and prays the Court to grant him a specific remedy, viz., an adjudication of insolvency, but also because, referring to ss. 344, 345 and 346, and reading them with s. 553 of the Code, the provisions which apply to plaintiffs-appellants also apply to the judgment-debtor-appellant in these proceedings.

Whatever the position of a judgment-debtor may be in the regular suit, in the insolvency proceedings he is the plaintiff. The Court which had jurisdiction to decide the regular suit, had not necessarily jurisdiction to decide the application for insolvency, because s. 349 lays down that such application should be made to the Dis-[787]trict Court, which is the highest Court having jurisdiction to decide ordinary original civil cases.

It has been argued that the position of the judgment-debtor-appellant is not absolutely analogous to that of the plaintiff in a regular suit; in the first place, because he (the judgment-debtor) would be defendant in the regular suit; and, in the next place, the rules applicable to the plaintiff in the regular suit did not apply to him, because his complaint, petition or prayer did not involve the array of creditors as defendants, nor could the creditors be in any sense regarded as "defendants" to such a proceeding.

The argument is plausible, but has no real force.

No doubt, in an insolvency proceeding, the Court has not to deal with the claim of A against B as specific parties, but has to deal with the petitioner's

prayer for declaration of insolvency as against such creditors as may appear to oppose the application as against the whole world. Section 41 of the Evidence Act deals with the effect of such adjudications. Judgments passed by the Court in such proceedings would be judgments *in rem*, binding not only upon the specific defendants, but upon the whole world. So far as the question of array of parties is concerned, the parties arrayed against the petitioner (who claims to be declared insolvent) are the creditors who would appear on the issue of the citation or who are named by the applicant. The position of the appellant being that of a plaintiff, the position of the decree-holder is that of the defendant, and, as a matter of fact, in this case the appellant did implead the decree-holder in his petition. The decree-holder-respondent having died, it was the appellant's duty to have some representative of the respondent substituted for him.

In this view, s. 368 is applicable to the present case, because, though relating to suits, it has been made applicable to miscellaneous proceedings by s. 647, and also to appeals from orders by s. 590 of the Civil Procedure Code. It was the duty of the appellant to apply within the time prescribed by law, under art. 171B, sch. ii, of the Limitation Act.

This article is somewhat curiously worded, in that it only mentions the defendant. By the rule of interpretation contained in the second paragraph of s. 3 of the Code, art. 171B of the Limitation Act must be construed with reference to s. 368 of the present Civil Procedure Code. Reading s. 368 with s. 582 of the Code, it is clear that the word *defendant* in s. 368 includes a *respondent*, and art. 171B of the Limitation Act is applicable to the case of a defendant, and it follows that that article applies to the present case.

No application having been made within the time allowed by art. 171B, the appeal must abate under the last clause of s. 368, read with ss. 582 and 590 of the Civil Procedure Code, with costs.

Oldfield, J.—I concur, although with some hesitation, in holding that this appeal must abate, as no one has been brought on the record to represent the deceased respondent within the term of limitation. Dismissed with costs.

Appeal dismissed.

NOTES.

[This case was overruled by (1888) 10 All., 284. See the notes to that case.]

[7 All. 738]

The 1st April, 1885.

PRESENT :

MR. JUSTICE BRODHURST AND MR. JUSTICE MAHMOOD.

Ram Prasad and others.....Defendants

versus

Raghunandan Prasad.....Plaintiff.*

Act I of 1872 (Evidence Act), ss. 63 (c), 114, illustration (g)—Secondary evidence—Copy of a copy—Suit for redemption of mortgage—Burden of proof—Withholding evidence.

A deed executed in 1812 became the subject of litigation resulting, on the 17th May 1813, in a decree the effect of which was to create a usufructuary mortgage of rights and interests in two villages. In 1871, the purchaser of a portion of the mortgagor's rights, alleging that the mortgage-debt had been liquidated from the usufruct, sued to recover possession of the property. The mortgagees resisted the claim for possession, on the grounds that, prior to the execution of the deed in 1812, the mortgagor's ancestor had granted to their own ancestor a *gawanda-dari* right, under which a fixed *jama* of Rs. 121 was payable by them in respect of the lands in the village, that what was mortgaged was not the lands, but only the right to receive the fixed *jama*, and that the fact that the mortgage money had been liquidated from the *jama* did not entitle the plaintiff to oust them from possession. It appeared that the alleged *gawanda-pattar*, the original mortgage deed, and the decree of the 17th May 1813, were at one time in the defendants' possession, but the defendants alleged that all three documents were destroyed by fire in 1872. The plaintiff sought to support his case by putting in a copy on plain paper purporting to have been transcribed from a certified copy of the decree of the 17th May 1813.

Held, with reference to the provisions of s. 63† of the Evidence Act (I of 1872), that, there being no evidence proving that the copy produced by the plaintiff had been compared with the original decree, the copy was not admissible in [739] evidence, inasmuch as it could not be regarded either as primary or as secondary evidence of the contents of the original decree.

Held also that the destruction or loss of the three documents alleged by the defendants to have been destroyed not being proved, their non-production placed them under the recognized prohibitions of the law of evidence, and subjected them to the presumption recognized by illustration (g), s. 114‡ of the Evidence Act, that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

Held also, that inasmuch as the plaintiff was no party to the alleged *gawanda-pattar*, or to the mortgage of 1812, nor to the litigation which resulted in the decree of the 17th

* First Appeal No. 18 of 1883, from a decree of Maulvi Mahmud Bakhsh, Subordinate Judge of Ghazipur, dated the 22nd December 1882.

Secondary evidence. †[Sec. 63 :—Secondary evidence means and includes—

- (1) Certified copies given under the provisions hereinafter contained ;
- (2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies ;
- (3) Copies made from or compared with the original ;
- (4) Counterparts of documents as against the parties who did not execute them ;
- (5) Oral accounts of the contents of a document given by some person who has himself seen it.]

‡[Sec. 114 .—The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case.]

Court may presume existence of certain facts.

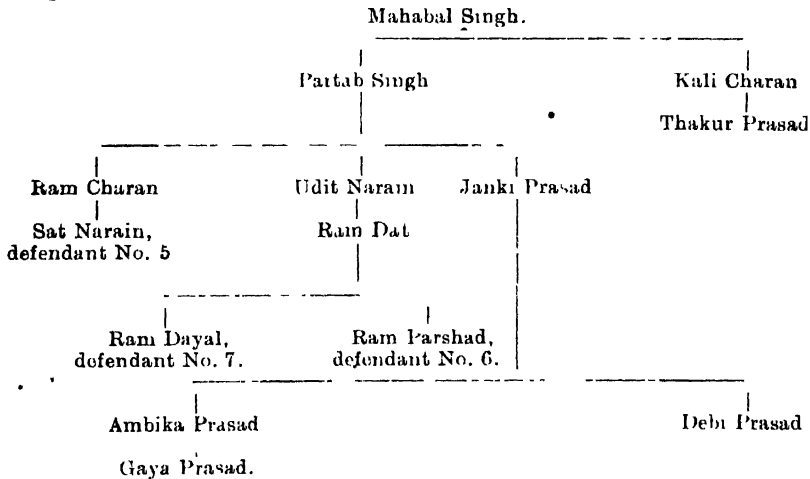
May 1813, and could not therefore be taken to be in a position to produce these documents or to prove their contents by secondary evidence; and inasmuch as the circumstances established a *prima facie* case in his favour, the burden of proof in regard to the existence of the alleged *gawanda-dari* tenure lay upon the defendants, who, whilst in a position which would involve their being in possession of the documents above-mentioned, and whilst admitting such possession up to the year 1872, had failed to prove either their destruction or their contents by secondary evidence such as could be relied on. *Rajah Kishen Dutt Ram Panday v. Narendar Bahadoor Singh*, L. R., 3 Ind. App., 85, referred to.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of MAHMOOD, J.

Mr. T. Conlan and Mr. G. T. Spankie, for the Appellants.

Mr. W. M. Colvin, Mr. G. E. A. Ross, and Munshi Hanuman Prasad, for the Respondent.

Mahmood, J.—The facts of the case, as far as they are necessary for the disposal of this appeal, may be recapitulated here, and the following pedigree throws light upon them :—



[740] In each of the two villages Mangalpur and Saidpur, Mahabal Singh owned an eight annas share, known as Patti Mahabal Singh. It is admitted in this case that, on or about the 4th April 1812, Mahabal Singh executed a deed which became the subject of litigation, resulting in a decree dated the 17th May 1813, the effect of which was to create a usufructuary mortgage of the rights and interests of Mahabal Singh in the two villages above-named, in lieu of a sum which is stated by the defendants to have amounted to Rs. 4,684. Another fact admitted in the case is, that under the terms of the mortgage so created the mortgage would expire in 1278 fasli, 1871 A. D., the usufruct of the interval of fifty-eight years being regarded as liquidating the mortgage without the necessity of taking any accounts at the time of redemption.

Upon the death of Mahabal Singh, his rights and interests devolved in equal shares upon his two sons Kali Charan and Partab Singh, and their rights having been at various times sold, under circumstances stated in paragraph 4 of the plaint, the plaintiff has acquired a six annas eight pies share in mauza Mangalpur, and a two annas eight pies share in mauza Saidpur, and his name has been recorded in the Government revenue papers as proprietor of these shares. The rest of the mortgagor's rights in these properties belong to the persons who have been impleaded in this suit as *pro formâ* defendants.

Upon this state of things, the plaintiff instituted this suit, praying for possession of the entire eight annas share in Mangalpur and the entire eight annas share in Saidpur, on the ground that he was entitled to such a remedy by virtue of being a joint holder of the equity of redemption in the mortgaged property. The plaintiff set forth that, under the terms of the mortgage, the money due thereon was liquidated from the usufruct by the very fact of the lapse of the term of the mortgage. The plaintiff also prays for recovery of mesne profits.

The principal defendants, who occupy the position of mortgagees, resisted the suit upon the ground that, before the mortgage by Mahabal Singh, his ancestor, Babu Abhai Singh, had granted a *gawanda-dari* right to their ancestors, that under that settlement a fixed *jama* of Rs. 121 was payable by them "with respect to all [741] the zamindari dues, cultivatory lands, *sayer*, up-lands and low-lands, water and forest produce, ponds, tanks, fruitful and unfruitful trees, of an eight annas share in each of the villages Mangalpur and Saidpur." They further pleaded that under the terms of the mortgage, what was mortgaged was not the lands of these villages, but only the right of Mahabal Singh to receive the fixed *jama* of Rs. 121, and that the condition in the mortgage was "that the sum of Rs. 71 out of Rs. 121, the amount of *jama* fixed as the right of Mahabal Singh, should be annually set off against the principal mortgage-money, and Rs. 50, the Government revenue, should be paid to the proprietor; and that, after the expiration of 1278 fasli, Rs. 121 should be paid to the proprietor of the property as before." Upon this ground, the defendants contended that "the fact that the mortgage-money has been liquidated from the *jama* fixed does not entitle the plaintiff to effect redemption of the mortgage by removal of the defendants' possession." They further went on to say that "the deed *gawanda-pattar* granted by Mahabal Singh's ancestor to the ancestor of the defendants before the British reign, was kept in a bundle of papers in the defendant Ram Prasad's house, which was destroyed by fire, and the file and bundle of papers were also burnt along with all the goods kept in the house." It may be noted here that the fire to which this allegation relates is stated in the evidence to have occurred about the year 1872.

The only other pleas in defence which need be noticed here are, that the plaintiff as owner only of a portion of the property is not entitled to claim possession of the entire property in the suit; and the other plea, after questioning the amount of mesne profits claimed by the plaintiff, goes on to say that "the entire amount of the profits of mauza Saidpur and Mangalpur comes to Rs. 242, half of which, Rs. 121, is paid to the proprietors of Patti Mahabal Singh, that the plaintiff himself has refused to take the amount which he is entitled to, according to proportion, on account of the share purchased by him."

Among the *pro forma* defendants, Sat Narain (defendant No. 5), Ram Parsan (defendant No. 6), and Ram Dayal (defendant No. 7), defended the suit upon allegations supporting the case set up by the principal defendants; whilst Ram Khilawan (defendant No. 8) [742] raised the plea that he was improperly impleaded in the suit, and the remaining defendant (No. 4), Nand Kumar Singh, did not appear to defend the suit at all.

The lower Court held that the defendants had failed to prove their allegation that they held any *gawanda-dari* right in the property; that the plaintiff had succeeded in proving that the mortgage of 1812-13 did not relate only to the *malikana* right as stated by the defendants, but to the full proprietary right in the lands of the villages which represented the share of Mahabal Singh; that the mortgage having been liquidated by the lapse of the year 1278

fasli, the plaintiff was entitled to proprietary possession by redemption of the share belonging to him, together with mesne profits of such share; that he was also entitled to obtain possession as mortgagee of the shares of Ram Khilawan and Nand Kumor who had not resisted the suit, but that he was not entitled to claim possession of the shares of Sat Narain, Ram Parsan, and Ram Dayal, who had contested the plaintiffs by supporting the case set up by the principal defendants-mortgagees. To the extent of the shares of the last named three persons, the suit was therefore dismissed, and the question of determining the amount of mesne profits was left by the Court for decision in execution of the decree.

From the decree so passed by the lower Court, only the principal defendants-mortgagees have preferred this appeal, and the argument of the learned counsel for the appellants raises only one main question for determination, namely, whether the defendants-appellants possessed any *gawandadari* rights in those villages at the time of the mortgage; in other words, did Mahabal Singh under that mortgage place them in possession of the village lands, &c., or only mortgage his right to receive the fixed *jama* of Rs. 121 under the conditions stated by the defendants? There is therefore only one issue for determination in this appeal, and its decision relates only to the weight of evidence in the case, and raises no main question of law.

Before proceeding further, I wish to decide a question upon which much argument has been addressed to us on either side. One of the most important pieces of evidence produced by the plaintiff to support his case was a copy on plain paper, purporting [743] to have been transcribed from a certified copy of the decree of the 17th May 1813. The document was admitted by the lower Court in evidence on the ground that, the original decree having been destroyed, the plaintiff had made fruitless attempts to obtain a certified copy, that the defendants were in all probability in possession of a certified copy of the decree, but did not produce it as it would not support their case. The learned counsel for the appellants contended that the copy was produced under suspicious circumstances and could not be relied upon, whilst Mr. Colvin on behalf of the respondent supported the admissibility of the document upon the ground that the evidence upon the record proved that the copy produced in evidence was transcribed from a certified copy, and could therefore be regarded as secondary evidence of the contents of the original decree. I am of opinion that the argument urged on behalf of the appellant on this point has force. Whatever the law may have been upon the subject before the passing of the Indian Evidence Act (1 of 1872), the rules contained in that enactment must now be strictly observed. Section 61 of the Act lays down that "the contents of documents may be proved either by primary or by secondary evidence," and I understand the rule to mean that there is no other method allowed by law for proving the contents of documents. Section 62 defines the meaning of primary evidence; s. 63 describes what constitutes secondary evidence within the meaning of the Act; and cl. (c) of the section lays down in express language that "a copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but a copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original." There is no evidence in this case, even if the whole deposition of the plaintiff's witness Anup Narain be accepted, which proves that the copy of the decree now produced in evidence was compared with the original decree, and I therefore hold that it was not admissible in evidence, because it could not be regarded either as primary or secondary evidence of the contents of the original decree. The contents of the copy must therefore be kept out of mind in determining this appeal.

The question then is, on whom lay the burden of proof in this case in regard to the existence of the *gawanda-dari* tenure alleged [744] by the defendants-appellants? But before determining this question, especially with reference to the expression as used in evidence, it seems to me necessary to ascertain the exact nature of the tenure known as *gawanda* in the district in which the property in suit is situate. In the *North-Western Provinces Gazetteer*, vol. XIII, p. 63, under the heading of cultivatory tenures, the following account is given of *gawanda-dari*:—"A tenure peculiar to the eastern portion of the district is the *ganwadh* (of uncertain derivation—a corruption, perhaps, of *ganw-wara*). The normal form of this tenure is the grant at a fixed rent of a whole village, or definite tract within a village, to a community of Brahmans. Where this can be inferred to have existed at the permanent settlement, the tenure is proprietary; in other cases, the precise definition and legal quality are rather doubtful. *Ganwadhs* may originate by grant as above mentioned, by purchase, or even by mere usurpation on the part of the village headmen. In the last case it is confused with, and generally indistinguishable from, the *tika istimrari* or 'perpetual lease,' another not unfrequent tenure in which a whole village or definite part of it is leased to the *mukaddam* or headman at a fixed rent. In the case of *ganwadhas* and *tikas*, the *status* of the under-tenants that pay rent to the *ganwadhas* and *tikadars* is somewhat obscure, and has to be determined, when dispute arises, by the investigation of each particular instance. For it may happen that the under-tenant is a mere tenant-at-will, incapable by law of acquiring occupancy right by lapse of time, or he may be a fixed rate tenant whose holding dates before the *ganwadh* or *tika*, or may have acquired occupancy-right under a *ganwadhar* whose own tenure is recognized as proprietary." The tenure thus described seems to have existed in *Sheopertab Narain Singh v. Hurshunker Pershad Singh*, N.-W.P.H.C. Rep., 1873, p. 40, as well as in *Likhun Pathuk v. Roop Lal*, N.-W. P. H. C. Rep., 1871, p. 48, in both of which cases the nature of the tenure was referred to. In the present case, however, the nature of the *gawanda-dari* right claimed by the defendants-appellants is specifically described by themselves in para. 3 of their written statement; they admit distinctly that the full proprietorship of the villages, including the right to actual possession of the lands, &c., did at one time vest in Babu Abhai Singh, ancestor of Mahabal Singh, and that the *gawanda-dari* [745] tenure was created by the former by grant of a deed of *gawanda-pattar* to the defendant's ancestors, and that the *gawanda-pattar* was in their possession up to the year 1872, when a fire in the defendant Ram Prasad's house destroyed the document. The original mortgage-deed and the decree of the 17th May 1813, would have been equally important pieces of documentary evidence in the present case, and it was alleged that they were in possession of the defendants-appellants, who, without denying that the documents were at one time in their possession, stated (in para. 5 of their written statement) that they were burnt along with the *gawanda-dari pattar* in the fire to which reference has already been made. Under these circumstances, the occurrence of the fire and the burning of the bundle of papers said to have contained these three important documents, constitute an important subsidiary point for arriving at any conclusion upon the merits of the case. The evidence upon the point, however, is either hearsay or unsatisfactory. There may possibly have been a fire in the defendant Ram Prasad's house, but it is certainly not proved that the *gawanda-pattar*, the mortgage deed, or the decree of the 17th May 1813, were burnt in that fire. On the other hand, the application made by the defendants, dated 7th July 1868 (paper No. 174 on the record), in a former litigation contains such specific reference to the decree that I agree with the learned Subordinate Judge

in holding that it must at that time have been in their possession. The destruction or loss of these three important documents not having been proved, their non-production by the defendants places them under the recognized prohibitions of the law of evidence, and subjects them to the presumption recognized by illustration (g), s. 114 of the Evidence Act, "that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it." It appears from an attested copy (paper No. 135 on the record) that the plaintiff's ancestor made an application on the 13th August 1872, to the proper authorities for obtaining a duly attested copy of the decree of the 17th May 1813, but the application could not be granted, because the original decree no longer existed among the official records. It is clear that, neither the plaintiff nor his ancestor having been a party to the litigation of 1813, they could not be expected to have obtained a certified [746] copy of the decree, and it is equally clear that under the circumstances of the case the non-production by the defendants of the alleged *gawanda-dari pattar*, and of the mortgage-deed, and the decree, leaves the plaintiff in a more or less helpless position in contesting the case set up by the defendants as to their *gawanda-dari* right. The case therefore upon this point falls within the purview of the rule laid down by the Lords of the Privy Council in *Rajah Kishen Dutt Ram Pandey v. Narendra Bahadoor Singh*, L. R., 3 Ind. App., 85, which was a suit for redemption, and in which, the mortgage-deed not being forthcoming, there was a contention between the mortgagor and the mortgagee as to the exact terms of the mortgage. Their Lordships observed:—"It appears to their Lordships that in such a case as the present it lies upon the plaintiff to substantiate his case by some evidence - by some *prima facie* evidence at least. But in this, as in most other cases, when the *quantum* of evidence required from either party is to be considered, regard must be had to the opportunities which each party may naturally be supposed to have of giving evidence, and although the burden of proof *prima facie* in this case, in their Lordships' view, is upon the plaintiffs, still they think the consideration should not be omitted that the defendant would naturally have the mortgage, and that it would be, *prima facie* at all events, more in his power to give accurate evidence of its contents The plaintiff, by the hypothesis, would not have seen the document, or probably have had access to it from the time of its execution, which in this case was the year 1840; whereas the defendant would be assumed to have it and to be able to produce it, to show why he could not, and to give some evidence of its contents if it were lost."

I have quoted these observations at such length because they seem to me to be especially applicable to the circumstances of the present case, which indeed in some points furnishes even stronger grounds for applying the rule than the case before their Lordships of the Privy Council. Here the plaintiff, who is simply a purchaser of a portion of the right of Mahabal Singh, was no party to the alleged *gawanda pattar*; he was no party to the mortgage of 1812, nor to the litigation which resulted in the [747] decree of the 17th May 1813. He cannot, therefore, be taken to be in a position to produce those documents or to prove their contents by secondary evidence. The defendants, on the other hand, whilst in a position which would involve their being in possession of the documents, and whilst admitting that they were in possession of them up to the year 1872, have failed to prove either their destruction or their contents by secondary evidence, such as can be relied upon. The plaintiff, on the other hand, has, in my opinion, shown a very good *prima facie* case which the defendants have not been able to rebut.

This leads me to the consideration of the various points in the evidence; but before doing so I wish to notice an argument which has been addressed to

us with especial cogency by Mr. Colvin on behalf of the plaintiff-respondent. The main feature of the defendant's case is, that the mortgage of 1812-13 was executed in lieu of a sum amounting to no less than Rs. 4,684; that it was a *patwari* mortgage for a definite term of fifty-eight years; that is, the mortgage would, by the very lapse of its term, be liquidated from the usufruct of the mortgaged property, or rather from the fixed annual *malikana jama* of Rs. 121, which the defendants represent to have been the limit of the rights of Mahabal Singh which he gave in mortgage as security for repayment of the debt. Further, the defendants' case is, that out of this sum of Rs. 121, Rs. 50 were to go towards payment of the Government revenue and only Rs. 71 were to be appropriated by the defendants-mortgagees towards payment of principal and interest due on the mortgage. Now, Mr. Colvin has effectively shown that such a hypothesis is rebutted by purely arithmetical calculation. It must be remembered that, according to the defendants' case, not the zamindari rights in the lands, &c., of the village, but only the fixed sum of Rs. 71, the annual *malikana jama*, was given as the sole security for repayment of the mortgage-debt. Now this annual sum of Rs. 71, if multiplied into fifty-eight, which is the number of years constituting the term of the *patwari* mortgage, would yield only a sum of Rs. 4,118, which falls short even of the alleged principal sum of the mortgage by no less than Rs. 566. A mortgage of such a nature is not intelligible in the ordinary course of human affairs, and the result of Mr. Colvin's argument by [748] arithmetical calculation shows the absurdity of the defendants' case, in proportion to the rate of interest which may be assumed as having been agreed upon between the mortgagor and the mortgagee. The rate of interest, if assumed at 12 per cent. per annum, would yield more than Rs. 500 per annum, and even 11 6 per cent. per annum is assumed to be the rate, the annual interest alone would be more than Rs. 250 per annum. This circumstance alone seems to me to raise a strong presumption in favour of the plaintiff's allegation that the mortgage by Mahabal was a mortgage not of his alleged *malikana jama*, which, according to the defendants' case, was a fixed sum under the *gawanda pattar*, incapable of increase, but the subject of the mortgage was the zamindari rights in the lands of the village, which might well, by increase of cultivated area or otherwise, have been regarded as likely to yield sufficient usufruct to satisfy not only the principal, but also the interest due on the mortgage. It may here be added in connection with this point that the defendants in this very case pleaded that the profits of the mortgaged property were less than those stated by the plaintiff.

In the face of such circumstances, which establish a strong *prima facie* case in favour of the plaintiff-respondent, it was incumbent upon the defendants-appellants, to have produced the strongest possible evidence to substantiate their case. They failed, as I have already said, to produce the best documentary evidence which would conclude in their favour the point in contention between the parties. And with the presumptions against them, which their course of action in the suit involves, I have to consider whether the evidence produced by them substantiates their case. (The learned Judge then proceeded to consider this evidence, and, being of opinion that it did not substantiate the defendants' case, came to the conclusion that the appeal should be dismissed).

Brodhurst, J. —I concur with my learned colleague. The appeal is dismissed with costs.

Appeal dismissed.

[749] APPELLATE CRIMINAL.

The 11th April, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE,
AND MR. JUSTICE BRODHURST.

Queen-Empress

versus

Lalli.

Act XLV of 1860 (Penal Code), s. 201.

In a trial upon a charge under s. 201 of the Penal Code, the accused made a statement to the effect that he was present at the commission of a murder by two other persons, that he himself took no part in the act, that before the murder was committed, one of the persons named pulled off a *razai* from the bed on which the deceased was sleeping, and that, in his presence, the *razai* was subsequently concealed in a stack. It was proved that the *razai* belonged to the deceased, that it was found concealed in a stack, and that it was pointed out by the accused to the police. The accused was convicted of concealing evidence of the murder with the intention of screening the offender from legal punishment, under s. 201 of the Penal Code.

Held, that the conviction must be quashed, inasmuch as if the *razai* had not been concealed or destroyed, its presence or existence would have been no evidence of the murder.

A person who is concerned as a principal in the commission of a crime cannot be convicted of the secondary offence of concealing evidence of the crime.

THIS was an appeal from a conviction by Mr. H. A. Harrison, Sessions Judge of Meerut, dated the 17th February 1885. The appellant was charged before the Court of Session with offences under ss. 201 and 202 of the Penal Code, and was convicted under the former section. The facts of this case are stated in the judgment of the Sessions Judge, which was as follows :—

“Salik, the brother of Dalli, was in his field when he was murdered. His brother Dalli found his corpse in the morning. The neck was between a wooden pitchfork : there were wounds on the head. The medical evidence shows that the skull was extensively fractured. The left jaw and eye were also injured. There were also abrasions on the nose and linear contusion on the neck, the latter caused evidently by the pitchfork.

“It appears that, at first, suspicion attached to no one, afterwards the accused was suspected, because the deceased had on two or three occasions found fault with him for joking with his sister-in-law, the wife of his brother Dalli.”

“The evidence of Dalli shows that the deceased had with him a *razai*. The recovery of this *razai* is the principal evidence in this case. The accused made two statements—one on the 20th [750] November, before Umrao Singh, Honorary Magistrate, and a second one before the committing Magistrate.

“His statements were—that Ganga Sahai and deceased were at feud, the former having been fined on the complaint of deceased ; that while he (accused) was sleeping at Ram Dayal Bania's, he was awakened by Mari and Mathura, nephew and son of Ganga Sahai, and asked by them to come with them and inspect the fields ; that he went, and after Mathura and Mari had inspected their own fields, they went to the field of the deceased, where deceased was

sleeping on a bed; that Mathura asked him (accused) to pull the *razai* off deceased, which he refused to do; that Mari pulled the *razai* off and asked him to stand aside; that he did so, when Mathura and Mari killed Salik with a *darati*; that they then left Mathura, carrying the *razai* which he had taken from deceased; that he (accused) went to sleep, and the others went to their home; that next evening Mathura asked him to come with him to conceal the *razai*; that Mari joined them, and that they all three went to Ram Ratan's field, where Mathura put the *razai* into a stack of *jawar*; that he (accused) was to keep silence; that when the darogah came he first denied all knowledge of the murder, and afterwards told him what had occurred, and pointed out the *razai*. Before this Court the accused pleaded not guilty, but when asked if the two statements made before the Magistrate were his, and were true, he stated that they were, and it was not till after the assessors had given their opinion in writing after the judgment had commenced, that accused retracted his statement, saying it was made under compulsion.

"The fact that the accused pointed out the *razai*, which was well concealed in a *jawar* stack, is proved by the evidence of two witnesses. The fact that the *razai* belonged to Salik is fully established.

"There can be no doubt that the statements made by the accused were voluntarily made. The second was made thirteen days after the first: they are lengthy, with much detail in them, and in this Court the accused admitted that they were true

"That the statements are wholly true, no one can for a moment believe. There can be but little doubt that the accused was [751] the actual murderer, but there is no evidence to convict him upon, except his own statement and the recovery of *razai*. In his statements he does not admit that he had any hand in the murder. He denies knowing that any murder was contemplated; all that he does admit is, that the murder and concealing of the *razai* took place before him; that he knew not that any murder was intended, but that he did know that the *razai* was to be concealed. His statements that Mathura and Mari killed deceased are doubtless false; but at the same time the probability is, that more than one were engaged in the murder. The reason assigned for the murder by accused seems to the Court altogether insufficient, others no doubt were engaged in it: who they were, and by what motive actuated, is not known.

"In the face of the double statements of the accused, and the admission in this Court that those statements were true, the Court must find the accused guilty of the charge under s. 201, for by his own admission he formed one of the party who went expressly to conceal the *razai*, and the evidence proves that he himself pointed out where it was.

"The assessors find the accused guilty of the charge under s. 201. The second charge is included in the first, for if a man conceals evidence, he does not report the crime which he tries to conceal.

"The Court finds that Lalli is guilty of the charge—that he, knowing an offence punishable with death had been committed, concealed a *razai* taken from the murdered person, that evidence of the commission of the offence might disappear, with the intention of screening the offender from legal punishment, and has thereby committed an offence punishable under s. 201, Indian Penal Code."

The appellant was not represented.

The Junior Government Pleader (Babu Dwarka Nath Banarji), for the Crown.

Petheram, C. J., and Brodhurst, J.—In our opinion this conviction must be quashed on the ground that s. 201, Indian Penal Code, contemplates

concealment or destruction of evidence [752] of a crime. In this case, if the *razai* had not been concealed or destroyed, its presence or existence would have been no evidence of the murder. Again, in our opinion, on the construction of the section, the person who is concerned as a principal cannot be convicted of the secondary offence of concealing evidence of the crime. The conviction must be quashed and the prisoner released.

Conviction quashed.

NOTES.

[See for a similar decision on s. 201, Indian Penal Code, the following cases.—(1886) 8 All., 252; (1895) 22 Cal., 638; (1903) 27 Mad., 271; 14 M. L. J., 226.]

[7 All. 752] APPELLATE CIVIL.

The 16th April, 1885.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE TYRRELL.

Kashi Prasad and another.....Decree-holders

versus

Miller.....Judgment-debtor.*

Execution of decree—Attachment of property—Judgment-debtor declared an insolvent—Claim by Official Assignee to attached property—Appeal from order disallowing claim—Statute 11 & 12 Vic., c. 21, ss. 7, 49—Civil Procedure Code, ss. 244, 275—"Representative" of judgment-debtor.

A decree-holder, having attached the property of his judgment debtors in execution of the decree, obtained an order for sale of the attached property. Prior to sale, the judgment-debtors made an application to be declared insolvents, and obtained an order under Stat. 11 and 12 Vic., c. 21, s. 7, by which their property was vested in the Official Assignee. An application was then made by the Official Assignee to the Court in which the execution of the decree was pending, for the release of the property from attachment, and that the property might be made over to him. The Court dismissed the application. On appeal, the District Judge reversed the first Court's order.

Held, that the matter did not come before the Court of First Instance under s. 49 of Stat. 11 and 12 Vic., c. 21, inasmuch as that section refers to cases where the insolvent's schedule has been filed, and to debts or demands admitted therein and, in the present case, no schedule had been filed at the time of the Official Assignee's application; and the Court could therefore only entertain the application under the provisions of the Civil Procedure Code relating to the execution of decrees.

Held, that the Official Assignee could not be held to be a representative of the judgment-debtors within the meaning of s. 244 of the Civil Procedure Code, and his application was not one relating to the execution, discharge, or satisfaction of the decree.

* Second Appeal No. 69 of 1884, from an order of A. Sells, Esq., District Judge of Cawnpore, dated the 10th March 1884, reversing an order of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Cawnpore, dated the 6th September 1883.

Held, that the Court of First Instance had only jurisdiction in the matter under s. 278 of the Code, and disposed of it under that section, and that the District Judge had no jurisdiction to entertain the appeal.

[753] THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Pandit *Sundar Lal*, for the Appellant.

Mr. *Greenway* and the *Junior Government Pleader* (*Babu Dwarka Nath Banarji*), for the Respondent.

Oldfield and Tyrrell, JJ.—It appears that the firm of *Gaya Prasad* and *Kashi Prasad*, represented by appellant, obtained a decree against *Chota Lal* and *Sheo Prasad* for money due, on the 31st March 1883. They had, on the 2nd March 1883, attached property of the judgment-debtors before judgment, and the attachment continued in force after decree, and they took out execution, and on the 4th April 1883, obtained an order for the sale of the attached property.

The judgment-debtors, prior to sale, applied on the 11th April 1883, in the Calcutta High Court, to be declared insolvents, and on the 11th April 1883, the High Court made an order under Stat. 11 and 12 Vic., c. 21, s. 7, vesting their property in the Official Assignee, who is the respondent before us.

On the 2nd June 1883, the Official Assignee made an application in the Court of the Subordinate Judge of Cawnpore, where the execution of the decree was pending, for the release of the property from attachment, and that the property be made over to him. On the 6th September 1883, the Subordinate Judge dismissed the application, and the Official Assignee appealed to the Judge, who reversed the order and allowed the application. The judgment-creditors now prefer an appeal to this Court from the Judge's order. There are two contentions raised—(1) that no appeal lay in the matter to the Judge; (2) that the judgment creditor, by reason of having attached the property of his judgment-debtors, and obtained an order for sale before the date of the vesting order, which vested the property in the Official Assignee, obtained rights in the property which cannot be affected by the vesting order. In order to determine the first question, we have to see how the application on the part of the Official Assignee came before the Court executing the decree, and what jurisdiction it had in the matter. The order vesting the real and [754] personal estate of the insolvents in the Official Assignee was made under s. 7, Statutes 11 and 12 Vic., c. 21, and s. 49 enables the Court in which any action, suit, execution or process is pending in respect of a debt or demand contained in an insolvent's schedule, to stay the proceedings or set aside or suspend the execution or process, so far as respects the debt or demand, until further order of the Court which made the vesting order. But the matter did not come before the Subordinate Judge under this section. It refers to cases where the insolvent's schedule has been filed, and to debts or demands admitted in the schedule, and no schedule had been filed at the time of the Official Assignee's application. The Subordinate Judge could therefore only entertain the application under the provisions of the Code of Civil Procedure relating to execution of decrees. Section 244 relates to questions between parties to the suit in which the decree was passed or their representatives relating to the execution of the decree; and s. 278 to objections by third parties to attachment of property made in execution of the decree. Now, if the application is to be considered as one to be dealt with, and which was dealt with, under s. 278 and succeeding sections, the order made on it was not appealable to the Judge, and the appellant's contention that the Judge had no jurisdiction is valid. If, on the other hand, the application was one to be dealt with under s. 244, the

Subordinate Judge would have jurisdiction, and the appeal was cognizable by the Judge. Did, then, the matter of the application relate to questions between the parties to the suit or their representatives, and in regard to the execution, discharge or satisfaction of the decree? In other words, can the Official Assignee be held to be a representative of the judgment-debtor within the meaning of s. 244, and does his application relate to the execution, discharge or satisfaction of the decree? We do not think this can be held. The Official Assignee did not apply to the Court as one representing the judgment-debtor in regard to any matter relating to the execution, discharge or satisfaction of the decree, but as a third party in whom the insolvent debtor's property had become vested under the Insolvent Debtors Act, and his object was to have the attachment withdrawn and the property made over to him, not for any purpose of execution of the decree, but that he might deal [755] with it under the provisions of the Act for the benefit of the general body of the creditors. As a matter of fact, he appears to have made his application under s. 278, and it was so treated by the Subordinate Judge. Nor can the Official Assignee be considered to be a representative of the judgment-debtor within the meaning of s. 244. He represents the general body of the creditors for whose benefit the property of the judgment-debtor is vested in him in trust, and it was in this capacity, as representing them and for their benefit, that he made his application.

The Judge has, therefore, erred in regarding the respondent as a representative of the judgment-debtor and treating the matter as one to be dealt with under s. 244, Civil Procedure Code, the order on which was open to appeal; and we cannot find that he is supported by the case he refers to (*Miller v. Mon Mohun Roy*, I. L. R., 7 Cal., 213), as there was no ruling in that case to the effect that the Official Assignee can be regarded as a representative of the judgment-debtor, and an application of this nature is one to be dealt with under s. 244, Civil Procedure Code.

We are of opinion, therefore, that the Subordinate Judge had only jurisdiction in the matter under s. 278, and he disposed of the application under that section, and the Judge had no jurisdiction to entertain the appeal. It is not necessary for us to consider the second question raised. We decree the appeal and set aside the Judge's order with costs.

Appeal allowed.

NOTES.

[For cases following this case, see (1894) 24 Cal., 259; (1901) 28 Cal., 416; (1896) 21 Bom., 205; (1908) 30 All., 486.]

[7 All. 755]
The 9th May, 1885.

PRESENT :

MR. JUSTICE BRODHURST AND MR. JUSTICE TYRRELL.

Kolai Ram and another.....Plaintiffs
versus
Pali Ram and others.....Defendants.

*Amendment of decree—Judgment awarding interest for period prior to
suit—Decree directing interest to be paid from date of suit—
Civil Procedure Code, ss. 206, 209.*

The judgment in an appeal adjudged interest to be paid for the period prior to the institution of the suit only. The decree contained an order for payment of interest from the date of the suit onwards.

Held, that no variance with the judgment, within the meaning of s. 206 of the Civil Procedure Code, was involved in the additional order contained in the decree.

[756] THIS was an application by the respondents for the amendment of the decree of the High Court in F. A. No. 125 of 1882. The grounds of the application are stated in the judgment of the Court.

Munshi *Hanuman Prasad*, for the Respondents, Applicants
Pandit *Ajudhna Nath*, for the Appellants, Opposite Parties.

Brodhurst and Tyrrell, JJ.—We are asked to amend this decree on the ground that it is at variance with the judgment in the appeal, inasmuch as the decree contains an order for the payment of interest from the date of the suit onwards, whereas interest was adjudged by the judgment for the period prior to the institution of the suit only. But no variance with the judgment is involved in this additional order contained in the decree. The decree agrees in all the respects with the judgment, according to the requirements of s. 206 of the Civil Procedure Code. It contains clearly and specifically all the reliefs adjudged by the Court, and the Court is competent under s. 209 to “order” in its decree that interest at a reasonable rate should be paid on the principal sum *adjudged* (*scil.* in the judgment) from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with *further* interest at a reasonable rate on the aggregate sum so adjudged from the date of the decree to the date of payment, or such earlier date as the Court thinks fit. The language is similar to that of the Act for the Repeal of the Usury Laws, No. XXVIII of 1855, ss. 2 and 3.

In the case before us, the Court has in its decree done no more than it was competent to do under the powers conferred by this section, and the decree has not thereby been made to be in variance with the judgment passed by the Court.

We therefore disallow this objection with costs.

Application refused.

[787] FULL BENCH.

The 12th May, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE STRAIGHT,
MR. JUSTICE BRODHURST, AND MR. JUSTICE TYRRELL.

Queen-Empress
versus

Ram Sarup and others.

*Offence made up of several offences--Rioting—Grievous hurt—Criminal
Procedure Code, s. 325—Act XLV of 1860 (Penal Code), ss. 146,
147, 149, 325.*

Three persons who were convicted (i) of riot under s. 147 of the Penal Code, (ii) of causing grievous hurt in the course of such riot, were respectively sentenced to six months rigorous imprisonment under s. 147, and three months' rigorous imprisonment under s. 325.

Held by PETHERAM, C. J., and STRAIGHT and TYRRELL, JJ., that inasmuch as the evidence upon the record showed that the three prisoners had committed individual acts of violence with their own hands, which constituted distinct offences of causing grievous hurt or hurt separate from and independent of the offence of riot, which was already completed, and the fact of the riot was not an essential portion of the evidence necessary to establish their legal responsibility under s. 325 of the Penal Code, the separate sentences passed under ss. 147 and 325 were not illegal. *Queen-Empress v. Ram Partab*, 1 L. R., 6 All., 121, distinguished.

Per BRODHURST, J., that the evidence showed that only one of the three prisoners had caused grievous hurt with his own hands, and that the others could only be properly convicted of that offence under the provisions of s. 149 of the Penal Code ; but that the separate sentences passed under ss. 147 and 325 were not illegal. *Queen-Empress v. Dugar Singh* (*Ante* p. 29) followed.

Also *per* BRODHURST, J.—Illustration (g) of s. 235 of the Criminal Procedure Code does not apply merely to the case of persons who, in addition to the offence of rioting, have with their own hands committed the further offences of voluntarily causing grievous hurt, and of assaulting a public servant when engaged in suppressing a riot ; and the convictions referred to in the illustration relate especially to convictions obtained under the provisions of s. 14 of the Penal Code.

THIS was a reference to the Full Bench by STRAIGHT, J. The point of law referred and the facts out of which it arose are stated in the referring order, which was as follows :—

STRAIGHT, J.—Ram Sarup and Narain Das were convicted—(i) of riot under s. 147 of the Penal Code ; (ii), of causing grievous hurt in the course of such riot to a person of the name of Daya Ram, and they were respectively sentenced to six months' rigorous imprisonment under s. 147, and three months' under s. 325. It is objected on their behalf by the petition for revision that these separate sentences were illegal. I think they were, and I have [758] already stated the views I entertain upon the matter in *Queen-Empress v. Ram Partab*, 1 L. R., 6 All., 121. My brother BRODHURST, however, has expressed a contrary opinion in *Queen-Empress v. Dugar Singh* (*Ante*, p. 29) and as this conflict may lead to confusion in the lower Courts, I refer the question raised in the first ground of the petition for revision to the Full Bench.

Mr. H. Dillon and Mr. N. L. Paliologus, for the Petitioners.

The *Public Prosecutor* (Mr. C. H. Hill), for the Crown.

The following judgments were delivered by the Full Bench :—

Petheram, C. J., and Straight and Tyrrell, JJ.—We find, upon looking into the evidence in this case, that Ram Sarup, Narain Das, and Mahbub Shah are shown to have committed individual acts of violence with their own hands, which constituted distinct offences of causing grievous hurt or hurt separate from and independent of the offence of riot, which was already completed. The fact of the riot was not an essential portion of the evidence necessary to establish their legal responsibility under s. 325 of the Penal Code, and it is in this respect that this case is clearly distinguishable from *Queen-Empress v. Ram Partab*, I. L. R., 6 All., 121. In holding that Ram Sarup, Narain Singh, and Mahbub Shah were liable to separate punishments under ss. 325 and 147 of the Penal Code, we in no way disturb that ruling. Let the referring Bench be answered accordingly.

Brodhurst, J.—The question referred to the Full Bench is whether separate sentences, under ss. 147 and 325 of the Indian Penal Code, are illegal

Mr. Justice STRAIGHT, who made the reference, was of opinion that, in the case before him, the separate sentences passed under the two sections above-mentioned were illegal, and he referred the question as different views on the subject had been expressed in two judgments of this Court, one in *Queen-Empress v. Ram Partab*, I. L. R., 6 All., 121, and the other in *Queen-Empress v. Dunga Singh* (*Ante*, p. 29) as it was not improbable that these conflicting judgments might lead to confusion in the lower Courts.

The same question was one of four questions referred to the Full Bench by a Division Bench—**MAHMOOD and DUTHOIT, JJ.**—[759] in the case of *Queen-Empress v. Pershad* (*Ante*, p. 414). The case was argued on the 17th January last before the Full Bench, which then consisted of five Judges; but unfortunately the majority of the Judges were of opinion that it was unnecessary to consider this particular question.

At the hearing of the present case before the Full Bench, the learned counsel were informed from the Bench that we were unanimously of opinion that the applicants had, under the circumstances of the case, been properly convicted and sentenced, both under ss. 147 and 325 of the Indian Penal Code, and that nothing further would, on this occasion, be decided, and consequently the points of law referred to in the two judgments above-mentioned, and regarding which there appeared to be a difference of opinion, were not fully argued.

A judgment has now been written in this case by my brother STRAIGHT, and I am informed that our other learned colleagues have concurred in it. I agree in holding that Ram Sarup, Narain Das, and Mahbub Shah were each liable to separate punishments under ss. 147 and 325 of the Indian Penal Code, but I do so on entirely different grounds to those relied upon by my honourable colleagues.

I also have looked into the evidence, and I find that, only one person, *viz.* Daya Ram, sustained "grievous hurt," and that injury was caused by one of the bones of his right wrist having been fractured by a "*lathi* blow." It is palpable, therefore, that only one of the accused persons can have caused grievous hurt with his own hands, and that three persons cannot properly be convicted of that offence, except under the provisions of s. 149 of the Indian Penal Code.

There is ample proof that the accused, with others, amounting to some fifty or sixty persons, armed with *lathis*, went to mauza Behri, with the common

object that they would by means of criminal force, or show of criminal force to the zamindars of the village, take or obtain possession of a certain share in that village in case the Court Amin was unable to give them possession of that share, that they assembled at the village in spite of the remons-[760]trances of the Amin, who apprehended a riot, and that they remained behind when he went away without having been able to give possession to the decree-holder. It is clearly proved that the accused were members of an unlawful assembly, and they each thus became punishable, under s. 143 of the Indian Penal Code, with imprisonment of either description for a term which might extend to six months, or with fine, or with both. They, however, did not stop at the commission of this offence, and as they went on to commit riot, they were properly punished, not for being members of an unlawful assembly, but for the more heinous offence of rioting, which is punishable, under s. 147 of the Indian Penal Code, with imprisonment of either description, for a term which may extend to two years, or with fine, or with both. They became guilty of "rioting" as defined in s. 146 of the Code, in the following manner, *viz.*, that when they were members of an unlawful assembly, one of them, *viz.*, Narain Das, in prosecution of the common object of that assembly, struck Sewa Ram, the karinda of the zamindars, on the head with a *lathi*, and voluntarily caused grievous hurt to him; thereupon every member of the unlawful assembly, including the applicants, became guilty of the offence of rioting, and became liable to punishment as above-mentioned. During the riot a second person, *viz.*, Sadanand, also sustained hurt, and a third person, *viz.*, Daya Ram, sustained grievous hurt. Under the provisions of s. 149 of the Indian Penal Code, the accused, who were members of the unlawful assembly, were guilty of "rioting," of "voluntarily causing hurt," and of "voluntarily causing grievous hurt." These three offences were committed in one series of acts so connected as to form the same transaction, and the accused could therefore, under the provisions of s. 235 of the Criminal Procedure Code, be tried at one trial for every one of those offences. They could, as shown in *illustration (g)* of s. 235, have been separately charged with and convicted of the three offences above-mentioned, and that persons can under such circumstances, not only be convicted, but can still also be sentenced for each of the three offences, as when Act X of 1872 was in force, is, I think, conclusively shown in the latter of the two judgments referred to at the commencement of these remarks.

[761] I think it desirable here to observe that I am unable to agree in the opinion expressed by one of my learned colleagues at the hearing of the case, that *illustration (g)* of s. 235 of the Criminal Procedure Code applies merely to the case of persons who, in addition to the offence of rioting, have with their own hands committed the further offences of voluntarily causing grievous hurt, and of assaulting a public servant when engaged in suppressing a riot.

Illustrations are furnished from ordinary and not from extraordinary cases and it is in the highest degree improbable that seven rioters should, each with his own hands, cause grievous hurt, and also assault a public servant engaged in suppressing the riot; but it is not improbable that one of the seven rioters should commit both of the said offences; and there is, I think, no room for doubt that the convictions under ss. 147, 325 and 152 of the Indian Penal Code, referred to in *illustration (g)* of s. 235 of the Criminal Procedure Code, relate especially to convictions obtained under the provisions of s. 149 of the Penal Code.

My reply to the reference is, that for the reasons above stated, as well as for the reasons stated in my judgment in *Queen-Empress v. Dungar Singh*,

Ante, p. 29, the separate sentences that were passed under ss. 147 and 325 of the Indian Penal Code, in the case before us, were not illegal.

NOTES.

[The following are similar decisions approving of this case :—(1887) 9 All., 645 ; (1889) 16 Cal., 725 , (1891) 19 Cal., 105 ; (1892) 17 Bom., 260 F.B]

[7 All. 761]

APPELLATE CIVIL.

The 14th May, 1885.

PRESENT :

MR. JUSTICE STRAIGHT AND MR. JUSTICE BRODHURST.

Muhammad Malik Khan.....Defendant

versus

Nirhai Bibi and others..... ..Plaintiffs.⁴

Suit for profits in respect of several years—Court-fees—Distinct causes of action—Distinct subjects—Act VII of 1870 (Court-fees Act), s. 17—

Civil Procedure Code, ss. 43, 44.

In an appeal in a suit for recovery of profits under s. 93 (h) of the N.-W. P. Rent Act, in respect of several years, the proper court-fee leviable on the memorandum of appeal is one calculated on the aggregate amount of the profits claimed, and not one calculated separately on the amount of profits claimed for each year.

[762] THIS was a case referred to the Court by the Registrar under s. 5 of the Court-fees Act.

The reference was in these terms .—

“ The office has laid this memorandum of appeal before me for determination of the question whether the Court-fee paid is sufficient. The suit is one for recovery of profits under s. 93 (h) of the Rent Act for the years 1286—88 fasli. The plaintiff-appellant has calculated the court-fee on the aggregate amount of the claim, Rs. 9,541, and paid Rs. 455. The fee payable on this basis is Rs. 465, and thus in any case there is a deficiency of Rs. 10 ; but if the proper method of calculation be that the fee should be levied separately on the amount of profits claimed for each year, it would be Rs. 205, and Rs. 190, and Rs. 170, that is, Rs. 565, and there is a deficiency of Rs. 110.

The case is on all fours with the case of *Malup Narain v. Jagat Narain*, N.-W. P. Legal Remembrancer, 1880, H.C. Series, p. 124, in which STRAIGHT, J., directed that the court-fee should be calculated on the latter basis. The reason for that decision was, that it had been held in the cases of *Raja Sutto Churn Ghosal v. Obhoy Nand Dass*, 2 W. R., 31, and *Ram Soondur Sein v. Krishno Chunder Goopto*, 17 W. R., 380, that arrears of rent for successive years are severed and distinct causes of action, in respect of which a plaintiff might institute separate suits, and that therefore, under the construction placed by the Full Bench on s. 17 of the Court-fees Act in *Mul Chand v. Shib Charan Lal*, I. L. R., 2 All., 676, such arrears formed “ distinct subjects ” in the light of that section.

* Stamp reference in First Appeal No. 97, of 1885.

The Calcutta High Court has, however, more recently held that the cases referred to above are overruled by s. 43, Act X of 1877 (now Act XIV of 1882), and that the *illustration* to that section treats a claim to all arrears of rent as a single cause of action—*Taruck Chunder Mukerji v. Panchu Mohini Debye*, I. L. R., 6 Cal., 791. This latter decision is, moreover, in accordance with a decision of the Madras High Court—*Chockalinga Pillai v. Kumara Viruthulam*, 4 Mad. H. C. Rep., 334. It is evident that in such cases there is but one contract, and although each item as it falls due constitutes a debt which [763] might be sued for when due, the understanding is that, if unsued for, it shall be added to other items due when the suit is brought, and shall form one entire demand, the aggregate constituting but one cause of action. The same principle is not confined to cases where there is one separate contract, but is extended to the case of tradesmen's bills in respect of which there may have been separate contracts, but in which one item is so connected with another that the dealing is intended to be continuous—*Grimbley v. Aykroyd*, 1 Exch., 479. Section 17 of the Court-fees Act was evidently not meant to apply to a case where there are various items based on one agreement, but which are intended to form one entire demand, but rather to cases where there are several and independent claims based on different titles, which, with the leave of the Court under s. 44, Civil Procedure Code, have been united in one suit.

I think therefore that the decision in *Mahip Narain v. Jagat Narain*, N.-W. P. Legal Remembrancer, 1880, II. C. Series, p. 124, should be reconsidered, and refer the case to the Court under s. 5 of the Court-fees Act.

Mr. *Amir-ud-din*, the Senior Government Pleader (Lala Juala Prasad), Munshi *Hanuman Prasad*, and Munshi *Sukh Ram*, for the Appellants.

Straight, and **Brodhurst, JJ.**—We are of opinion that the proper fee leviable is the one calculated on the aggregate amount of the profits claimed.

NOTES.

[This case was referred to, on the question of Court-fees, in (1889) 14 Bom., 286.]

[7 All. 763]

The 15th May, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT. CHIEF JUSTICE, AND MR JUSTICE TYRRELL.

Damodar Das.....Plaintiff

versus

Wilayet Husain.....Defendant.*

Majority—Capacity to contract—Muhammadan over 16 years of age before Act IX of 1875 came into force—Muhammadan Law—Act IX of 1872 (Contract Act), s. 11—Act XL of 1858 (Bengal Minors Act) s. 26—Act IX of 1875 (Majority Act), s. 2 (c).

In a suit upon a bond [executed on the 5th June 1875, by a Muhammadan who at that date was sixteen years and nine months old, the defendant pleaded that at the time when

* First Appeal No. 80 of 1884, from a decree of Muhammad Abdul Qayum, Subordinate Judge of Bareilly, dated the 10th May 1884.

the bond was executed, he was a minor, and that the agreement was therefore not enforceable as against him.

Held that the defendant, having at the date of the execution of the bond, reached the full age of sixteen years, and so attained majority under the Muham-[765] madan Law, which, and not the rule contained in s. 26* of the Bengal Minors Act (XL of 1858), was the law applicable to him under s. 2 (c) of the Indian Majority Act (IX of 1875) before the latter Act came into force, was competent in respect of age to make a contract in the sense of s. 11 of the Contract Act (IX of 1872), and the agreement was therefore enforceable as against him.

The rule contained in s. 26 of the Bengal Minors Act is limited by its terms to "the purposes of that Act," which provides exclusively for the care of the persons and property of minors possessed of property which has not been taken under the protection of the Court of Wards, and it is to such persons only, when they have been brought under the operation of the Act as in it provided, that the prolongation of nonage under s. 26 applies.

THIS was a suit for recovery of a sum of money, principal and interest, due upon a bond executed by the defendant in favour of the plaintiff on the 5th June 1875. The defendant (who was a Muhammadan) pleaded, *inter alia*, that at the date of the execution of the bond he was a minor, and that the agreement was therefore not enforceable as against him. The lower Court found that the defendant at the date of execution was sixteen years and nine months old. Upon this finding, it held that the provisions of Act IX of 1875 (Indian Majority Act) were applicable, that therefore the defendant, having been under eighteen years of age at the time when he executed the bond, was at that time not competent to contract, and that the suit was in consequence not maintainable against him.

The plaintiff appealed to the High Court, contending that "the respondent was not a minor according to the law applicable to him on the date of the execution of the bond in dispute."

On his behalf it was urged that "the law applicable to him" within the meaning of Act IX of 1875, s. 2 (c), was the Muhammadan Law, according to which he had attained majority at the age of sixteen years, before that Act came into force. On behalf of the respondent, it was urged that "the law applicable to him" was that contained in Act XL of 1858 (Bengal Minors Act), s. 26.

The Junior Government Pleader (Babu Dwarka Nath Banarji) and Pandit Bishamber Nath, for the Appellant.

Mr. C. H. Hill, for the Respondent.

Petheram, C.J., and Tyrrell, J.—We are of opinion that the respondent was not a minor in June 1875, when he executed [765] the bond on which this suit has been brought. He had then attained the full age of sixteen years, and had thus reached his majority under the Muhammadan Law, which was applicable to him before Act IX of 1875 came into force. He was consequently competent in respect of age to make a contract in the sense of s. 11 of the Indian Contract Act.

We hold that the "law applicable to" the respondent under s. 2, cl. (c) of Act IX of 1875, was the Muhammadan Law, and not the statute law contained in s. 26, Act XL, of 1858, because it seems to us that the rule of that section is limited by its terms to "the purposes of that Act," which provides

Persons under the age of 18 years to be held Minors for the purposes of this Act.

*[Sec. 26 :—For the purposes of this Act, every person shall be held to be a Minor, who has not attained the age of eighteen years.]

exclusively for the care of the persons and property of one class of minors, that is to say, minors possessed of property which has not been taken under the protection of the Court of Wards. It is to such persons, and to them only, when they have been brought under the operation of the Act, as in it provided, that in our view the prolongation of nonage under s. 26 applies. We have not overlooked the rulings to the contrary effect on this point, in forming the conclusion above stated. We may observe, however, that no ruling has been cited to us in which it has been held in terms that a Muhammadan who had not been made amenable to the provisions of Act XL of 1858 was a minor for the purposes of making a contract till he had reached the age of eighteen years.

We therefore set aside the decree of the Court below, and decree this appeal with costs.

Appeal allowed.

[7 All. 766]

FULL BENCH.

The 4th June, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE STRAIGHT,
MR. JUSTICE BRODHURST AND MR. JUSTICE TYRRELL.

Bal Kishen.....Defendant

versus

Jasoda Kuar.....Plaintiff. *

Second appeal—Finding on issue of fact remitted—Civil Procedure Code, ss. 565, 566, 568.

Held by the Full Bench (TYRRELL, J., dissenting), that the findings upon issues remanded by the High Court in second appeal cannot be challenged upon [766] the evidence as in first appeals, but objections to these findings must be restricted to the limits within which the original pleas in second appeal are confined, *Nivath Singh v. Bhikki Singh* (*ante*, p. 649) referred to.

Per PETHERAM, C. J., and TYRRELL, J.,—Sections 565 † and 566 of the Civil Procedure Code are, as far as may be, incorporated in Chapter XLII of the Code relating to second appeals, and when the evidence for disposing of the real issues in the case has been taken and exists on the record, it is the duty of the High Court on the hearing of a second appeal, to

* Second Appeal No. 1731 of 1883, from a decree of A. Sells, Esq., District Judge of Cawnpore, dated the 17th September 1883, affirming a decree of Maulvi Farid-ud-din, Subordinate Judge of Cawnpore, dated the 21st December 1882.

† [Sec. 565 :—When the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court shall, after resettling the issues, if necessary, finally determine the case, notwithstanding that the judgment of the Court against whose decree the appeal is made has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.]

When evidence on record sufficient, Appellate Court shall determine case finally.

itself fix and determine such issues on the evidence on the record, and not to put the parties to the expense and delay involved by a remand.

Per STRAIGHT, J.—S. 587 of the Civil Procedure Code does not mean that the provisions of Chapter XLI relating to first appeals are to be applied indiscriminately or in their entirety to second appeals, and implies no warrant for the decision by the High Court of questions of fact in any shape or at any stage of a second appeal. *Rammarain v. Bhawanidin*, Weekly Notes, 1882, p. 104, and *Sheoambar Singh, v. Lallu Singh*, Weekly Notes, 1882 p. 158, referred to.

Per TYRRELL, J.—The jurisdiction of Courts of second appeal in respect of questions of fact is restricted, inasmuch as the appeal may not be entertained on “grounds” of fact, but, under the circumstances of s. 566 of the Code, no less than under the abnormal circumstances contemplated by the ruling of the Full Bench in *Nivath Singh v. Bhikki Singh* (*ante*, p. 649) the Court may take cognizance of omitted issues of fact, and must determine them if there be evidence upon the record sufficient for that purpose. In cases where the Court, still acting under s. 566, has been obliged, in the absence of evidence on the record, to supplement the defect through the agency of the Court below, its jurisdiction in respect of such evidence does not become limited thereby or by reason only of the circumstance that the evidence is accompanied by a “finding” of the inferior Court,—the term “finding” being used in s. 566 in its restricted sense of an answer to the proposition referred for inquiry, and not of an award or decision of the issue before the Court. THIS was a reference to the Full Bench by PETHERAM, C.J. and BRODHURST, J. The point of law referred was as follows:—

“Whether, when a case comes before the Court on second appeal, and an issue of fact has been remitted, the finding on that issue can be challenged upon the evidence as in first appeals.”

The second appeal in which this reference was made arose in a suit for possession of certain immoveable property, which the plaintiff alleged had been purchased by her in the name of the defendant. The Court of First Instance gave the plaintiff a decree, [767] which, on appeal by the defendant, the Lower Appellate Court affirmed. On Second Appeal by the defendant, the High Court (OLDFIELD and MAHMOOD, JJ.) being of opinion that the Lower Appellate Court had lost sight of the real issue in the case, namely, whether the plaintiff had actually found the money by which the estate in dispute had been purchased, remanded this issue to the Lower Appellate Court for trial. The Lower Appellate Court decided that the plaintiff had actually found the money by which the estate in dispute had been purchased. On the return of this finding, the defendant took objections to its propriety. The case came before PETHERAM, C. J., and BRODHURST, J., who referred the question stated above to the Full Bench.

Mr. C. H. Hill, for the Appellant.

Mr. Shivanath Sinha, Pandit *Ajudhia Nath*, and *Munshi Kashi Prasad*, for the Respondent.

The following judgments were delivered by the Full Bench:—

Petheram, C. J.—This reference raises the question—How far is the decision of the first Appellate Court final on questions of fact which have been remanded to it for trial by the High Court on second appeal?

It has been decided by a Full Bench decision of this Court, *Nivath Singh v. Bhikki Singh* (*ante*, p. 649) that it is lawful for the Court on the hearing of a second appeal to look into the evidence for the purpose of ascertaining whether the findings of fact are of such a character as to contravene the rules laid down in that case.

In my opinion, it follows as a necessary consequence from that decision that, as the Court has the power to look into the evidence, it must have the

power to remand issues for trial when it appears that the issues necessary for the determination of the dispute have not been tried, *and the evidence necessary for the trial of such issues has not been taken*; and consequently I think that in such a case the provisions of s. 566 are, "as far as may be," incorporated in the chapter relating to second appeals; but inasmuch as the findings on the remanded issues and the evidence upon them are, when returned, part of the record in the second appeal, the findings are, in my opinion, subject to the same incident as the other findings of fact in the case, and can only be disputed on the grounds [768] prescribed by the judgment of the Court in the recent Full Bench decision.

It follows from these remarks that, in my opinion, s. 565 and s. 566 are, as far as may be, incorporated in the chapter which relates to second appeals, and that when the evidence for disposing of the real issues in the case has been taken and exists on the record, it is within the powers, and is the duty of the High Court on the hearing of a second appeal, to itself fix and determine such issues on the evidence on the record, and not to put the parties to the expense and delay involved by a remand. My answer to the reference is in the negative.

Straight, J.—As I understand the question put by this reference, we are asked whether the findings to issues remanded by this Court in second appeal can be impeached upon their return, as if they had come from a Court of First Instance. If this be a correct interpretation of the inquiry addressed to us, my answer must be in the negative. It is true that by s. 587 of the Code the provisions of chapter XLI, regulating first appeals, are declared to be applicable, "as far as may be," to second appeals, but it is obvious this does not mean that they are to be adopted indiscriminately or in their entirety. As an illustration, I will take a case in which a first Court, though recording all the evidence essential to the determination of the rights of the parties, has disposed of the suit upon a preliminary point of, say, *res judicata* or limitation, and the Lower Appellate Court, without dealing with it on the merits, has upheld its decision. In second appeal, this Court would have before it all the materials sufficient to enable it to pronounce judgment, and finally determine the case; but no one would seriously contend, nor has it ever been decided, that in such a state of things this Court can proceed to dispose of the suit upon the merits. In such an event, our duty and practice is to remand the case to the Lower Appellate Court, and direct it to proceed under s. 565, or, in certain contingencies, under s. 566. Take another instance, in which a first Court has acted in the manner indicated in my illustration, but the Lower Appellate Court, disagreeing with its determination of the preliminary point, enters fully into the merits under s. 565, and disposes of all the matters raised by the pleadings as it is by law bound to do. Here it will [769] be observed that the Lower Appellate Court entertains and decides the issues of fact virtually as a Court of First Instance, and for the first time, yet we cannot disturb those findings in second appeal unless they are open to the objections set forth in the recent ruling of the majority of the Full Bench, and then only to the extent of sending back the case for re-determination according to law. But suppose it appears to this Court that the Lower Appellate Court has omitted to frame or try an essential question of fact, of which there is, or is not, evidence on the record, then adopting the provisions of s. 566, as far as they can conveniently be applied, it has long been the practice to remand the issue for trial, that is to say, to direct the Lower Appellate Court to do what it ought to have done under s. 565, 566 or 568, as the circumstances required, and then to return the results of its findings to this Court. If this course has been

adopted, I fail to see how the position is in any way altered from what it would have been had the Lower Appellate Court properly fulfilled its functions under s. 565 or 566 when originally disposing of the appeal; or why its findings of fact in obedience to the remand are to be treated on a different footing to what they would have been had they come up with the record when the second appeal was first preferred. I may add, without going at greater length into the matter, that I concur in the views expressed by MAHMOOD, J., in *Ramnarain v. Bhawanideen*, Weekly Notes, 1882, p. 104, and *Sheoambar Singh v. Lallu Singh*, Weekly Notes, 1882, p. 158, and I cannot hold that any sanction is to be implied from s. 587 of the Code to this Court's deciding questions of fact in any shape or at any stage of a second appeal. My answer to the reference, putting it into explicit terms, is, that objections to findings upon issues remanded in second appeal by this Court must be restricted to the limits within which the original pleas in second appeal are confined.

Brodhurst, J.—The question referred to the Full Bench for determination is—“Whether, when a case comes before the Court on second appeal, and an issue of fact has been remitted, the finding on that issue can be challenged upon the evidence as in first appeals?” Under my view of the law, findings by a Lower Appellate Court on a remand made to it by this Court, under [770] s. 566 of the Civil Procedure Code have not the effect of converting a second appeal into a first appeal, and this Court is not, I think, competent to consider and deal with evidence recorded on remand in second appeal in the same way that it would have done had that evidence been taken on a remand in first appeal.

This Court should, in my opinion, accept findings of fact recorded by a Lower Appellate Court under s. 566 of the Code, unless those findings are clearly open to the objections referred to in *Nivath Singh v. Bhukki Singh*, *Ante*, p. 649. In their judgment in *Mahomed Kamil v. Abdool Luteef*, 23 W. R., 51, COUCH, C.J., and AINSLIE, J., observed:—“In the special appeal, our learned colleague appears to have thought that, as fresh evidence had been taken by the Subordinate Judge, the case might be heard as if it were a regular appeal, and the learned Judge considered whether the new evidence was worthy of credit, and came to the conclusion that it was not, and disbelieved it. We are not aware that there was any authority that the fact of the Lower Appellate Court taking additional evidence made the special appeal liable to be heard and decided as if it were a regular appeal. It does not appear to us that this is the effect of the Lower Appellate Court taking additional evidence, and so far we cannot agree with the learned Judge.” The Code of Civil Procedure that was in force when the judgment above referred to was delivered, was Act VIII of 1859, but the ruling appears to me to be equally applicable under the present law, and the practice of the Court has hitherto, I believe, been in accordance with that ruling.

My reply to the reference is in the negative.

Tyrrell, J.—I am not aware of any reason, whether of rule or principle, why we should be deemed to be precluded from determining a question of fact by reason only of the circumstance that it arises in the hearing of a second rather than of a first appeal. It is true that a case is not made amenable to our jurisdiction under Chapter XLIII because of errors in the decision of issues of fact, but where the “substantial defect in the procedure” of the Courts below (s. 584 (c)) has been their neglect to decide a question of fact essential to the decision of the case upon the merits (*ibid*), I do not see why this Court should not follow the [771] rule of s. 566, which forbids the reference of an omitted issue for trial when the evidence on the record is sufficient to enable

the Court to determine such issue or question for itself. Indeed, I am unable to appreciate the practical distinction between a personal verdict and the unquestioning adoption of the verdict of another on an issue. It seems to me that the jurisdiction of Courts of second appeal in respect of questions of fact is restricted in so much as the appeal may not be entertained on "grounds" of fact (s. 584), but that, under the circumstances of s. 566, no less than under the abnormal circumstances contemplated by the recent Full Bench ruling in *Nivath Singh v. Bhikk Singh, Ante*, p. 649, we may take cognizance of omitted issues of fact, and must determine them if there be evidence upon the record sufficient for that purpose. I agree therefore with the learned Chief Justice in thinking that the rule of s. 566 is applicable in its entirety to Courts of second appeal.

An issue to be tried in this way will, with all the evidence bearing upon it, be *res integra* before the High Court, and, as such, open to unrestricted consideration from any point of view that may be present to the Court in the argument on the evidence and otherwise. It follows then, to my mind, that in cases where the Court, still acting under s. 566, has been obliged, in the absence of evidence on the record, to supplement the defect through the agency of the Court below, its jurisdiction in respect of such evidence does not become limited thereby or by reason only of the circumstance that the evidence is accompanied by a "finding" of the inferior Court. This word "finding" is of course used in s. 566, in its restricted sense of an answer to the proposition referred for inquiry, and not of an award or decision of issue before the Court.

It seems to me that we have the evidence returned to us under s. 566 before us as fully and as much open to examination as the evidence if taken by ourselves under s. 568 would be.

That the provision of s. 568 can be adopted under Chapter XLII will, I suppose, not be disputed, as it is covered by the authority of the Privy Council and the Indian High Courts in many decisions.

NOTES.

[This case and (1886) 8 All., 172 F.B. were **overruled** in (1886) 9 All., 147 F.B., which was adopted in (1896) 24 Cal., 98.]

[772] APPELLATE CIVIL.

The 7th January, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND
MR. JUSTICE MAHMOOD.

Gokal Singh and another.....Plaintiffs
versus

Mannu Lal and another.....Defendants.¹

Pre-emption—Wajib-ul-arz—Co-sharers—" Village"—Effect of perfect partition on covenants contained in the wajib-ul-arz.

The *wajib-ul-arz* of a village contained a covenant among the co-sharers that, in the event of any one of them selling his share, a right of pre-emption should be enforceable,

* First Appeal No. 27 of 1684, from a decree of Saiyid Farid-ud-din Ahmad, Subordinate Judge of Cawnpore, dated the 15th December 1883.

first by a "near share-holder," next, by a partner in the *thoke*, and thirdly by a partner in the village. The village was subsequently divided into three separate mahals by means of a perfect partition, under the N.-W. P. Land Revenue act (XIX of 1873).

Held, that the agreement regarding pre-emption remained in force after the partition.

The term "village," as used in the *wajib-ul-arz* means a definite area of land with houses upon it, and does not necessarily imply a joint ownership of such land, inasmuch as after partition there may remain some community of interest, and things held and used in common by all the inhabitants. Every one who lives in that area has a share in it, and may therefore be regarded as a "share-holder" within the meaning of the *wajib-ul-arz*.

THIS was a suit to enforce a right of pre-emption based on the *wajib-ul-arz* of a village called Maharajpur. The plaintiffs and defendant No. 2 were co-sharers in the village, and in 1875 they entered into an agreement that, in the event of any one of them selling his share, a near share-holder in the first instance, next, a partner in the *thoke*, and thirdly, a partner in the village, should be entitled to purchase it in preference to a stranger. This agreement was entered in the *wajib-ul-arz*. Subsequently the village was divided into three separate mahals by means of a perfect partition under the N.-W. P. Land Revenue Act (XIX of 1873). After this had been done, defendant No. 2 sold his share to defendant No. 1, a stranger, and thereupon the plaintiffs brought the present suit for the enforcement of their right of pre-emption.

The first issue framed by the Court of First Instance (Subordinate Judge of Cawnpore) was—"Whether or not the settlement *wajib-ul-arz*, which was prepared prior to the partition, can be acted upon after the taking place of a complete partition?" The [773] second issue need not be stated. The third was—"Has the sale in dispute taken place with the consent of the plaintiffs, and after their refusal to purchase?" The fourth—"Is the amount of the sale-consideration mentioned in the sale-deed in question correct or not?"

Upon the first issue, the Subordinate Judge made the following observations:—"As to the first point, the Court holds that the *wajib-ul-arz*, which was prepared at the time of settlement, when the disputed village Maharajpur was jointly held, can have no force or effect after the time when the said village was divided into three separate mahals by means of a complete division. The *uajib-ul-arz* is a document comprising the conditions and engagements entered into by the co-sharers and co-parceners, and it can remain in force only as long as the parties executing it continue to retain the same character, and the nature of the co-parcenership and partnership is not altered. It cannot affect the persons who do not fall under the definition of co-parceners or co-sharers. By a complete division, each divided share becomes a separate mahal and a separate village, without any connection with the other co-sharers. Although those shares are parts of a village which was once jointly held by the co-sharers, yet after division they become altogether separate mahals and villages, and all co-parcenership among the former co-sharers ceases to exist." In consequence of the first issue being decided against the plaintiffs, the Court did not try the other issues above set out.

The plaintiffs appealed to the High Court. It was contended on their behalf that the partition of a village by a Revenue Court could not exempt the co-sharers from their liabilities under the covenants entered in the *wajib-ul-arz*, and that, no new contract having been made at the time of partition, the former contract must be regarded as still subsisting.

Mr. C. H. Hill and Munshi Kashi Prasad, for the Appellants.

Messrs. T. Conlan and W. M. Colvin and Pandit Bishambar Nath, for the Respondents.

Petheram, C. J.—In this case, an arrangement was made among three owners of shares in a village, who held those shares *jointly*, in the sense that there had been no division between them, [774] that if any co-sharer should sell his share, a right of pre-emption should belong first to a near shareholder, next to a partner in the *thoke*, and thirdly, to a partner in the village. This agreement was entered in the *wajib-ul-arz*. After it had been made, what is called a "perfect partition" among the co-sharers was effected. In other words, the whole inhabitable and cultivable area of the village was absolutely divided, and the joint ownership of the shares was determined. This having been done, Mr. *Conlan* argues that there ceased to be any entire thing which can be called a "village" in the sense in which the term is used in the *wajib-ul-arz*, for the reason that each of the original co-sharers thenceforth was the owner of a separate property. If that argument were good, every "village" would cease to exist where there was no joint ownership. But although there may be no joint ownership in a village, there may still be some community of interest, and also a considerable community of things held and used in common by all the inhabitants, such, for instance, as roads, drains, and other things which are necessary to all. Hence, even after partition, something is still left in common; and, with reference to the merits of this case, there remained enough community of interest to justify the preference given by the *wajib-ul-arz* to partners in the village over strangers in respect of the right of pre-emption. The meaning of the word "village" as used in the *wajib-ul-arz* is well understood. It means a definite area of land with houses upon it. Every one living in that area has a share in it, and may therefore be regarded as a "shareholder" within the meaning of the document in question. Here one of these shareholders wishes to sell his share. The person who desires to purchase it is also a shareholder. The case therefore falls within the terms of the *wajib-ul-arz* specifying the conditions under which the right of pre-emption may be enforced. The agreement appears to me to have been in force as well after the partition as before it. I am of opinion that the appeal should be allowed, and that the case should be sent back for a new trial upon the issues numbered (3) and (4) in the Subordinate Judge's judgment.

Mahmood, J., concurred.

Issues remitted.

NOTES.

[See for other decisions following this case :—(1887) 9 All., 234 ; (1888) 11 All., 257 ; (1895) 17 All., 226 ; (1899) 22 All., 1 ; (1905) 27 All., 602.]

[775] FULL BENCH.

The 9th February, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE OLDFIELD,
MR. JUSTICE BRODHURST, MR. JUSTICE MAHMOOD AND
MR. JUSTICE DUTHOIT.

Gobind Dayal.....Defendant

versus

Inayatullah.....Plaintiff.*

Brij Mohan Lal.....Defendant

versus

Abul Hasan Khan.....Plaintiff.†

*Pre-emption—Muhammadan Law—Muhammadan vendor and pre-emptor
and Hindu purchaser—Act VI of 1871 (Bengal Civil Courts Act),
s. 24—"Religious usage or institution"—"Parties."*

Held, by the Full Bench that, in a case of pre-emption, where the pre-emptor and vendor are Muhammadans and the vendee a non-Muhammadan, the Muhammadan Law is to be applied to the matter, in advertence to the terms of s. 24† of the Bengal Civil Courts Act (VI of 1871). *Sheikh Kudratulla v. Mahim Mohan Shaha*, 4 B. L. R., 134, dissented from.

Per PETHERAM, C.J., and OLDFIELD, J., that, by the provisions of s. 24 of the Bengal Civil Courts Act, the Court was not bound to administer the Muhammadan Law in claims for pre-emption; but that, on grounds of equity, that law had always been administered in respect of such claims as between Muhammadans, and it would not be equitable that persons who were not Muhammadans, but who had dealt with Muhammadans in respect of property, knowing the conditions and obligations under which the property was held, should, merely by reason that they were not themselves subject to the Muhammadan Law, be permitted to evade those conditions and obligations.

Per MAHMOOD, J., that, by a liberal construction, the rule of the Muhammadan Law as to pre-emption is a "religious usage or institution" within the meaning of s. 24 of the Bengal Civil Courts Act, and, as such, is binding on the Courts.

Also *per* MAHMOOD, J., that the word "parties," as used in s. 24 of the Bengal Civil Courts Act, does not mean the parties to an action, but must be interpreted with the reference to the inception of the right to be adjudicated upon.

Also *per* MAHMOOD, J.—The right of pre-emption is not a right of "*re-purchase*" either from the vendor or from the vendee, involving any new contract of sale; but it is simply a

* First Appeal No. 103 of 1883, from an order of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 11th June 1883.

† First Appeal No. 135 of 1883, from an order of F. S. Bullock, Esq., Officiating District Judge of Allahabad, dated the 30th July 1883.

‡ [Sec. 24 :—Where in any suit or proceeding it is necessary for any Court under this Act to decide any question regarding succession, inheritance,

Certain decisions to be according to Native law. marriage or caste, or any religious usage or institution, the Muhammadan Law in cases where the parties are Muhammadans, and the Hindu Law in cases where the parties are Hindus, shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished.

In cases not provided for by the former part of this section, or by any other law for the time being in force, the Court shall act according to justice, equity and good conscience.]

right of substitution, entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title.

The history and nature of the right of pre-emption discussed by MAHMOOD, J.

Shunsh-ool-nissa v. Zohra Bibi, N.-W. P. H. C. Rep., 1874, p. 2; *Chundo v. Hakeem Alim-ood-deen*, N.-W. P. H. C. Rep., 1874, p. 29; *Ibrahim Saib v. Muni Mir Uddin*, 4 Mad. H. C. Rep., 26; *Moti Chand v. Mahomed Hossein Khan*, N.-W. P. H. C. Rep., 1875, p. 147, and *Dwarka Das v. Husain Bakhsh*, I. L. R., 1 All., 564, referred to.

[776] THE suits in which these appeals arose were suits to enforce the right of pre-emption. The pre-emptor and vendor were in each case Muhammadans, and the vendees were Hindus. The right in each case was based upon the Muhammadan Law, the plaintiff in the one claiming "by virtue of his being a co-sharer in the right and property sold, and also by right of vicinage," and in the other as "a partner in the property the subject of sale." In each case, the Court of First Instance dismissed the suit, being of opinion that the right of pre-emption could not be enforced by a Muhammadan against a non-Muhammadan vendee; but the Lower Appellate Courts, being of the contrary opinion, reversed the decrees, and remanded the cases for disposal on the merits. The defendants in each case appealed to the High Court from the order of remand.

The appeals came for hearing before STRAIGHT and MAHMOOD, JJ., who referred the following question raised by them to the Full Bench:—

"In a case of pre-emption, where the pre-emptor and vendor are Muhammadans and the vendee a non-Muhammadan, is the Muhammadan Law of pre-emption to be applied to the matter, in advertence to the terms of s. 24 of Act VI of 1871?"

Munshi Kashi Prasad, for the Appellant.

Munshi Hanuman Prasad, for the Respondent, in No. 103.

Mr. T. Conlan, Babu Dwarka Nath Banarji, and Babu Ram Das Chakrabati, for the Appellant.

Messrs. W. H. Colvin and A. Strachey, for the Respondent, in No. 135.

The following judgments were delivered by the FULL BENCH:—

Mahmood, J.—These two connected appeals have been referred together to the Full Bench as presenting the same question for determination by the Court, and I have been requested by my learned brethren to deliver my judgment first. The question is exactly the same as that which was raised in *Sheikh Kudratulla y. Mahini Mohan Shaha*, 4 B. L. R., 134. The order of reference in F. A. from Order No. 135 of 1883, after alluding to certain rulings of this Court and of the Calcutta Court, and considering the great importance of the points of law involved, refers to the Full Bench the following question:—"In a case of pre-emption, where the pre-emptor and the vendor are Muhammadans and the vendee a non-Muhammadan, is the Muhammadan Law of pre-emption to be applied to the matter, in advertence to the terms of s. 24 of Act VI of 1871?" This question presents itself to my mind in two aspects. The first is, whether s. 24 of the Bengal Civil Courts Act renders it imperative on this Court and the Courts subordinate to it to administer the Muhammadan Law in cases of this nature? The second is, what is Muhammadan Law of pre-emption in regard to the point before us?

The first of these questions depends upon the construction to be placed on s. 24 of the Bengal Civil Courts Act (VI of 1871). In discussing this, I shall be within the recognized rules of interpretation in reviewing shortly the history of the particular section in question. It is not a new provision of the law. The principle which it embodies was recognized by the British rule at the outset of

its authority in this country. The history of the recognition of this principle has been accurately traced by a learned Judge of the Indian Bench, Mr. Justice FIELD, at pages 169—171 of his valuable work on the *Regulations of the Bengal Code*. The legislation there described began with the Regulation of the 21st August 1772, which laid down the exact scope of the application of the Hindu and Muhammadan Laws, and the omission to provide for cases which did not fall within the rule was supplied by the Regulation of the 5th July 1781, which directed that "in all cases for which no specific directions are hereby given, the Judges do act according to justice, equity, and good conscience." The latter part of the rule was reproduced in s. 21 of Regulation III of 1793, and the former part of the rule was re-enacted in s. 15 of Regulation IV of 1793, which laid down that "in suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Muhammadan laws with respect to Muhammadans, and the Hindu laws with regard to Hindus, are to be considered as the general rules by which the Judges are to form their decisions." To the two-fold rule so laid down, addition was soon after made by Regulation VIII of 1795, which enacted that "in cases in which the plaintiff shall be of a different religious persuasion from the defendant, the decision is to be regulated by the law of the religion of the latter, excepting where Europeans or other persons, not being either Muhammadans or Hindus, shall be defendants, in which cases the law of the plaintiff is to be made the rule of decision in all plaints and actions of a civil nature." The principle of applying the native laws according to the religious persuasions of the parties to the suit, and, with reference to the accident of their being arrayed as parties-plaintiffs or parties-defendants in the litigation, is an illustration of the simplicity which marks some of our oldest legislative enactments. The principle must have given rise, not only to confusion, but in some cases to positive injustice; whilst in cases where every one of the persons arrayed as parties to the suit belonged to a different persuasion, the application of the rule must have been impracticable. The experience of some years seems to have brought this difficulty into prominence, for we find that the next important piece of legislation on the subject was Regulation VII of 1832, s. 9 of which, while affirming the rules to which reference has already been made, added a new proposition as an injunction to the Courts administering justice under the East India Company. The section ran thus:—"It is hereby declared, however, that the above rules are intended and shall be held to apply to such persons only as shall be *bona fide* professors of those religions at the time of the application of the law of the case, and were designed for the protection of the rights of such persons,—not for the deprivation of the rights of others. Whenever, therefore, in any civil suit, the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Muhammadan persuasion; or where one or more of the parties to the suit shall not be either of the Muhammadan or the Hindu persuasion, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of those laws, they would have been entitled. In all such cases, the decision shall be governed by the principles of justice, equity and good conscience, it being clearly understood, however, that this provision shall not be considered as justifying the introduction of the English or any foreign law, or the application to such cases of any rules not sanctioned by those principles."

[779] Such was the law at the time when the celebrated case of *Sheikh Kudratulla v. Mahini Mohan Shaha*, 4 B. L. R., 134, was decided by the Full Bench of the Calcutta High Court. Since that time, however, the provisions

which I have referred to have been repealed by the Bengal Civil Courts Act (VI of 1871), and the question is now governed by s. 24 of that Act, which provides that "where in any suit or proceeding it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Muhammadan Law in cases where the parties are Muhammadans, and the Hindu Law in cases where the parties are Hindus, shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished. In cases not provided for by the former part of this section, or by any other law for the time being in force, the Court shall act according to justice, equity, and good conscience." It is this section with which we are directly concerned in the present case, and I have referred to the old Regulations because, without reference to them, the law in its existing form can scarcely be properly interpreted.

The question then arises:—Is pre-emption a "religious usage or institution" within the meaning of the section? It cannot come within any of the other matters enumerated. A similar question was considered by a Full Bench of this Court in connection, not with the subject of pre-emption, but with that of gift under the Muhammadan Law. This was in the case of *Shumshool-nissa v. Zohra Bibi*, N.-W. P. H. C. Rep., 1874, p. 2, in which the Court was divided in opinion, SPANKIE, J., differing from the other three Judges, STUART, C. J., PEARSON, and JARDINE, JJ. The majority of the Court were of opinion that, under s. 24 of Act VI of 1871, the Muhammadan Law is not strictly applicable to questions relating to gifts, but it is equitable as between Muhammadans to apply that law to such questions. I shall presently refer to the dissentient judgment of SPANKIE, J., for whose opinion upon such questions I have always entertained the greatest respect. Shortly after this, the Full Bench case of *Chundo v. Hakeem Alim-ood-deen*, N.-W. P. H. C. Rep., 1874, p. 28, was decided. That repeats the same principle, but is still more to the point, because [780] it relates to pre-emption, and the majority of the Court held that, under s. 24 of Act VI of 1871, the Muhammadan Law is not strictly applicable in suits for pre-emption between Muhammadans, not based on local custom or contract, but it is equitable in such suits to apply that law. Here again SPANKIE, J., adhering to the opinion formerly expressed by him, dissented from the opinion of the majority of this Court.

Now, as to the two Full Bench cases, the opinion of the majority of this Court in regard to gift and pre-emption was that, although the Court was, as a matter of fact, bound to apply the rules of Muhammadan Law, it was so bound not by the strict terms of the first part of s. 24, but by the rule of justice, equity, and conscience, referred to in the second part. SPANKIE, J., on the other hand, held that the law of pre-emption, as of gift, must be applied under the first part of the section, being included under the head of "religious usage or institution." In other words, the majority thought that they might properly let their notions of justice, equity, and good conscience prevail over those of the Muhammadan Law, while SPANKIE, J., held that the Court was absolutely bound to follow that law. With all due respect to the majority in that case, I cannot help observing that the view expressed by SPANKIE, J., is the only one which could be accepted by a Muhammadan lawyer sitting here as a Judge. That learned Judge did not consider the question in any limited or superficial manner. He carefully and thoroughly dealt with the circumstances under which the Muhammadan Law is binding upon the Courts, and referred to the opinions expressed by Muhammadan writers, and, among others, to a work by my father, Syed Ahmed Khan Bahadur. He observed:—"It is contended that we cannot connect 'religious usage or institution' with cases of gift, and that it would be straining the

ordinary acceptation of the meaning of the words to do so. But I am not satisfied that this is the case. 'Usage' ordinarily means use or long continued use, custom, practice. 'Institution' means the act of establishing, establishment, that which is appointed, prescribed or followed by authority, and intended to be permanent. One of the four senses in which the word 'institution' is used technically extends to laws, rites, and ceremonies, which are enjoyed by authority as permanent rules of conduct or of govern-[781]ment. So far, then as the ordinary meaning of the word goes, I do not see anything anomalous in the suggestion that judicial questions regarding gifts may be determined according to religious usage, which includes prescription as well as custom. So if laws have been enjoined by authority to govern questions of gift and were intended to be permanent, the word 'institution' may not be misapplied. It is to be remembered that Hindu and Muhammadan laws are so intimately connected with religion that they cannot readily be dis severed from it. As long as the religions last, the laws founded on them last. Mr. Baillie has noticed this, and he remarks that Muhammadans in the provinces are more in the habit of regulating their dealings with each other by their own law, and to disregard it would be inconsistent with justice, equity, and good conscience; and, this being so, he assumed that the Judges have been obliged to extend the operation of the Muhammadan Law beyond the cases to which it is strictly applicable under the Regulations. He quotes Macnaghten in his preface to the *Principles of Muhammadan Law*, as having arranged the order of cases in which this law has been applied by our Courts." The learned Judge then proceeds to consider the cases in which Baillie holds that the Muhammadan Law perforce applies. Then he goes on to say:—"Questions then, of gifts, pre-emption, etc., if not governed by Muhammadan Law as expressed clearly in the text of the Kuran, are controlled by religious usages founded on, or institutions enjoined by the oral law or sayings of the Prophet." And in conclusion:—"I am of opinion that the proper answer to the reference is, that the suit giving rise to it should be determined by that law (*i.e.*, the Muhammadan Law), and without reference to the principles of justice, equity, and good conscience."

Now, although the decision of the majority in that case is binding upon me, I regard the question as virtually reopened by this case, and I must therefore confess that I am unable to agree with it, and my reasons are these:—In the first place the Muhammadan Law of gift or pre-emption either is or is not law in the proper sense, by which I mean a rule of conduct binding upon the subjects of the State, and upon the Courts which the State has established. No doubt the opinion of the learned Judges leads to the same result. They also apply the Muhammadan Law, [782]not as a law, but only as a rule enjoined by equity. In my view, equity cannot, so to speak, invent rules by which rights are to be determined: it must follow and be guided by rules which are law in the strict sense. This is implied by the maxim *æquitas sequitur legem*; and the "*lex*" to be followed must mean the law of the land in which equity is administered, and not any foreign law or any system not obligatory on the Courts. If it is supposed that equity can, in some unexplained manner, evolve rules as to gift or pre-emption without any example or analogy in the rules of law, I do not understand how the maxim is to be applied. No equity, for instance, could invent rules on the subject of inheritance or limitation, and apply them to the determination of rights. Further, if the view of the majority of the Court in the cases referred to were correct, the first part of s. 24 would be superfluous. It would be easy to apply their reasoning in regard to gift and pre-emption, to marriage and inheritance, and the other matters mentioned in the section, by simply following the rule of justice,

equity, and good conscience provided by the latter part of the section, and by saying that the Hindu and Muhammadan Laws were therefore to govern them.

Upon the present occasion it is unnecessary to consider whether "gift" can properly be described as a "religious usage or institution" within the meaning of s. 24. I am here concerned only with the question whether *pre-emption* can be so described. My own opinion is that it can, and although I cannot add much to the reasons given by SPANKIE, J., I may observe that pre-emption is closely connected with the Muhammadan Law of inheritance. That law was founded by the Prophet upon republican principles, at a time when the modern democratic conception of equality and division of property was unknown even in the most advanced countries of Europe. It provides that, upon the death of an owner, his property is to be divided into numerous fractions, according to extremely rigid rules, so rigid as to practically exclude all power of testamentary disposition, and to prevent any diversion of the property made even with the consent of the heirs, unless that consent is given after the owner's death, when the reason is, not that the testator had power to defeat the law of inheritance, but that the heirs, having become owners of the property, could deal with it as [783] they liked, and could therefore ratify the act of their ancestor. No Muhammadan is allowed to make a will in favour of any of his heirs, and a bequest to a stranger is allowed only to the extent of one-third of the property. Under these circumstances, to allow the Muhammadan Law of inheritance, and to disallow the Muhammadan Law of pre-emption, would be to carry out the law in an imperfect manner; for the latter is in reality the proper complement of the former, and one department of the law cannot be administered without taking cognizance of the other. Among Aryan systems, which favour the notion of the inchoate rights of heirs, the rule of primogeniture, the *jus representationis*, and the exclusion of females from inheritance, except in special cases, the property is not so completely split up on the owner's death; but, under the Muhammadan system, upon a man's death, not only his children are entitled to succeed to his property, but also his wife, mother, father, and other heirs, according to well-defined rules; and I myself know of a case in which, after a Muhammadan's death, his property was divided into twenty-three shares, each heir having a separate share in every parcel. If such a law of inheritance were not mitigated by the law of pre-emption, the result would be serious inconvenience, and possibly even disturbance. It is hardly necessary to add that the *zenana* system, which the Muhammadans regard as based upon religious texts and which emphatically prohibits invasion of the privacy of a domestic habitation, lends an importance to the pre-emptive right, even when claimed *ex jure vicinitatis*, which it would not perhaps have otherwise possessed. This would go some way to support Mr. Justice SPANKIE's conclusions; but the point is perhaps not one of much practical importance, because, whatever view may be taken as to the right of pre-emption, all are agreed that it must be enforced by the Courts. I need only refer to one more case on this part of the subject—*Ibrahim Saib v. Muni Mu Uddin Saib*, Mad. H. C. Rep., 26, decided by the Madras High Court, in which HOLLOWAY, J., stated the question to be—"Whether a Muhammadan can exercise the right derived from neighbourhood (*ex jure vicinitatis*) to insist upon the sale by a Hindu being made to him instead of to another Muhammadan." I concur in the conclusion arrived at by HOLLOWAY, J., [784] in that case, so far as that conclusion simply answered in the negative the specific questions enumerated by the learned Judge. But unless the Civil Courts Act in the Madras Presidency as to the administration of the Muhammadan Law is very different to that which is in force in these Provinces, I am

bound to say that there is much in his mode of treating the Muhammadan Law of pre-emption, in which I am unable to concur.

So far I have been considering the question whether the Muhammadan rule of pre-emption can, at least by a liberal construction, be described as a "religious usage or institution" within the meaning of the Bengal Civil Courts Act. Before leaving s. 24, I wish to refer to the word "*parties*," which occurs in it. And upon this point much of what I have already said as to the provisions of the old Regulations applies also to the interpretation of this section. I do not understand the word to mean the *parties to an action*, but it must be interpreted with reference to the *inception* of the right involved in the action. Any other interpretation would render the section impracticable, if not meaningless. Who are necessary *parties to an action* is a matter governed by the rules of procedure, and in a country like India, where personal laws prevail, it is not an uncommon occurrence that every one of the persons arrayed as parties to the suit belongs to a different race and religion. In such a case, it would be impossible to administer any particular law if the word "*parties*" in the section meant "*parties to the suit*." This is obviously the only interpretation which can apply to the administration of Muhammadan Law of inheritance and succession by our Courts. Indeed, cases are readily conceivable in which none of the *parties to the suit* are Muhammadans, but in which their right, having been derived by transfer or otherwise from Muhammadans, the Muhammadan Law would be the sole rule of decision, because the inception of the rights to be adjudicated upon took place under that law. This can be best illustrated by supposing the case of a Muhammadan who dies leaving a widow, a son, and a daughter, each one of whom conveys his or her share, by gift or sale in the estate of the deceased, to a Hindu, a Christian, and a Parsi, respectively. It is to my mind obvious that in a suit between these various transferees, involving the ascertain-
[785] ment of the extent of the right of each person, the Muhammadan Law would, under the former part of s. 24 of the Bengal Civil Courts Act, be the only possible guide for decision, and that law would apply in its strictest force, notwithstanding the circumstance that none of the *parties to the suit* belonged to the Muhammadan persuasion. There is no reason for not applying the same principle to the cases to which this reference relates; and it follows that the circumstance that some of the parties to these suits are Hindus, would not, *ipso facto*, render the Muhammadan Law of pre-emption inapplicable, but that the question must be decided with reference to the rules governing the *inception* of the pre-emptive right claimed in these two cases. This leads me to another aspect of the question. To the cases out of which this reference has arisen, both Hindus and Muhammadans are parties, and the standing Full Bench rulings of this Court, already referred to, lay down the rule that the Muhammadan Law of pre-emption is to be administered, not as a law by which the Courts are bound, but only on the general principles of justice, equity, and good conscience. And if this is so even in cases where *all* the parties are Muhammadans, it follows *a fortiori* that in cases like the present, where some of the parties are Hindus, the same principle would apply; and thus the question whether the Hindu Law recognizes any rules of pre-emption naturally assumes sufficiently great importance to justify my dwelling upon it at some length. For no rule of equity can either invent the law of pre-emption or administer it to people who never had such a law. And, in view of this circumstance, I will deal with the matter under three heads; *first*, the history of the law of pre-emption, and its introduction into India; *secondly*, the manner in which it has been administered by the British Courts; and *thirdly*, the Muhammadan texts upon which my conclusions are founded.

Upon the first point, I desire to cite a passage from the introduction of Sir W. MACNAGHTEN'S *Principles and Precedents of Muhammadan Law* (p. 14). He says:—"Sales of land and other immoveable property are clogged with an incumbrance, which is not, however, peculiar to this Code. I allude to the law of pre-emption. This confers the privilege on a partner or a neighbour to preclude any stranger from coming in as a purchaser, provided [786] the same price be offered as that which the vendor has declared himself willing to receive for the property to be disposed of." Then, after discussing the question whether pre-emption prevailed originally among the Hindus, he goes on to say:—"I have found in the *Maha Nirvana Tantra*, a work which chiefly treats of mythology, a passage which would seem to imply that pre-emption is recognized as a legal provision according to the notions of the Hindus. But it remains yet to be decided whether this shall be held to be practical law or not."

I hope, before ending this judgment, to contribute something to a settlement of the question which Sir W. MACNAGHTEN regarded as undecided, having long taken an interest in the subject of pre-emption, and having considered it my duty to investigate the much-vexed question whether the right existed under the old Hindu Law, and whether the Muhammadans found it existing when they came into India. I may here quote from a very distinguished Sanskrit scholar, Dr. Rajendralal Mitra. After stating that the *Smritis*, from which the Hindu Law is derived, contain no reference to the right of pre-emption, the learned scholar goes on to say:—"The word *samanta* is everywhere defined to mean owner of an adjoining property, and not the right which such an owner has to claim precedence in purchasing his neighbour's property. The word occurs first in Manu (VIII, 258), and there it means 'neighbour,' and most of the other text-writers have since used it invariably in the same sense. The verse of Katyayana might at first sight suggest a different meaning, but the commentators leave us no option in the matter. The verse, literally translated, would mean 'a village is the *samanta* of a village, a field is said to be so of a field, a house is defined to be that of a house, from their being near to each other.' And this suggests the idea that each of the classes of land being reckoned *samanta* to a similar class, there would be no *samanta* in a dissimilar case; that is, the owner of a field or hut could not claim pre-emption for a village, and unless this be admitted, the classification becomes unmeaning. But Vijnanesvara, the author of the *Mitakshara*, commenting on the text of Yajnavalkya, does not accept this obvious and direct meaning. He says, by the words *grama*, &c., men residing thereon are indicated. And all the leading writers of digests accept this meaning [787] ing. Under these circumstances, it would be hazardous in a question of positive law to accept any other meaning. The practice of resorting to figures of metonymy is very common among Sanskrit writers, and we cannot urge that the interpretation of Vijnanesvara is a forced one. In so far, therefore, the argument as founded on the word *samanta* may be rejected as untenable. Dr. Monier Williams, in his English Sanskrit Dictionary, has given *prakhyata* as the equivalent of *pre-emption*, but this meaning has not been given in any original Sanskrit work on law. I must therefore reject it, too, as of no value in the decision of the question at issue. The absence, however, of a concrete term to imply pre-emption does not necessarily imply the absence of such a right, and there are indications to the contrary in our law-books. Pre-emption pre-supposes living in joint families, and the desire to exclude strangers from intruding into a family-house or the privacy of a *zenana*. The Hindus felt this desire at an early period, and tried to restrain co-sharers from selling their shares to outsiders; but this device never developed itself into a positive law, and

the latest digest-writer, the author of the *Dayabhaga*, in a manner sets it aside by saying that sales of undivided shares are immoral, but valid in law. In so far, the claim to pre-emption in cases where it is most urgently demanded is entirely abandoned . . . Had there been any authentic law in existence, it would have for certain been cited in some case or other, but there is no record of any such citation. These remarks are certainly not in keeping with the positive rules laid down in the *Maha Nirvana Tantra*, and quoted in the preface to Macnaghten's *Muhammadan Law*; but those rules, not having been recognized by any of our current law-books, cannot be held binding or authentic. It has been nowhere recognized as an authority on law. Nor has it been anywhere quoted in a law digest. Moreover, the *Tantra* is not by any means an ancient work. The belief is, that the most authentic *Tantras* number sixty-four, but the name of the *Maha Nirvana* does not occur among them, and it must therefore be accepted to be of secondary importance, even as a *Tantra*. My idea is, that the administration of law by Kazis during the Muhammadan period gave wide currency to *haq-i-shufa*, and its advantage became so apparent to the Hindus that they attempted to naturalize it by [788] working on its principles in the *Tantra* in question, where an interpolation could easily be effected without any fear of detection. This must have happened three or more centuries ago."

I now quote from another eminent authority, Dr. Jolly of the University of Würzburg, in Germany, who recently acted as the Tagore Professor of Hindu Law at the University of Calcutta. He says:—"The only trace of pre-emption in the Hindu law which I am aware of occurs in a text quoted in the *Mitakshara* and other standard law-books. It is as follows:—'Transfers of landed property are effected by six acts: by consent of fellow-villagers, kinsmen, neighbours, and co-parceners, and by gift of gold and water.' This text indicates clearly the existence in the early period of the Hindu Law of a feeling that a transfer of landed property is not valid unless the neighbours, fellow-villagers, and others who are but remotely concerned with it should have given their consent to its being effected. These persons might therefore be supposed perhaps to have been invested with a right of pre-emption. Whatever notions may have been prevalent on this subject in the early period of Hindu Law, this much is clear, that the compilers of those commentaries and digests of law on which the modern law is based did not approve of any sort of pre-emption. Thus the *Mitakshara*, in dealing with the above text, deprives it entirely of such legal significance as may have once belonged to it. The consent of fellow-villagers, according to the *Mitakshara*, is required for the publicity of the transaction merely; but the contract is not invalid without their consent. The consent of neighbours tends to obviate future disputes concerning boundaries. The consent of kinsmen and co-parceners (*dayada*) is indispensable when they are united in interest with the vendor. If they are separate from him, their consent is useful, because it may obviate any future doubt as to whether they are separated or united, but the want of their consent does not invalidate the transaction. The gift of gold and water serves to ratify the transfer of property—(see Colebrooke's *Mitakshara*, 1, 230—232). This interpretation of the *Mitakshara* may be viewed as an instance of the way in which the Indian commentators used to dispose of obsolete laws. At the same time, it shows clearly that anything approaching to pre-emption was entirely foreign to the ideas of such an eminent authority as [789] Vijnanesvara the author of the *Mitakshara*. Nor is there any other trace of pre-emption in the Hindu law-books. The *Tantras*, generally speaking, have never been recognized as authoritative law-books in any sense of the word.'

Adopting the authority of these eminent Sanskritists, there is no doubt in my mind that the question which Sir WILLIAM MACNAGHTEN regarded as open to doubt is in reality not so, and that there has never been such a right as that of pre-emption recognized by the Hindu Law, though I cannot forget that the rule of that law which prohibits any member of a joint undivided family from selling his share in the joint property without the consent of his co-parceners, aims at a result not dissimilar to that which the Muhammadan Law of pre-emption is intended to achieve. The fact that some of the parties concerned in the present cases are Hindus, need not therefore in itself complicate the question as to the applicability of the Muhammadan Law, nor create any such difficulty as would otherwise have arisen with regard to the question how the rule of pre-emption is to be administered according to justice, equity, and good conscience, in a case where, some parties being Hindus and the other Muhammadans, the law of each provided different rules for the enforcement of the pre-emptive right.

I now turn to the case-law upon the subject. In *Ramrutun Singh v. Chunder Naraen Rai*, 1 S. D. A. Rep., 1, which is the earliest reported case, having been decided in 1792, it was held by the Bengal Sadr Diwani Adawlat, that among the holders of separate shares of an hereditary zamindari, each, according to the Hindu Law, may sell his share to whom he pleases, and the other sharers have no necessary right of pre-emption. And in *Ram Kanhaee Rai v. Bung Chund Bunhoojea*, 3 S. D. A. Rep., 17, decided in 1820, it was held that vicinage and partnership did not confer any right of pre-emption according to the Hindu Law as current in Bengal. A similar view of pre-emption was taken by the Madras Diwani Adawlat in *Kristinen v. Sendalangara*, 3 Morley's Digest, p. 344, decided in 1849. In that case, before judgment was delivered, the Pandits who were at that time consulted as assessors upon points of Hindu Law, gave it as their [790] opinion that no general right of pre-emption existed under that law, and could not be enforced except in cases "where there exists a resolution in a village to the effect that a share-holder in such village should sell his land only to another shareholder of the same village, and if an inhabitant sell his estate to a stranger or to the inhabitant of another village, the other inhabitants of the village where the estate in question is situated, are competent to claim the right of pre-emption of such estate." This, however, only shows that special local custom, when duly adopted, would override the general Hindu Law. These cases leave no doubt in my mind that the Courts have never recognized the rule of pre-emption as a part of the Hindu Law.

The law of pre-emption is essentially a part of Muhammadan jurisprudence. It was introduced into India by Muhammadan Judges who were bound to administer the Muhammadan Law. Under their administration it became, and remained for centuries, the common law of the country, and was applied universally both to Muhammadans and Hindus, because in this respect the Muhammadan Law makes no distinction between persons of different races or creeds. "A Musalman and a Zimmee being equally affected by principles on which *shafa* or right of pre-emption is established, and equally concerned in its operation, are therefore on an equal footing in all cases regarding the privilege of *shafa*." (Hamilton's *Hedaya*, vol. III, p. 592). What was the effect of this? In course of time, pre-emption became adopted by the Hindus as a custom. I may here refer to an official paper printed in the *Revenue Reporter*, vol. V, at p. 150, in which it is said that the rule of pre-emption has been adopted as a custom almost universally throughout these Provinces, even by villages which are purely Hindu. I have already in *Zamir*

Husain v. Darlat Ram, I. L. R., 5 All., 110, and in the recent case of *Sheoratan Kuar v. Mphipal Koer*, *Ante*, p. 258, explained my views as to the manner in which this custom has been adopted by the Hindu community.

Now, there can be no question that the Muhammadan Law of pre-emption must be administered in cases in which all the parties concerned are Muhammadans. The question is, whether it should be administered in cases in which only the vendee is a [791] Hindu. Before expressing my own view of the matter, I think it will be useful to review the case-law on the subject, and to ascertain how it stands at present. The most important of the cases is that of *Sheikh Kudratulla v. Mahini Mohan Shaha*, 4 B. L. R., 134. It was there ruled by a majority of the Judges of the Calcutta High Court (PEACOCK, C.J., and KEMP and MITTER, JJ.), that a Hindu purchaser is not bound by the Muhammadan Law of pre-emption in favour of a Muhammadan co-parcener, nor is he bound by the Muhammadan Law of pre-emption on the ground of vicinage, because the right of pre-emption in a Muhammadan does not depend on any defect of title on the part of his Muhammadan co-parcener to sell except subject to his right of pre-emption, but upon a rule of Muhammadan Law which is not binding on the Court, nor on any purchaser other than a Muhammadan. The minority (NORMAN and MACPHERSON, JJ.), on the other hand, held that whenever a Muhammadan co-sharer or neighbour has a right of pre-emption, when property is sold by his neighbour or co-sharer, also a Musalman, his right is not defeated by the mere fact that the purchaser is a Hindu. The ruling of the majority of the Court was adopted by a Division Bench of this Court in *Moti Chand v. Muhomed Hossein Khan*, N.-W. P. H. C. Rep., 1875, p. 147. These two cases are clear authorities against the opinion which I hold. Upon the converse of the proposition which they laid down, I may refer to a case in which the pre-emptor was a Muhammadan, the vendor a Hindu, and the vendee a Muhammadan. This was the Full Bench case of *Chundo v. Hakeem Alim-ood-deen*, N.-W. P. H. C. Rep., 1874, p. 28, in which it was ruled (SPANKIE, J., dissenting), that the application of Muhammadan Law in a suit for pre-emption between a Muhammadan claimant of pre-emption and a Muhammadan vendee on the basis of that law, is *not* precluded by the fact of the vendor not being a Muhammadan. The rule so laid down was the only one which could be adopted consistently with the principle on which the two last mentioned cases were decided. But it was subsequently and formally over-ruled in the Full Bench case of *Dwarka Das v. Husain Bakhsh*, I. L. R., 1 All., p. 564, in which it was held (STUART, C.J., and PEARSON, J., dissenting) that where the vendor is a Hindu, a suit to enforce a right of pre-emption [792] founded upon Muhammadan Law is not maintainable. In this case, the majority of the Court followed in principle the judgment of COUCH, C.J., in *Poorno Singh v. Hurrychurn Surmah*, 10 B. L. R., 117, where it was held that the right of pre-emption arises from a rule of law by which the owner of the land is bound, and that it is essential that the vendor should be subject to that rule of law.

I have read these cases carefully, and it appears to me impossible to reconcile them. The most important of them are *Sheikh Kudratulla v. Mahini Mohan Shaha*, 4 B. L. R., 134, and *Dwarka Das v. Husain Bakhsh*, I. L. R., 1 All., 564, in which a Full Bench of the Calcutta High Court and a Full Bench of this Court respectively laid down two propositions, one being, so to say, the converse of the other. Bearing in mind the rules of the Muhammadan Law of pre-emption, it seems to me impossible to hold that both of these decisions can be right. I know that, as a matter of pure logic, it does not follow because a proposition is true, that its converse must be true also; and it

is obvious that, as a matter of pure reasoning, if a Muhammadan pre-emptor, cannot enforce pre-emption against a Hindu purchaser, the vendor being a Muhammadan, it does not necessarily follow that a Muhammadan can enforce pre-emption where the vendor is a Hindu and the purchaser a Muhammadan. But the exigencies of the definite rules of the Muhammadan Law of pre-emption happen to be such as to render it essential that the various propositions relating to the subject should be governed by a common principle, and therefore consistent with each other. I may illustrate my meaning by supposing concrete cases.

In all cases of pre-emption there are three parties to be considered, the pre-emptor, the vendor, and the purchaser. And so far as the question now under consideration is concerned, different cases may be imagined by supposing all, or one, or two of these three parties to be Hindus or Muhammadans. The simplest and ordinary case is where *all* the three parties concerned are Muhammadans, and in such circumstances it is obvious, as was indeed admitted by MITTER, J., and the learned Judges who agreed with him in the case of *Sheikh Kudratulla v. Mahim Mohan Shaha*, 4 B. L. R., 134, that the Muhammadan Law would apply,—a proposi-[793]tion which, as a matter of law, though not of logic, necessarily implies a negative answer where *all* the parties to a pre-emptive suit are Hindus. Nor can there be any difficulty in holding that, for similar reasons, the same negative answer must be given in a case in which the pre-emptor being a Muhammadan, both the vendor and the vendee are Hindus; or conversely, where the pre-emptor being a Hindu, both the vendor and vendee are Muhammadans. And to carry the reasoning further, the same negative answer must be given where, both the pre-emptor and the vendor being Hindus, the only party who is Muhammadan is the vendee. Nor would any one maintain that the Muhammadan Law would govern a pre-emptive suit in which the pre-emptor and the vendee are both Hindus, and only the *vendor* is a Muhammadan. Indeed, I am not aware of a single case in which the Muhammadan Law *as such* has been held applicable in any of such circumstances. The reason of the negative answer is that, although the Muhammadan Law of pre-emption makes no distinction of race or creed, that law, from being the common law of the land, applicable alike to Hindus and Muhammadans, has been reduced to the status of being a personal law of the latter, who alone can enforce the rights or incur the obligations created by that personal law. Rights derived from members of that community, whether by Hindus or by other non-Muhammadans would, of course, be governed by the Muhammadan Law, because, as I have already explained the *inception* of the right and not the array of the parties *to the suit* must be the turning point of the decision within the meaning of s. 24 of the Civil Courts Act. But because a Hindu is not under that section subject to the Muhammadan Law of pre-emption, he cannot avail himself of any pre-emptive right which that law creates only in favour of those who are subject to its behests. And the reason is simple. The rights and obligations created by that law, as indeed by every other system with which I am acquainted, must necessarily be reciprocal. Then, if a Hindu cannot as a pre-emptor avail himself of the Muhammadan Law of pre-emption in a case where the *vendor* is a Muhammadan and the *purchaser* is a Hindu, what reason is there for holding that a Muhammadan pre-emptor *can* enforce the pre-emptive right where the *vendor* is a Hindu and the purchaser a Muhammadan? The question was discussed by this Court in the [794] Full Bench case of *Chundo v. Hakeem Alim-ood-deen*, N.-W. P. H. C. Rep., 1874, p. 28, and the majority of the Court gave an *affirmative* answer upon a reasoning which must necessarily lead to the conclusion that an *affirmative* answer should also be

given to the proposition which, as I have just stated, can only be answered in the *negative*. Indeed, the untenability of the proposition, as already pointed out, was not long afterwards enunciated by the majority of the Full Bench of this Court in *Dwarka Das v. Husain Bakhsh*, I. L. R., 1 All., 564, which furnishes an answer in the *negative*, perfectly consistent with my own view,—an answer which gives full effect to an important portion of the reasoning adopted by MITTER, J., in *Sheikh Kudratulla v. Mahini Mohan Shaha*, 4 B. L. R., 134, though it controverts the conclusion at which the learned Judge arrived. He says (p. 147):—"If we decide this case against the Hindu purchaser, and thereby deprive him of a property which has already become his by the law of his country, we must bear in mind that we have already decided that, so far as he is concerned, he will never be able to enforce any right of pre-emption even though a Muhammadan should choose to purchase a part of his family house from one of his co-parceners. So long as this country was under the Muhammadan Government, the right of pre-emption was extended to all classes of persons without any distinction of creed, color or birth, inasmuch as no such distinction was recognized in that respect by the Muhammadan Law, which was in fact the law of the land. Now that the Muhammadan Law has ceased to be the law of the country, it seems to me to be manifestly unjust and inequitable that we should enforce the Muhammadan Law of pre-emption against a Hindu, without giving him the benefit of that law in other cases in which he would like to stand in the position of a pre-emptor."

I have said enough to show that with a great deal of the reasoning upon which this passage proceeds I entirely concur. But I reject the conclusion, because the necessary steps leading to it are based upon what I may respectfully call fallacies as to the rules of the Muhammadan Law of pre-emption. These I shall presently discuss at some length; but I may here make some observations with reference to the illustration given in the passage, [795] namely, the case of a Hindu co-parcener selling his share in his family-house to a Muhammadan. I should unhesitatingly say in such a case that the sale was subject to the incidents of the Hindu Law which governed the rights of the *vender*, that if that law provided a rule of pre-emption, the rule should be enforced against the Muhammadan purchaser, whether his law recognized it or not. In such a case there can be no question of the Muhammadan being deprived of a "property which has already become his by the laws of his country." He bought it subject to the rules which governed it in the hands of his vendor, from whom he has derived his title, and the circumstance that he is not a Hindu will not save him from the incidents of the Hindu Law. Indeed, in the case supposed, as the law stands, the Muhammadan purchaser would no doubt be free from a pre-emptive claim at the instance of his Hindu vendor's co-parceners. But he would be free only because the Hindu Law provides no pre-emptive right. He would, however, be liable to something "worse," by reason of that law which governed the property in the hands of his vendor. The sale might be avoided at the instance of the Hindu co-parcener, if the subject of the sale was a share in joint property. And if it can be shown that property in the hands of a Muhammadan is *in principle* as much subject to the pre-emptive claim of his Muhammadan co-parcener or neighbour as the marital estate in the hands of a Hindu widow, or the share of a member of a Hindu joint family, is subject to its own restrictions or qualifications as to sale, it seems to me that the enforcement of the Muhammadan rule of pre-emption against the Hindu purchaser from a Muhammadan would be anything but "manifestly unjust and inequitable." And once this proposition is established, it will be

obvious that all the exigencies of Mr. Justice MITTER'S reasoning, contained in the passage cited; are satisfied by the *ratio decidendi* in *Dwarka Das v. Husain Bakhsh*, I. L. R., 1 All., 564, wherein the majority of the Full Bench of this Court *declined* to enforce the Muhammadan rule of pre-emption in a case in which the vendor was a Hindu, although the pre-emptor and the purchaser were both Muhammadans. For if the *ratio decidendi* of that ruling is correct, the matter stands thus :—Property in the hands of a Muhammadan *is* subject to the [796] pre-emptive claim of his Muhammadan co-parcener or neighbour; property in the hands of a Hindu *is not* so subject to the Muhammadan rule of pre-emption. The Muhammadan *can* claim the benefit of the law of pre-emption. The Hindu *cannot* claim the benefit of that law. These propositions, which seem to me to be intelligible, consistent, and equitable, would meet all the objections which MITTER, J., contemplated; and, if they are correct, there can be no question of either the Hindu or the Muhammadan being "deprived" of his right by reason of the law of the other. The pre-emptive rights and obligations between Muhammadan co-parceners and neighbours being mutual, the principle of the maxim *qui sentit commodum sentire debet et onus* applies, but it would not apply in the case of a Hindu where no such reciprocity exists. And if the Hindu purchaser is to be affected by the Muhammadan pre-emptive claim, it would be on the principle of a cognate maxim that land passes with its burdens, *terra transit cum onere*, and there would be no violation of the notions of justice, equity, and good conscience.

This, however, begs the whole question, and having already supposed the various cases in which it would arise on account of the difference in religion of the partners in a pre-emptive case, the only case which remains to be conceived is one in which the pre-emptor and the vendor are both Muhammadans, and the only non-Muhammadan among the parties is the vendee. This is the case now before us, and to the question whether the Muhammadan Law of pre-emption is applicable to such a case, my answer is in the affirmative. But because the authority of Sir BARNES PEACOCK and Mr. Justice DWARKA NATH MITTER demands the highest respect from me, as from every one else connected with the administration of justice in British India, I feel myself bound, in differing with them, to explain my reasons fully by reference to original texts of the Muhammadan Law of pre-emption, which I cannot help feeling would have led those eminent Judges to a different conclusion had the texts been accessible in the English language. I make this observation because Sir BARNES PEACOCK at the beginning of his judgment in the celebrated case of *Sheikh Kudratulla v. Mahini Mohan Shaha* [797] 4 B. L. R., 134, used expressions which leave no doubt that, even after the case had been argued before him in the Full Bench, His Lordship was inclined to form an opinion similar to that which I have formed in this case, and that he adopted the opposite view in consequence of the opinion which had been "so forcibly and clearly expressed by Mr. Justice MITTER." And because the judgment of that learned Judge in the most exhaustive and powerful manner presents the opposite view to that which I hold in this case, the best way in which I can justify my own opinion is to examine the reasoning leading to the conclusions which he and the majority of the Court adopted in that case.

Dealing thus with the question now before us, I may remark, in the first place, that I entirely agree with Mr. Justice DWARKA NATH MITTER in holding that the answer to the question depends upon the *nature* of the right of pre-emption under the Muhammadan Law. I also concur generally in the following remarks (p. 140):—"If that right is founded on an antecedent defect in the title of the vendor, that is to say, on a legal disability on his part to sell his property to a stranger, without giving an opportunity to his co-

parceners and neighbours to purchase in the first instance, those co-parceners and neighbours are fully entitled to ask the Hindu purchaser to surrender the property, for although as a Hindu he is not necessarily bound by the Muhammadan Law, he was at any rate bound by the rule of justice, equity, and good conscience, to inquire into the title of his vendor; and that very rule also requires that we should not permit him to retain a property which his vendor had no power to sell. If, on the contrary, it can be shown that there was no such defect in the title of the vendor, or in other words, that he was under no such disability, even under the Muhammadan Law itself, it would follow, as a matter of course, that there was no defect in the title of the purchaser at the time of its creation." Further on he says: "Now, so far as I can Judge of the Muhammadan Law of pre-emption from the materials within my reach, it appears to me perfectly clear that a *right of pre-emption is nothing more than a mere right of repurchase, not from the vendor, but from the vendee*, who is treated for all interests and purposes as the full [798] legal owner of the property which is the subject-matter of that right." In this passage, MITTER, J. referred to the materials upon which he based his conclusion, and he proceeds to quote passages from those materials. On this point I have to say that those materials appear to me to be in several respects inadequate. They are to be found in the *Hedaya*, or rather in the translation of the *Hedaya* made by Mr. Hamilton about a century ago, under the orders of the Governor-General, Warren Hastings. It was not, however, a translation of the original Arabic text, but of a Persian translation. For that work gratitude is due to Mr. Hamilton, but at the same time I am afraid it has been sometimes the source of mistakes by our Courts in the administration of the Muhammadan Law. MITTER, J. says that he is satisfied by certain passages in this work, that the conclusions at which he arrived were consistent with the Muhammadan Law of pre-emption. I need not quote any more passages from the learned judgment, as I purpose to analyse all the main arguments adopted by the majority—PEACOCK, C. J., KEMP and MITTER, JJ. The first proposition which those learned Judges laid down was, that *the right of pre-emption under the Muhammadan Law does not exist, before actual sale*, because, on the one hand, the pre-emptor has no right of prohibiting the sale, and, on the other hand, the vendor is not bound to offer the property for purchase to the pre-emptor before selling it to the stranger; and they held their view to be supported by the circumstance that the pre-emptor cannot *before* such sale relinquish his pre-emptive right, nor could the absence of his consent vitiate the sale. Upon this reasoning they held that a Muhammadan owner of property was subject to no *legal disability* arising out of pre-emption, but was free to sell it regardless of that right. They then proceeded to lay down the *second* main proposition that a sale, in respect of which pre-emption might be claimed, passed full ownership to the vendee, and did not involve "any defect of title," because it could not be regarded as an infringement of a pre-existing pre-emptive right. From this the learned Judges concluded that the right of pre-emption under the Muhammadan Law was "a mere *right of repurchase*, not from the *vendor*, but from the *vendee*," which right could not be enforced by a Muhammadan pre-emptor against a Hindu *vendee*, [799] because the property, even in the hands of the Muhammadan *vendor*, not being subject to the pre-emptive right at the time when the title of the Hindu *vender* was created by the sale, the right could not run with the land, nor follow it in the hands of a stranger not subject to the Muhammadan Law. These are the main conclusions at which the learned Judges arrived, and the rest of their reasoning seeks to support those conclusions by the argument that, under the Muhammadan Law, the right of pre-emption is a right "feeble"

and "defective," because, according to the rules of that law, it can be easily defeated by devices which MITTER, J., designated as "*tricks and artifices*."

I believe in giving this analysis I have exhausted all the arguments which the learned Judges employed in arriving at the view to which I am opposed. But if it can be shown from the original texts of the Muhammadan Law itself that the main propositions upon which the whole argument proceeds are in themselves erroneous, I think I shall have justified my view. First, then, as to the *nature* of the right. I remember the salutary warning of the Roman Jurist Javolenus (whom CREASY, C.J., has quoted in his work on *International Law*), that the task of laying down definitions is not only "the most laborious, but also the most perilous." The exigencies of this case, however, require that I should endeavour to define the right of pre-emption as prescribed by the Muhammadan Law; and I think I am strictly within the authorities of that law when I say that pre-emption is a right which the owner of certain immoveable property possesses, as such, for the quiet enjoyment of that immoveable property, to obtain, in substitution for the buyer, proprietary possession of certain other immoveable property, not his own, on such terms as those on which such latter immoveable property is sold to another person. I could easily support every word of this definition by original Arabic texts of the Muhammadan Law itself, but I will confine myself only to such texts as bear immediately upon the main propositions involved in this case. I may, however, observe that the *nature* of the right, as appears from the definition which I have given, partakes strongly of the nature of an easement,—the "*dominant tenement*" and the "*servient tenement*" of the law of easement being terms extremely analogous to what I may respectively call the "*pre-emptive tene-[800]ment*" and "*pre-emptional tenement*" of the Muhammadan Law of pre-emption. Indeed, the analogy goes further, for I shall presently show that the right of pre-emption, like an easement, exists before the injury to that right can give birth to a cause of action for a suit,—sale in the one case corresponding to the invasion of the easement in the other. In short, I maintain that, under the Muhammadan Law, the rule of pre-emption, proceeding upon a principle analogous to the maxim *sic utere tuo ut alienum non lædas*, creates what I may call a legal servitude running with the land; and the fact that that law has ceased to become the general law of the land cannot alter the *nature* of the servitude, but only render its enforcement dependent upon the religion of the party who claims the servitude and of the party who owns the property subject to that servitude.

Now, the main authority upon which the learned Judges relied for the view that the right of pre-emption does not exist before sale, is a passage in Mr. Hamilton's *Hedaya* to be found at p. 568, vol. III, of his translation. The translation is at its best a very loose one when compared with the original Arabic text, which I shall literally translate here:—
 "Pre-emption becomes obligatory (*i.e.*, enforceable) by a contract of sale, which means after the sale. Not that sale is the cause (of pre-emption), for the cause is conjunction (of the properties) as we have already mentioned. And the reason in the matter is, that pre-emption becomes obligatory when the seller has turned away from (*i.e.*, wishes to get rid of) the ownership of his house, and the sale makes this apparent. Hence, proof of sale is sufficient as against him even to the extent of the pre-emptor taking it (the house) when the seller acknowledges the sale, although the buyer contradicts him." (1) The

(1) الشفعة تجب بعقد البيع معداً بعده لا أنه هو السبب لأن سببها الاتصال علي ما بيناه والوجه فيه أن الشفعة إنما تجب إذا رغب البائع عن ملك الدار والبيع يعرفها ولهذا يكفي بثبوت البيع في حقه حدي يأخذها الشفيع إذا أقر البائع بالبائع وإن كان المشتري يكذب *

meaning to be evolved from the passage is obviously different from the interpretation which can be placed upon Mr. Hamilton's translation, which indeed seems to me to have misled MITTER, J., and the other learned [801] Judges who agreed with him. The Arabic word *tajibo* which occurs in this and other passages, and which Mr. Hamilton translated as "established," really means "becomes obligatory, necessary or enforceable" as a term of law, and I cannot help feeling that if the passage had been accurately translated by Mr. Hamilton, the majority of the Full Bench in *Sheik Kudratulla's* case might possibly have arrived at a very different conclusion. It is unnecessary to quote any more passages from the original Arabic text of the *Hedaya*, which distinctly go to show that the cause or foundation of the right of pre-emption is the conjunction of the pre-emptive tenement with the pre-emptional tenement, that its object is to obviate the inconvenience or disturbance which would arise by the introduction of strangers, that the right exists antecedently to sale, and that sale is a condition precedent, not to the existence of the right, but only to its enforceability. Mr. Hamilton's translation is sufficiently accurate to indicate these conclusions, and I shall therefore pass on to other books as high in authority as the *Hedaya* itself. Here is a short text from the *Durrul-Mukhtar* :— "The cause of pre-emption is the contiguousness of the pre-emptor's property with the purchased property, whether by co-parcenership or vicinage." (1) Again, a more explicit passage is to be found in *Ami*, a commentary upon the *Kanz* :— "The author (of the *Kanz*) says 'by sale,' which must be referred to his expression, 'pre-emption becomes obligatory.' This would indicate that the cause of the obligatoriness of pre-emption is sale, that is the sale of the pre-emptional house, and some have held this very opinion. The correct opinion, however, is that the cause of pre-emption is the conjunction of the properties in a necessary manner, and sale is a condition (of pre-emption). From this it follows that pre-emption becomes enforceable by sale, that is, after its coming into existence." (2) All the different views on the subject enter-[802]tained by Muhammadan jurists, who were only too fond of the mediæval schoolmen's method of arguing such questions, are to be found in *Birjandi*, a well-known commentary on the Muhammadan Law :— "Be it known that the language of the author implies that the cause of the obligatoriness of pre-emption is the conjunction of the pre-emptor's property with the subject of the sale in some way or other, and this is the opinion adopted by the *Mashaikhs* (elders) in general. Khassaf says that pre-emption becomes enforceable by sale, then by demand, and therefore both become the cause: but as to this it may be said that when pre-emption is established by sale, there is no meaning in establishing it a second time by demand. Sheikh Abubakr Razi used to maintain that pre-emption becomes enforceable by sale, the right of taking possession is established by demand, and ownership (of the pre-emptor) is established either by decree or by mutual consent. Sheikh-ul-Islam held that co-partnership, together with sale, constitutes the reason of the enforceability of pre-emption, and it is emphasized by demand, and ownership is established either by decree or by mutual consent,

(1) و سببها اتصال ملك الشفيع بالمشتري شركة ارجوارة (در المختار صفحه ٦٩٧)

(2) قوله بالبيع يتعلق بقوله يجب ان سبب وجوب الشفعة البيع اعمي

بيع الدار المشفوعة هكذا قال بعضهم والصحيح ان السبب هو اتصال الاملاك علي الملزوم والبيع شرط فحيث يكون النقدير يجب الشفعة بعقد البيع اي بعد وجوده (عيني شرع

كنز جلد دوم صفحه ٢٣٨) *

and so it is laid down in the *zakhira*." (1) These texts leave no doubt in my mind that the "cause" or foundation of pre-emption is "conjunction" of the pre-emptor's property with that of the vendor, and, inasmuch as such conjunction existed before the sale, it follows that the pre-emptive right originates antecedently to the sale in respect of which it may be exercised. For example, when two Muhammadans own shares in a house, the share of each may in turn be regarded as dominant or servient to the other for purposes of pre-emption, because the conjunction of the properties of the two owners being a circumstance common to both, alternately entitles the other to claim pre-emption when the proper occasion arises, that [803] is, when either transfers his share by sale. The analogy of a non-apparent easement again suggests itself. It is true, as MITTER, J., says, that neither can prevent the other from selling his share to whomsoever he pleases, because the Muhammadan Law "nowhere recognizes any right of *veto* in the pre-emptor," nor does it impose any "positive legal disability" on the vendor in this respect. This, no doubt, at first sight suggests a distinction in principle between pre-emption and non-apparent easement, such as a right annexed to A's house to prevent B from building on his own land. But the distinction, so far as the question of the origin of right is concerned, is in reality not one of principle, but of detail, arising from the difference in the nature of the occasion demanding the exercise of the right. In the one case, that occasion is sale; in the other, it is building. Now, it is true that in the one case the pre-emptor cannot prevent his co-parcener from selling his property to a stranger, whilst in the case supposed, A could prevent B from building on his land. But the reason of the distinction is not that the right of the one did not exist before the sale, and the right of the other did exist before the building. The reason is this. The object of the non-apparent easement possessed by A is the beneficial enjoyment of his own property, and *definite* infringement of that right is ascertained when B takes any definite action to build upon his land,—a state of things which would be sufficient to afford a cause of action in favour of A, seeking preventive relief or other assertion of his right of easement. But in the case of pre-emption, the *object* of the right is to prevent the intrusion, *not* of all purchasers in general, but only of such as are objectionable from the pre-emptor's point of view. Again, the right (unlike the right of *veto* possessed by members of a joint Hindu family with respect to the sale of his share by any one of them) is not free from definite qualifications, among which the most important is that the pre-emptor complaining of the intrusion of the purchaser should place himself absolutely in the position of the purchaser with reference to the terms of the contract of sale, such as the amount and payment of the price, &c. It is obvious, then, that before a pre-emptor can make up his mind to assert his pre-emptive right, he must, *ex necessitate rei*, know definitely who the purchaser is, and under what terms he has

(1) اعلم ان كلام المصنف مشعر بان سبب وجوب الشفعة هو اتصال ملك الشفيع بالبيع بوجه من الوجوه و الى هذا ذهب عامة المشايخ و ذكر الخصاف ان الشفعة تجب بالبيع تم بالطلب فيكون كلاهما سبباً وفيه انه اذا ثبت بالبيع فلا معنى لثبوتها ثانياً بالطلب و كان الشيخ ابو بكر الرازي يقول الشفعة تجب بالبيع و حق الاخذ يثبت بالطلب و الملك يثبت بالقضاء او بالرضاء و ذكر شيخ الاسلام ان الشركة مع البيع علة لوجوب الشفعة و تأكيدها بالطلب و ثبتت الملك بالقضاء او بالرضاء كذا في الذخيرة (برجندي صفحہ ۲۰۱) *

purchased the property, because it may [804] well be that, on the one hand, he may have no objection to such purchaser, and on the other hand, even if he does object, he may not be in a position to pay the price which the purchaser has paid. No such considerations exist in the case of the right of *easement* which I have supposed by way of illustration. And it follows that before a sale is actually completed, the pre-emptor is not *ex necessitate rei*, in a position to have definite information as to whether the proper occasion has arisen for the exercise of his already existing pre-emptive right. This is the reason why the law gives him no right of vetoing the sale. But the reason falls far short of showing that his right of pre-emption was wholly non-existent at the time of the sale, when the title of the purchaser was created. From what I have already said, it is perfectly clear to me that any action on the part of the pre-emptor before the sale would be premature, whether such action consisted of vetoing or consenting to a sale which has not yet been effected, and of which the terms and the purchaser have not yet been ascertained, in the sense of creating the legal rights and obligations which render a sale an accomplished fact in law. I have already said that, unlike the *veto* possessed by a member of a joint Hindu family, the right of pre-emption does not prohibit sale *in general* regardless of the purchaser, of the amount of the price, and other terms of the contract of sale; and because the right is in its very nature incapable of being asserted or exercised till these matters are definitely ascertained, it follows that a sale, irrespective of the pre-emptor's consent, is not void in law. The pre-emptive right may or may not be asserted or enforced; and it would be absurd to say that that which is only possible should, by a retrospective effect, vitiate that which is certain, namely the sale. This is the manner in which the jurists of the Muhammadan Law have dealt with this point of the rule of pre-emption, and it is upon very similar grounds that they hold the pre-emptor incapable of relinquishing his pre-emptive right in respect of a sale which has not yet taken place. They would say (and there is ample authority for this statement) that the identity of the purchaser, the amount of the price, and other terms of the sale, the certainty of which is essential, not to the *existence*, but to the *exercise* of the pre-emptive right, being still undefined by a legal relation between the vendor and the vendee, the pre-emptor had no [805] means of knowing for certain whether he should or should not give up an ascertained legal right, and therefore the relinquishment of pre-emption before sale is void. Whatever the merits of this reasoning from a jurisprudential point of view may be, I confess I fail to see how it supports the view that the right of pre-emption does not exist as a restriction or qualification of the right of sale possessed by the owner of property subject to pre-emption. It is indeed not an absolutely unqualified disability, for it does not absolutely prohibit sale without the consent of the pre-emptor. But that it amounts to a qualified disability, distinctly operating in derogation of the vendor's absolute right to sell the property, and thus affects his title, which would otherwise amount to absolute dominion, cannot, in my opinion, be doubted. That the results of such restrictions or qualifications are dependent for their enforcement upon the occurrence of the actual sale, is a circumstance which, in my opinion, does not affect the question relating to the inception of the right of pre-emption.

But, in opposition to this view, MITTER, J., and the learned Judges who concurred with him, relied upon the argument that "there is nothing whatever in the Mahammadan Law which imposes upon any one the obligation of making the first offer to his neighbour, nor is there anything to show that the right of pre-emption is based upon any such obligation,

the non-fulfilment of which would prevent the stranger from acquiring a complete and valid title to the property by virtue of his purchase." In dealing with this argument, I must, in the first place, observe that one of the greatest difficulties in the administration of the Muhammadan Law, as indeed of all ancient systems, lies in distinguishing *moral* from *legal* obligations. The Muhammadan Law having been evolved from the Kuran and the sayings of the Prophet, naturally presents such difficulties, and the question whether the vendor is bound to offer the property to his co-parcener before selling it to a stranger, is an illustration of what I mean,—a difficulty which was felt at an early stage by the Muhammadan jurists themselves. The following is a text from *Aini*, a commentary upon the *Kanz*, a well-known book on Muhammadan jurisprudence:—"A co-parcener is one whose share has not been divided in the property sold. This is universally agreed upon, because it has been relat-[806]ed by Jahir that the Prophet decreed pre-emption in respect of every joint undivided property, whether a grove or a house, saying:—"It is *not lawful* for any one to sell till he has informed his co-parcener who may take or leave it as he wishes; and if he has sold without such information, the co-parcener has a preferential right to the share." This tradition has been related by Mushini, Abu David, and Aukissai." (1) Two other traditions to the same effect are also to be found in *Muslim*, which is one of the books of acknowledged authority on *Hadis* or traditions. I will, however, quote only one of them, as it brings into prominence the difficulty with which I am now dealing:—"It is related by Jahir that the Prophet said:—"Pre-emption exists in all joint properties, whether land, or house, or grove. It is *not proper* for him (the owner) to sell till he has offered it to his co-parcener, who may take or reject it; and if the vendor fails to do this, his co-parcener has the preferential right to it until he is informed." (2) Both these traditions have much the same effect, but in the first of them the Arabic word *la yahillo* occurs, which I have rendered by "*not lawful*;" whilst in the second the phrase employed is *la yashih*, which I have translated as meaning "*not proper*." The importance which the Muhammadan jurists, in laying down legal principles, attached to the exact words in the sayings of the Prophet, at once gave rise to the question whether the injunction as to the vendor's giving notice to the pre-emptor and offering to him the property for purchase, was a mere *moral* behest or created a legal obligation. I have already shown how Muhammadan jurists dealt with the right of pre-emption, and the method of arguing which they adopted had no doubt considerable influence [807] in the interpretation of these two traditions. The difference of phraseology which I have already indicated, enabled them to put such an interpretation as would render the traditions consistent with the rule that the absence of the pre-emptor's consent does not vitiate the sale—the rule which had been unanimously adopted by the jurists. This is best shown by *Nawawi*, a celebrated commentary on *Muslim*, in which these traditions occur. The author

(1) الشريك الذي لم يقاسم في نفس المبيع هذا لا لا جماع لما روى جابر رضي الله عنه

ان النبي صلى الله عليه وسلم قضي بالشفعة في كل شراكة لم تقسم ربعاً واحياً لا يباح له ان يبيع حتى يؤذن شريكه فان شاء اخذ وان شاء ترك وان باعه ولم يؤذن به فهو احق به رواه مسلم و ابو داود والنسائي (عيني شرح كذا جلد دوم صفحہ ۲۳۷) *

(2) عن جابر يقول قال رسول الله صلى الله عليه وسلم الشفعة في كل شريك

في ارض او ربع او حائط لا يصلح ان يبيع حذي يعرض علي شريكه فياخذ او يدعه فان ابى فشريكه احق به حتى يؤذنه (مسلم جلد ۲ صفحہ ۳۲) *

explains the traditions in the following manner:—The saying of the Prophet to the effect that it is not for him (the vendor) to sell until he has apprised his co-parcener is, in the opinion of our doctors, taken to refer to the *moral* propriety of giving notice and to the objectionableness of sale before such notice—an objectionableness which arises from impropriety. It does not, however, mean that such sale is "*absolutely prohibited*," and this is the manner in which they have interpreted the *Hadis* (sayings of the Prophet), because it may be rightly affirmed of that which is morally objectionable, that it is not lawful, and thus the expression "lawful" comes to mean permissible, which implies that both sides (positive and negative) are on an equal footing, whilst that which is '*morally objectionable*' cannot be said to be permissible, both sides of which are equal, but, on the contrary, the '*morally objectionable*' is that the rejection of which prevails (over its adoption)" (1)

It is not necessary to pursue any further the syllogistic manner in which such questions were dealt with by Muhammadan jurists. I may, however, say that the ultimate reason which prevented them from interpreting these traditions in the sense of creating a *legal* obligation imposed upon the vendor was, that the language of the tradition being capable of two interpretations, they adopted the more lenient one, acting upon the presumption that a *legal* obligation does not exist till expressly provided, and [808] that all contracts are lawful unless expressly prohibited by law. The law, therefore, as it stands, does not oblige the vendor to give notice of the projected sale to the pre-emptor, nor does it vitiate a sale executed without his permission. I am not at liberty to interpret the sayings of the Prophet in a sense other than that adopted by the recognized authorities on Muhammadan jurisprudence. But it is perfectly clear from these traditions that the very conception of pre-emption in Muhammadan Law necessarily involves the existence of the right before the sale in respect of which it may be exercised. All that the interpretation of the Muhammadan jurists goes to show is, that the sale is not vitiated by the absence of the pre-emptor's consent—an interpretation which, whilst it is perfectly consistent with the rest of their method of reasoning in dealing with pre-emption, again falls short of establishing the proposition that the *right* is not *antecedent* in existence to the sale complained of by the pre-emptors.

I have now to deal with the argument that the right of pre-emption under the Muhammadan Law is "*a mere right of re-purchase*, not from the *vendor*, but from the *vendee*." I trust what I have already said goes far to show that this conclusion cannot be right. If by the expression "*re-purchase*" is meant the institution of a new contract of sale other than that entered into by the vendor and the vendee, the hypothesis becomes obviously erroneous, because the entire argument, that the vendor of a pre-emptional tenement conveys an *absolute* ownership to the vendee unhampered by any defect of title arising out of pre-emption, applies as much to a Muhammadan as to a Hindu vendee. And if the right of pre-emption is only a right of re-purchase, and if the right is to be enforced, *not as a rule of law*, but only by reason of the rule of justice,

(1) واما قوله صلي الله عليه وسلم فليس له ان يبيع حتي يؤذن شريكه فهو
محمول عدد اصحابنا علي الذنب الي اعلامه و كراهية بيعه قبل اعلامه كراهة تنزيه
وليس بحرام و يتاولون الحديث علي هذا اذ يصدق علي المكروه انه ليس بحلال و
يكون الحلال بمعني المباح وهو مستوي الطرفين والمكروه ليس بمباح مستوي
الطرفين بل هو راجع الترك (نووي شرح مسلم جلد ٢ صفحه ٣٢) *

equity, and good conscience, I fail to see, even in a case where all the parties are Muhammadans, where the equity lies in forcing a man to sell that which is *absolutely* his own to a man who had no right in connection with it at the time when the title of the *vendee* was created. Equity is higher than the considerations of race and creed, nor will it allow parties to impose upon each other rules not sanctioned by the *law*. And if its rules prohibit a Hindu purchaser from being deprived of property of which he is the absolute owner, that same rule should, by ordinary legal analogy, benefit also a Muhammadan purchaser [809] of property whose title is, *ex hypothesi*, as *absolute* and as free from defect as that of the Hindu vendee. Further, if pre-emption is only a right of "*re-purchase*" from the vendee who, *ex hypothesi*, has, under the sale, derived an *absolute* title, unhampered by the pre-emptive right, there is no reason which would prevent the vendee from insisting that the terms of the new sale should be other than those under which he himself purchased. That this would be the necessary consequence of the hypothesis, seems to me to be as clear as the proposition that every *absolute* owner is at full liberty to sell or not to sell his property, and that if he chooses to sell it, he can make his own terms as to the bargain of sale. That such a result is not only not warranted by the Muhammadan Law of pre-emption, but would positively strike at the very root of the right itself, seems to me to be too obvious to require any explanation. But the Muhammadan Law of pre-emption involves no such anomalous inconsistencies of reasoning, because the right of pre-emption is not a right of "*re-purchase*" either from the *vendor* or from the *vendee*, involving any new contract of sale; but it is simply a right of *substitution*, entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. It is, in effect, as if in a sale-deed the vendee's name were rubbed out and the pre-emptor's name inserted in its place. Otherwise, because every sale of a pre-emptional tenement renders the right of pre-emption enforceable in respect thereto, every successful pre-emptor obtaining possession of the property, by the so-called "*re-purchase*" from the vendee, would be subject to another pre-emptive claim, dating, not from the original sale, but from such "*re-purchase*"—a state of things most easily conceivable where the new claimant is a pre-emptor of a higher degree than the pre-emptor who has already succeeded. The result would be that pre-emptive litigation could never end.

I could go on at much greater length to show that the hypothesis that pre-emption is only "a right of *re-purchase* from the vendee," would involve even greater anomalies inconsistent with the fundamental rules of the right of pre-emption. But I need not pursue the argument any further, because it seems to me [810] that the general principles of jurisprudence suggest the same conclusions as those at which I have arrived. I take it as a fundamental principle that no state of things can give rise to cause of action, such as can be sued upon in a Court of justice, unless there is a right and an infringement of that right—the right being *necessarily antecedent* to the injury. My conceptions of jurisprudence prevent me from conceiving any kind of right of which both the *inception* and the *infringement* depend upon one and the same incident. And it would be absurd to conceive a right of which the infringement takes place *before* the *inception* of the right itself. And if I am right so far, how would the right of pre-emption stand these tests, if it be taken not to exist before the sale in respect of which it is to be exercised? The *injury* to the right is the *intrusion* of a stranger under a sale, and the whole *object* of the right is to prevent such intrusion. And how could such intrusion be legally prevented if the right did not exist before the intrusion? Similar difficulties will arise if it

be assumed that the point of the inception of the pre-emptive right is not *sale* but "*talab*," that is, demand of pre-emption by the pre-emptor. There can be no legal demand of a right which does not exist, nor could refusal by the vendee to surrender the pre-emptional property constitute any legal injury where no legal right existed.

But apart from the reasoning suggested by the analogy of jurisprudential conceptions, it seems to me that, if it is once conceded that the sole object of the pre-emptive right is to prevent the intrusion of strangers objectionable to the pre-emptor, it follows, I should say as a matter of "common sense," that if a Muhammadan pre-emptor can by the exercise of his pre-emptive right prevent the intrusion of another Muhammadan, he should, *a fortiori*, be able to do so in the case of a purchaser who belongs to a different race and creed, for, *ceteris paribus*, it may be taken that a non-Muhammadan purchaser under such conditions would be more objectionable to the Muhammadan pre-emptor, and would demand a more strenuous exercise of the pre-emptive right.

Besides these arguments there is much on the subject of conflict of laws in the judgments delivered by NORMAN and MACPHERSON, J.J., in *Sheikh Kudratulla v. Mahini Mohan Shaha*, 4 B. L. R., 134, which [811] I might adopt in support of my view. But it is unnecessary to repeat the arguments which those learned Judges have already expressed with such force and lucidity. It, however, remains for me to deal with the reasoning adopted by MITTER J., as to pre-emption being a right "feeble and defective," because, on the one hand, it is lost if not immediately asserted, and, on the other hand, it can be defeated by "tricks and artifices." If "*feeble and defective*" only means that the right of pre-emptor is *transitory* in the sense of requiring immediate assertion, I can understand the phrase. But I do not understand how the transitory character of the right can affect the question whether or not it should be enforced against a Muhammadan vendee and not against a non-Muhammadan. So far as this particular point is concerned, it seems enough to say that, if the right is legally enforceable against the one, it should be enforceable against the other. On the other hand, in one sense, full ownership itself may be called transitory, because if *A*, being the owner of *X*, allows *B* to sell it to *C*, *A* being present at the time of the sale, his mission to assert his title to *X* would, in effect, by the doctrine of estoppel, defeat his right in *X*. Pre-emption is feeble in a sense not dissimilar in principle to the illustration which I have given. The object of the Muhammadan Law in rendering the immediate demand of pre-emption a condition precedent to the exercise of the right, is to render it obligatory upon the pre-emptor to give the earliest possible notice to the vendee not to rely upon his purchase for making improvements, &c., or otherwise dealing with the purchased property. The rule is a very salutary restriction of right, which might otherwise be very capriciously enforced under a system of law which recognized no rule as to the limitation period for enforcing claims. Indeed, the rule rests much upon the same considerations as the doctrine of "*notice*" and the principle of acquiescence amounting to estoppel in equity jurisprudence. But such restrictions do not derogate from the right of pre-emption any more than another equitable rule of the same right, that the pre-emptor, in enforcing his right, cannot break up the bargain of sale by pre-empting only a portion of the property sold to one purchaser. The law of pre-emption is full of equitable considerations of this nature, but it is scarcely necessary to pursue the argument any further.

[812] This brings me to the last point. Considerable portions of the judgments in *Sheikh Kudratulla's* case are devoted to showing that the right of pre-emption can be defeated by what MITTER, J., calls "tricks and artifices," which PEACOCK, C. J., held are recognized and allowed by Muhammadan Law;

and from this it is inferred (though I confess, with due respect, I am not able to follow the reasoning) that the right is not enforceable against a Hindu purchaser, though enforceable against a Muhammadan. If any question of the "tricks and artifices" referred to were involved in this case, I should have a good deal to say on the subject, but here I need only say once more that in dealing with questions of Muhammadan Law, the distinction between moral behests and legal duties on the one hand, and between rules of substantive law and procedure on the other, must always be borne in mind. And I think I may safely say that most if not all the notions about the efficacy of these "tricks and devices" arise from overlooking these distinctions. PEACOCK, C.J., says (p. 173):—"The Muhammadan Law, as has been already shown by Mr. Justice KEMP and Mr. Justice MITTER, admits of all kinds of devices for the purpose of frustrating its own law. If there is a *bonâ fide* sale between a Muhammadan vendor and a Hindu purchaser, and they come forward and declare that which is not true, and say that it was not a sale intended to operate, but was a fictitious device, their words must be accepted according to the Muhammadan Law, and the truth of the assertion cannot be disputed. They would be bound by the untruth which the vendor and the purchaser declare for the purpose of evading the right of pre-emption. Can we say that if they will state an untruth, the Hindu shall remain in possession of the property which he has purchased; but if they will not declare that which is untrue, there is an equity to take the property away from the purchaser." The argument is consistent with certain passages in the text-books, which His Lordship went on to cite. But without attempting to explain the real reasons upon which those passages proceed, the argument may be fully answered by saying that in the case supposed, the question whether there has been a *bonâ fide* sale or not is not a question of substantive law, but a mere question of fact, to be ascertained by the rules of that department of procedure which consists [813] of the rules of evidence; and that we are no more bound to follow the Muhammadan Law of evidence in a pre-emptive suit than in a suit involving questions of succession or inheritance. The Muhammadan law of evidence, like other old systems, contains numerous rules which arose either from imperfect notions as to the distinction between the *weight* and *admissibility* of evidence, or from the rules of procedure, or from the political exigencies of the Muhammadan people, when those rules were formulated. The rule whether upon any particular point in a pre-emptive suit the statement of the pre-emptor, the vendor or the vendee is to be believed, is an illustration of the former part of this proposition, and the latter part may be exemplified by the disability imposed upon non-Muhammadans to give evidence against a Muhammadan in a Court of Justice, the reason being stated to be "that they have no power or authority over the Moslems, and are suspected of inventing falsehoods against them." But the Muhammadan law of evidence is not the law of British India, and, whatever force the argument of PEACOCK, C.J., might have had in 1869, when his judgment was delivered, it can have no application now. For if it was intended as an enunciation of the Muhammadan law of evidence, since that time a Code of Evidence has been passed providing its own rules for ascertaining facts, and s. 2 of the enactment (Act I of 1872) has abolished all other rules of evidence. Similarly, it will be found upon close examination of the other devices to defeat pre-emption, referred to in the *Hedaya* and in *Baillie's Digest*, on which the learned Judges of the Calcutta Court relied, that they owe their origin to extremely technical rules of the Muhammadan Law of contract, procedure or evidence, in none of which departments of law are we bound by these technicalities. The Muhammadan substantive law, in

matters governed by it, cannot, of course, be administered without ascertaining the facts to which it is to be applied. But how those facts are to be ascertained, is a matter relating to the remedy, *ad litem ordinationem*, for which the Courts in British India have their own rules. And there is in principle no more reason for saying that in a pre-emptive suit the questions, whether a valid *bona fide* sale has taken place or not, and if so, for what price, are governed by the Muhammadan Law, than there would be for saying that when a [814] decree is passed under the Muhammadan Law for dower or inheritance, the process for executing that decree is to be regulated by the rules of procedure provided by that law. And, speaking generally, I may say that if it is once conceded that the technicalities of the Muhammadan Law of contract, procedure or evidence, are not binding upon us, it will be found that no "tricks and artifices" can defeat the pre-emptive right in our Courts. Such devices are held to be "*abominable*" even where the technicalities of Muhammadan adjective law might give them some plausible effect; and this is the prevalent doctrine, notwithstanding the opinion of Kazi Abu Yusuf, to be found in the passage from the *Heāaya*, to which KEMP, J., has referred. The opinion of Imam Muhammad, given in that same passage, condemns all devices; but there being no such questions in this case, I need not discuss the matter any further. But I wish to add that I have considered it my duty to deal with this reference at such elaborate length, not only out of respect for the eminent authorities with whom I have ventured to differ in arriving at my conclusions, but also because the rapid rise in the value of landed property in British India has gone far to extend the exercise of the pre-emptive right and to enhance its importance by confirming it as an incident of the proprietary tenure. Moreover, the right, though it no doubt operates as a restriction of the principle of free sale, and thus tends to diminish the market-value of property, must have enough to recommend itself, for even in some of the most civilized parts of Germany, a similar right (*retract-recht*) is still maintained, either as a custom or as a rule of law. And if such is the case in a country where distinctions of race, caste, or creed do not prevail, it seems to me that the right must not be lightly dealt with in a country like India, where the population presents quite the opposite state of things, and where the intrusion of a stranger as a co-sharer must not only give rise to inconvenience, but disturb domestic comfort, if not, as in some cases, lead to breach of the public peace.

My answer to this reference is in the affirmative.

Oldfield, J.—The answer should be in the affirmative. I concur in the opinion expressed in the case in *Chundo v. Hakeem* [815] *Alim-ood-deen*, N.-W. P. H. C. Rep., 1874, p. 28, by the majority of this Court, that by the provisions of s. 24, Act VI of 1871, the Court is not bound to administer the Muhammadan Law in claims of pre-emption, but on grounds of equity that law has always been held to bind Muhammadans, and has always been administered as between them in claims for pre-emption. Muhammadans therefore, as between themselves, hold property subject to the rules of Muhammadan Law; and it would not be equitable that persons who are not Muhammadans, but who have dealt with Muhammadans, in respect of property, knowing perfectly well the conditions and obligations under which the property is held, should, merely by reason that they are not themselves subject to Muhammadan Law, be permitted to evade those conditions and obligations. I wish to add that although I was a party to *Moti Chand v. Mahomed Hossein Khan*, N.-W. P. H. C. Rep., 1875, p. 147, my decision followed the Full Bench ruling in *Chundo v. Hakeem Alim-ood-deen*, N.-W. P. H. C. Rep., 1874, p. 28, by which I felt myself bound.

Brodhurst, J., concurred.

Petheram, C. J.—My answer to the question referred to the Full Bench is in the affirmative. There appears to be no doubt as to what the rule of Muhammadan Law is. It imposes an obligation upon a Muhammadan owner of property, in the neighbourhood of which other Muhammadans have property, or in respect of which other Muhammadans have a share, to offer it to his neighbours or his partners before he can sell it to a stranger. This is an incident of his property, as the text-books of the Muhammadan Law show, and, for the reasons stated by my brother **OLDFIELD**, I think that it is equitable to apply the rule to cases like the present, in which the purchaser is a Hindu.

Duthoit, J., concurred.

NOTES.

[LAW OF PRE-EMPTION :—

1. (a) According to *Shia* law, there is no right of pre-emption if there are more than two co-sharers :—(1888) 12 All., 229.

(b) In (1899) 22 All., 102, it was held that a *Shia* cannot claim the right of pre-emption as a neighbour, when both the vendor and vendee are *Sunnis*.

ii. Law of pre-emption was applied when the vendee was a Hindu :—(1908) 30 All., 272.

iii. As regards the General law on the Subject, see the exhaustive judgment of **BRET, J.** in (1908) 35 Cal., 575.

See also (1897) 19 All., 466 ; (1889) 12 All., 234 ; (1887) 9 All., 513 ; (1886) 8 All., 502 ; (1901) 24 Mad., 513 (*Musha*) ; 30 Mad., 519.]

[7 All. 816]

CIVIL JURISDICTION.

The 13th May, 1885.

PRESENT :

MR. JUSTICE STRAIGHT AND MR. JUSTICE BRODHURST.

Ramphul.... Plaintiff

versus

Durga and others.....Defendants.*

Civil Procedure Code, s. 617—High Court, reference to—

" Final " decree or order.

A Munsif, being of opinion that he had no jurisdiction to entertain a particular suit, made an order returning the plaint for presentation to the proper [816] Court. An appeal was preferred under s. 588 of the Civil Procedure Code, to the District Judge, who, entertaining doubts upon the question of jurisdiction, referred the matter to the High Court, under s. 617.

Held that, inasmuch as the order of the Munsif was not a final decree in the suit, and any order of the Judge in appeal disposing of the plea of jurisdiction would not amount to a " final " decree within the meaning of s. 617 of the Civil Procedure Code, the High Court had not jurisdiction to entertain the reference.

THE facts of this case are sufficiently stated for the purposes of this report, in the judgment of **STRAIGHT, J.**

The Senior Government Pleader (*Lala Juala Prasad*), for the Plaintiff.

Munshi *Kashi Prasad*, for the Defendants.

* Reference No. 79 of 1885, under s. 617 of the Civil Procedure Code, by C. Donovan, Esq., Offg. District Judge of Benares, on the 23rd March 1885.

Straight, J.—This is a reference by the Judge of Benares, made under the following circumstances:—

A suit was instituted in the Court of the Munsif of Benares. It is not necessary to describe in detail the nature of the suit, but it is sufficient to say that it related to immoveable property. Upon the statement of the plaintiff's case, as disclosed in the plaint, the Munsif was of opinion that he had no jurisdiction to entertain the suit, and he made an order returning the plaint for presentation to the proper Court.

Under the Statute, that order of the Munsif was not a decree, but was an order appealable as an order under s. 588, Civil Procedure Code; and under that section an appeal was preferred to the Judge. The Judge, entertaining doubts upon the question of jurisdiction, has made the reference now before us under s. 617 of the Code.

This Court has jurisdiction to entertain the reference only when there is a suit or appeal before the Court making the reference in which the decree or order by the Court entertaining it is final.

In this case the order of the Munsif was not a final decree in the suit; nor would any order of the Judge in appeal passed at the present stage, disposing of the plea of jurisdiction, amount to a *final* decree within the meaning of s. 617, Civil Procedure Code. In other words, there would be no decree. Whether the Judge reversed or upheld the Munsif, a final decree could only be passed [817] by the Court subsequently disposing of the suit upon the merits, and the decision of such Court would not only be open to appeal to the Judge, but to a second appeal to this Court.

Under these circumstances, I do not think that the case falls within s. 617 of the Code, and the record must be returned to the Judge, and he must dispose of the appeal as to him seems fit. Any costs that may have been incurred by the parties owing to this reference will abide the result of the cause.

Brodhurst, J.—I concur.

[7 All. 817]

APPELLATE CIVIL.

The 16th May, 1885.

PRESENT:

MR. JUSTICE STRAIGHT AND MR. JUSTICE BRODHURST.

Imdad Ali Khan.....Opposite Party

versus

The Collector of Farakhabad.....Applicant.*

Act X of 1870 (Land Acquisition Act), s. 15—Reference by Collector to District Court—Land claimed by Collector on behalf of Government or Municipality.

The scope and object of the Land Acquisition Act (X of 1870) is to provide a speedy method for deciding the amount of the compensation payable by the Collector, when such amount is disputed, and the person or persons to whom it is payable.

Section 15† of the Land Acquisition Act contemplates a reference when the question of the title to the land arises between the claimants who appear in response to the notice issued under s. 9, and who set up conflicting claims one against another as to the land required, which the District Judge as between such persons can determine.

* First Appeal No. 168 of 1884, from an order of C. J. Daniell, Esq., District Judge of Farakhabad, dated the 23rd August 1884.

The Collector has no power to make a reference to the District Judge under s. 15 in cases in which he claims the land in question on behalf of Government or the Municipality, and denies the title of other claimants, and the District Judge has no jurisdiction to entertain or determine such reference.

THE facts of this case are sufficiently stated for the purposes of this report, in the judgment of STRAIGHT, J.

Mr. *Amir-ud-din*, for the Appellant.

The Senior Government Pleader (*Lala Juala Prasad*), for the Respondent.

Straight, J.—This is an appeal from a decision of the Judge of Farakhabad, dated the 15th August 1884, and by way of precaution, a petition for revision was also filed by the appellant. The order impeached professes to have been passed under the provisions of the Land Acquisition Act of 1870.

Now, I find that the Judge, at the commencement of the judgment, observes as follows:—

"This claim is contested by three persons, the Collector, representing the Municipality of Farakhabad, Brindaban, and Chotey Khan. It is a claim to a strip of land, seven biswas in area, lying immediately with the *jesmai gate* of the city, next to a plot of land No. 1793, which is said to be owned by Chotey Khan."

I gather from this passage in the Judge's decision that he regarded the matter much in the light of a civil suit for land in which three different parties were asserting a title to such land, and this question of title to the property was what he had to determine.

The first plea which has been raised before us is, that the Judge had no jurisdiction to take cognizance of such a dispute on a reference from the Collector of Farakhabad under the Land Acquisition Act, as no such reference could properly be made, when the Collector himself claimed the land as belonging to Government. I think that this plea is a sound one, and must prevail. The action of the Collector in making this reference was apparently founded upon a misapprehension of the object and intention of the Land Acquisition Act of 1870, which contemplate the provisions of a summary method of determining the compensation to be paid for land required for certain defined purposes, and the Act points out the mode in which the same is to be acquired, and the formalities necessary.

By s. 15 it is enacted that, if upon inquiry before the Collector, any question respecting the title to the land, or any rights thereto, or interests thereon, arise between or among two or more persons making conflicting claims in respect thereof, the Collector is authorized to refer the matter to the determination of the Judge.

This section clearly contemplates a reference when the question of the title to the land arises between the claimants who appear in [819] response to the notice issued under s. 9 of the Act, and who set up conflicting claims one against another as to the land required, which the District Judge as between such persons can determine. The scope and object of the Act as I have already observed, was to provide a speedy method for deciding the amount of the compensation payable by the Collector, when such amount is disputed, and the person or persons to whom it is payable.

The special jurisdiction of the Judge for this purpose is intelligible enough ; but I do not think it was ever intended to be extended to a case in which the Collector claims the land on behalf of the Government or the Municipality, and denies the title of other claimants to the land. Such a position would be inconsistent with the applicability of the Act, for it denies the right of any person to compensation. It seems a contradiction in terms to speak of the

Collector as seeking acquisition of land, when he asserts that the land is his own, and that no other person has any interest in it.

The Judge has treated this case as one between three persons making conflicting claims to the land, and he has determined that it belongs to the Collector. In other words, he has, under colour of the Land Acquisition Act, tried a triangular civil suit for declaration of proprietary title to land; and in my opinion he had no authority whatever to do so. Looking to all the circumstances of the case, it is clear to my mind that the Collector had no power to make the reference, and consequently the Judge had no jurisdiction to entertain and determine it. The proceedings of the Judge being without jurisdiction, we have no other alternative but to decree the appeal with costs, and set them and his order aside.

Brodhurst, J.—For the reasons recorded by my brother STRAIGHT, I am of opinion that the proceedings of the Judge are without jurisdiction, and must be set aside, and the appeal decreed with costs.

Appeal allowed.

NOTES.

[See also (1897) 19 All., 339 as regards the restriction on the powers of the Collector in Land Acquisition cases.

These two cases were distinguished in (1906) 4 C.L.J., 256 as regards the *quantum* of interest acquired under the Land Acquisition Act.

See also (1904) 5 C. L. J., 301.]

[820] *The 1st June, 1885.*

PRESENT:

MR. JUSTICE STRAIGHT AND MR. JUSTICE TYRRELL.

Gurdial Mal.....Plaintiff

versus

Jauhri Mal and others.....Defendants.*

Mortgage—Agreement, for fresh consideration, between mortgagee and third person for release of property from mortgage—Release not required to be in writing and registered.

The mortgagee of immoveable property under a hypothecation bond, entered into an agreement with one who was not a party to his mortgage, to release part of the property from liability under his mortgage. This agreement was not in writing and registered. The mortgagee subsequently sought to enforce the hypothecation against the whole of the mortgaged property.

Held, that the agreement, being a new contract for a fresh consideration between persons who were not parties to the mortgage, was not, as between the parties to the mortgage, a release which the law required to be in writing and registered.

Held, also, that the party to the agreement with the mortgagee might have come into Court as a plaintiff to enforce the same, and that it was equally competent for him to plead it in avoidance of the mortgagee's claim to bring to sale the property referred to therein. *Nash v. Armstrong*, 30 L. J., C. P., 286, referred to.

THE plaintiff in this case, Gurdial Mal, sued for the recovery of a sum of money, principal and interest, due on a hypothecation bond executed in his favour by defendants Nos. 1 to 6, by enforcement of lien against the mortgaged property. This property comprised, among other things, a ten biswas share in a village called Etawa, an eight biswas share in a village called Muzaffarpur

* First Appeal No. 47 of 1884, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 26th January 1884.

Kaisho, and a mango grove in the town of Bijnor. The plaintiff alleged that, subsequent to the execution of his bond, the shares and the grove before-mentioned were mortgaged to the defendants Nos. 7 and 8; that in 1873 these defendants paid him the sum of Rs. 700 on account of his bond; that, without his knowledge, they made an indorsement in Persian upon the bond, to the effect that Rs 700 had been paid in consideration of the release of the share in Muzaffarpur Kaisho and of the grove from the charge held by him thereon: that, in consequence of his ignorance of Persian, he did not, till 1883, become aware of the real character of the indorsement; and that he had made no release of the property as alleged. The allegations of defendants Nos. 1 to 6 are not material to the purposes of this report. The defendant No. 7, Jauhri Mal, alleged that he had purchased the share in Etawa in satisfaction of a lien which was prior to that of the plaintiff; that the share [821] in Muzaffarpur Kaisho and the grove in Bijnor were mortgaged to him in 1873, on the condition that he should pay Rs. 700 to the plaintiff in order to exempt such property from the plaintiff's mortgage; that, in consideration of such payment, the said property had been released by the plaintiff; and that the indorsement by which this release had been effected was genuine, and was made by the plaintiff himself. The indorsement was in the following terms:—"Received on account of the release of an eight biswa share in Muzaffarpur Kaisho in pargana Bijnor, and a mango grove in the town of Bijnor, (the amount) through Jauhri Mal, purchaser of the aforesaid property." The defendant No. 8, Pertab Singh, alleged that he had purchased a share in Muzaffarpur Kaisho at a date prior to that of the plaintiff's bond, and that this share was therefore not subject to the plaintiff's lien.

The Court of First Instance (Subordinate Judge of Moradabad) found that the truth of the allegations of the defendant Jauhri Mal was established by the evidence; and accordingly, while decreeing the claim as against the defendants Nos. 1 to 6, exempted from the decree the shares in Etawa and Muzaffarpur Kaisho and the grove in Bijnor.

The plaintiff appealed to the High Court, contending, *inter alia*, that "under the provisions of the Stamp and Registration Acts, the indorsement on the back of the bond, which is the basis of the suit, is invalid, and cannot operate to release any property from the lien created by the bond."

Pandits *Ajudhia Nath* and *Bishambar Nath*, for the Appellant.

Babus *Dwarka Nath Banarji* and *Ratan Chand*, for the Respondents.

Straight and Tyrrell, JJ.—In this appeal there are only two questions before us. The first of these relates to the village of Etawa. With regard to this village, we concur with the findings of the Subordinate Judge, and approve the views expressed by him. Upon the remaining question, we are first of all of opinion that the evidence satisfactorily proves that Jauhri Mal paid the Rs. 700 to the plaintiff on the 6th March 1883, upon the faith of the plaintiff's promise that he would release the share of Muzaffarpur Kaisho from the mortgage held by him, and we entirely disbelieve the [822] plaintiff's assertion that, though the deed was all along in his possession, he never discovered the indorsement on it till the 8th February 1883, a period of about ten years. The case, therefore, so far as the defendants Jauhri Mal and Pertab Singh are concerned, comes to this—that in consideration of the plaintiff's promise to release a particular property from a charge he already held on it, Jauhri Mal paid Rs. 700 to the plaintiff. This was a new contract for a fresh consideration between persons who were not parties to the mortgage, and was not, as between the parties to the mortgage, a release which the law required to be in writing and registered. In short, it was a fresh oral agreement for a

distinct and separate consideration *dehors* the original contract. We think that Jauhri Mal might have come into Court as a plaintiff to enforce that agreement, and that it is equally competent for him to plead it in avoidance of the plaintiff's claim to bring Muzaffarpur Kaisho to sale. The principle enunciated in *Nash v. Armstrong*, 30 L. J., C. P., 286, is applicable *a fortiori* to the present case, in which a stranger to the original contract is setting up, as a consideration for money paid by him, a promise of one of the parties not to enforce a particular covenant of such contract.

In this view of the case, it is not necessary for us to decide the objection taken by the learned counsel for Pertab Singh.

The appeal fails, and we dismiss it with costs.

Appeal dismissed.

NOTES.

[See this case followed in (1904) 27 All , 305.]

[7 All. 822]

FULL BENCH.

The 10th February, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE
STRAIGHT, MR. JUSTICE OLDFIELD, MR. JUSTICE
BRODHURST, AND MR. JUSTICE MAHMOOD.

Jafri Begam... ..Defendant

versus

Amir Muhammad Khan.....Plaintiff.*

Muhammadian Law—Inheritance—Devolution not suspended till payment of deceased ancestor's debts—Decree in respect of deceased Muhammadian's debts passed against heir in possession of estate—Decree not binding on other heirs not parties thereto and not in possession, so as to convey their interests to auction-purchaser in execution—Recovery of possession by other heirs contingent on payment of proportionate shares of debt for which decree was passed.

Upon the death of a Muhammadian testate, who leaves unpaid debts, whether large or small with reference to the value of his estate, the ownership of such [823] estate devolves immediately on his heirs, and such devolution is not contingent upon, and suspended till, payment of such debts.

A decree relative to his debts, passed in a contentious or non-contentious suit against only such heirs of a deceased Muhammadian debtor as are in possession of the whole or part of

* First Appeal No. 70 of 1883, from a decree of Pandit Rai Jagat Narain, Subordinate Judge of Farukhabad, dated the 19th March 1883.

his estate, does not bind the other heirs who, by reason of absence or other cause, are out of possession, so as to convey to the auction-purchaser, in execution of such a decree, the rights and interests of such heirs as were not parties to the decree.

In execution of a decree for a debt due by a Muhammadan intestate, which was passed against such of the heirs of the deceased as were in possession of the debtor's estate, the decree-holder put up for sale and purchased certain property which formed part of the said estate. One of the heirs, who was out of possession, and who was not a party to these proceedings, brought a suit against the decree-holder for recovery of a share of the property sold in execution of the decree, by right of inheritance.

Held, by the Full Bench, that the plaintiff was not entitled to recover from the auction-purchaser in execution of the decree possession of his share in the property sold, without such recovery of possession being rendered contingent upon payment by him of his proportionate share of the ancestor's debt for which the decree was passed, and in satisfaction whereof the sale took place.

Wahidunnissa v. Sheobrattun, 6 B. L. R., 54; *Assamatham Nessa Bibi v. Roy Lutcheeput Singh*, 1. L. R., 4 Cal., 112; *Mazhar Ali v. Budh Singh*, *ante*, p. 297; *Backman v. Backman*, 1. L. R., 6 All., 583; *Hamir Singh v. Musannat Zakia*, 1. L. R., 1 All., 57, and *Muttyjan v. Ahmed Ally*, 1. L. R., 8 Cal., 370, referred to by MAHMOOD, J.

THE facts of this case were as follows:—One Ali Muhammad Khan died in 1878, leaving as his heirs his parents, a widow named Wirasat Begam, two sons named Ali Ahmad and Abdul Majid, three daughters named Banarsi Begam, Niyaz Begam, and Jafri Begam, and a brother, Amir Muhammad Khan.

On the 8th December 1879, Abdul Rahman, the husband of Jafri Begam, obtained against Wirasat Begam, Ali Ahmad, Abdul Majid, and the three daughters, as heirs of the deceased and in possession of his estate, a decree for a debt due by the deceased. In execution of this decree, ten biswas of a village called Bakhtiarapur, forming part of the estate of the deceased, were put up for sale, and were purchased by Abdul Rahman.

In 1882, Amir Muhammad Khan, brother of the deceased, brought the present suit against the widow, the sons, and the daughters of the deceased, to recover thirty-five out of 168 sehams into which the estate of the deceased was divisible. He claimed these [824] thirty-five sehams upon the following grounds. He alleged that, about a month after the death of Ali Muhammad Khan, his mother, Panna Bibi, died, and of the twenty-eight sehams she inherited from her son, seven went to her husband, Ghulam Muhammad, and twenty-one to him, the plaintiff, and that his father Ghulam Muhammad died about three months before the suit was brought; and the twenty-eight sehams he inherited from his son Ali Muhammad Khan, and the seven sehams which he inherited from his wife, or thirty-five sehams in all, descended to him, the plaintiff. In the property in suit was included the village of Bakhtiarapur. With reference to this village, the defendant Jafri Begam contended, as the legal representative of her husband, that, under the circumstances stated above, the plaintiff was not entitled to share in it. The eleventh issue in the case related to this point, and was as follows:—

“Is the plaintiff entitled to share in ten biswas of mauza Bakhtiarapur, held by defendant No. 6 (Jafri Begam) as legal representative of her husband Abdul Rahman, the auction-purchaser?”

Upon this issue the lower Court held as follows:—“As it is not denied that the whole of Bakhtiarapur formed part of the estate of Ali Muhammad Khan, deceased, the plaintiff cannot, by the mere fact of ten biswas of that estate being sold in execution of Abdul Rahman's decree, to which he was no party, be debarred from obtaining his legal share. See *Luchmeeput Singh v. Sita Nath Doss*, 1. L. R., 8 Cal., 477.”

The defendant, Jafri Begam, appealed to the High Court. The following contentions were raised on her behalf:—

"When the appellant's vendor purchased the property in satisfaction of the debt due by the ancestor and in execution of a decree duly obtained against all the heirs in possession of the estate, such property can no longer be claimed by the plaintiff, especially as he did not prefer any objection in the course of the suit, notwithstanding that he had full knowledge of the same.

"The ruling quoted by the lower Court is not applicable to the case of the appellants.

[825] "Assuming the decree to be correct, it should have ordered payment of the proportionate debt by the respondent before awarding possession."

The case came on for hearing before STRAIGHT and MAHMOOD, JJ., who referred the following questions to the Full Bench:—

"(1) Upon the death of a Muhammadan intestate, who leaves unpaid debts, whether large or small, with reference to the value of his estate, does the ownership of such estate devolve immediately on his heirs, or is such devolution contingent upon, and suspended till, payment of such debts?

"(2) Does a decree, relative to his debts, passed in a contentious or non-contentious suit against only such heirs of a deceased Muhammadan debtor as are in possession of the whole or part of his estate, bind the other heirs who, by reason of absence or other cause, are out of possession, so as to convey to the auction-purchaser, in execution of such a decree, the rights and interests even of such heirs as were no parties to the decree?

"(3) If not, can such heirs as were no parties to the decree recover from the auction-purchaser in execution of such decree, possession of their shares in the property sold, without such recovery of possession being rendered contingent upon payment by them of their proportionate shares of the ancestor's debts for which the decree was passed, and in satisfaction whereof the sale took place?"

This last question was amended by the Full Bench to read as follows:—
"If not, is the plaintiff in this case entitled to recover from the auction-purchaser in execution of such decree possession of his share in the property sold, without such recovery of possession being rendered contingent upon payment by him of his proportionate share of the ancestor's debts for which the decree was passed, and in satisfaction whereof the sale took place?"

Munshi Kashi Prasad for the Appellant. .

Munshi Hanuman Prasad, and Lala Harkishan Das, for the Respondent.

The following judgments were delivered by the FULL BENCH:—

Petheram, C. J., Straight, Oldfield, and Brodhurst, JJ.—Our answer to the first question referred to us in this case [826] is in the affirmative, to the second question in the negative, and to the third question (as amended) also in the negative.

Mahmood, J.—In this case I agree generally in the answers given by the learned Chief Justice and my learned brethren to the three questions referred to the Full Bench; but I do not intend on this occasion to state the grounds upon which my conclusions are based. One reason why I refrain from doing so is, that one of the greatest difficulties in the way of the Courts established in British India, is the paucity of text-books upon Muhammadan Law written in English which are sufficiently accurate to be safe guides in the administration of those branches of that law which, by s. 21 of the Bengal Civil Courts Act (VI of 1871) we are bound to administer. The only means of information

consists of books of reference which are either incomprehensive compilations or abbreviated translations, and, in some cases, translations of translations. Another difficulty is that the language of the highest Courts in India is not the language of the people, and consequently the vast majority of advocates who appear in those Courts are those who must speak English, and who, as a matter of fact, are not likely to refer to the original Arabic authorities. For these reasons, I confess, I fully expected that the judgment of the Court would have been reserved in such a case.

As the learned Chief Justice rightly observed during the argument, there is "no magic in Muhammadan Law." There is, of course, no magic in that system any more than in any other. The Muhammadan Law is only a part of the general system of jurisprudence, and whatever is true as a matter of general principle would be true of any particular legal system, worthy of the name, so long as its rules are accurately ascertained.

My difficulty in the present case does not arise from anything intrinsically abstruse in the three questions referred to the Full Bench, but from the fact that some of the highest tribunals in India have repeatedly expressed views upon the subject which, according to the conclusions arrived at by us to-day, directly contradict some of the principles of Muhammadan jurisprudence. I make this observation with due respect, and do so because it was for this reason only that my brother STRAIGHT and I made [827] the reference. Speaking for myself, I should not otherwise have thought it necessary to refer the case to the Full Bench. And this being so, I should be sorry if anything said by me in this case merely added one more to the rulings to be found in the Reports; and I reserve the grounds of my conclusion, in the hope that I may, perhaps, be able to make my judgment of such a nature as might, in some measure, help to remove what I may respectfully call the existing cloud of judicial exposition upon these important questions. For this reason, I should have been glad to hear in the argument at the Bar some reference to the Arabic texts of the Muhammadan Law; but under the circumstances, and considering that the learned Chief Justice and my learned brethren have been anxious to deliver their judgments at once, the only course open to me is, that I must search out these texts for myself, and as that will require some time, I must, of necessity, reserve the reasons of my judgment till such time as the exigencies of the business of the Court allow.

[On the 14th March, the following *judgment* was delivered by MAHMOOD, J., on the question referred to the Full Bench.]

Mahmood, J.—When this case was argued before the Full Bench, I mentioned the reasons why I did not on that occasion set forth the exact grounds upon which I concurred in the conclusion at which the learned Chief Justice and the rest of the Court had arrived. I was anxious, as I said then, to support my conclusions by citing original authorities of Muhammadan Law—a course which I considered especially necessary in view of the long conflict of decisions which exists in the Reports upon the subject to which this reference relates. The exigencies of the business of the Court have not allowed me, before now, to consult the original authorities of the Muhammadan Law to which I wished to refer, and it has therefore devolved upon me to deliver my judgment now, although the rest of the Bench have already delivered their judgments.

Before, however, citing the original authorities of the Muhammadan Law, I wish to consider briefly the various rulings to be found in the Reports, and which constitute the case-law upon the subject. I shall, in dealing with this part of the judgment, [828] refer only to the most important cases which have

been cited, as in the order of reference I have already summarised nearly all the cases.

The first question referred to us does not appear to have arisen simply and directly in any case to be found in the Reports, though it formed a necessary step of the *ratio decidendi* of some of the rulings which have been cited, and in this sense it was discussed and decided. Under this class of cases, the first authorities to which I wish to refer are the case of *Wahidunnissa v. Shubrattun*, 6 B. L. R., 54, and another case very similar in principle, namely, *Bazayet Hossein v. Dooli Chund*, I. L. R., 4 Cal., 402. The first of these was decided by the Calcutta High Court, and the second by the Privy Council. The principle which they lay down is, that the creditors of a deceased Muhammadan cannot follow his estate into the hands of a *bonâ fide* transferee for valuable consideration. Their effect is best described in the words used by their Lordships of the Privy Council in the latter of the two cases to which I have referred. Their Lordships say:—"At that time, if Najmooddin were the legitimate son of the deceased—and it has now been decided that he was—he had the right to convey his own share of the inheritance, and was able to pass a good title to the alienee, notwithstanding any debts which might be due from his deceased father. For that position the case of *Wahidunnissa v. Shubrattun*, 6 B. L. R., 54, was cited as an authority. In that case, the share of an heir was seized and sold in execution of a decree against the heir, in his individual, and not in his representative, capacity, and it was held that the purchaser had a right to hold the property against a creditor of the ancestor who had obtained a decree for the debt before the seizure in execution. In that case, the creditor was a widow of a deceased Muhammadan, and her claim was in respect of dower. The principle of that case is applicable to the present, and the ruling is quite in accordance with the English law applicable to heirs and devisees as to real estate, and to executors as regards personalty."

Such being the effect of these cases, I am of opinion that the ruling of the Privy Council cannot be understood without holding that, upon the death of a Muhammadan owner, the inheritance [829] vests *immediately* in his heirs, and is not suspended by reason of debts being due from the estate of the deceased. It is true that the present question was not then raised in an unmixed and direct form, for there were considerations as to third parties being *bonâ fide* transferees for value, which to some extent contributed to the decision. But no considerations arising from any doctrine of equity relating to "notice" and *bonâ fide* transferees for value, could render the title of a transferee from a Muhammadan heir valid, where such transfer was made before the liquidation of the ancestor's debts, and if such liquidation were the turning point of the *devolution* of the inheritance. The Privy Council ruling is therefore of a clear authority in support of my view, and indeed I may go the length of saying that no other view can reconcile the ruling with the undoubted principles of law and equity in such cases. But a short time before the Privy Council delivered their judgment, the same question regarding the devolution of inheritance was raised, but again indirectly, in the Calcutta High Court in *Assamatthem Nessa Bibi v. Roy Lutchnieput Sing*, I. L. R., 4 Cal., 142. That was a Full Bench case in which two of the learned Judges dissented from the opinion of the majority. That opinion was stated by GARTH, C.J., but it bears upon the second only of the points before us in the present case. The judgment of the minority was delivered by MARKBY, J., who considered the question of the *devolution* of Muhammadan inheritance as a necessary step to the conclusions at which he arrived. The learned Judge, relying upon certain passages in the *Hedaya*, held it to be clear that the estate of an intestate descends entire, together with all

the debts due from and owing to the deceased; that it is therefore, to use a convenient expression adopted by lawyers, a "universal succession;" that "there ought, according to the Muhammadan Law, to be in every case of death something very similar to what we should call an administration of the estate by a Court of Justice;" that, under the strict Muhammadan Law, the personal liability of the individual heirs was "something quite distinct from the liability of the estate;" that it was unimportant to determine whether such personal liability was *proportione hereditaria* or *proportione emolumentis*; but that "the liability of the estate remained, if the [830] creditors chose to resort to that remedy, until the debts had been completely liquidated." And pursuing this argument, the learned Judge went on to say:—"If this be so, it follows, I think, that on the decease of a Muhammadan, neither his estate *vested immediately* in his heirs, nor did his heirs become immediately liable for his debts. Until the heirs came forward to take possession, the succession was vacant (*hereditas jacens*). But by a fiction the deceased owner was supposed during this interval to be represented by the estate itself (*quia creditum est hereditatem dominam esse et defuncti locum obtinere*). It is particularly to be observed, however, that it was the deceased owner, and not the heirs, who were thus represented (*personæ vicem sustinet non hæredis futuri sed defuncti*)." This view was not adopted by the majority of the Court, though their judgment mainly proceeds upon another ground, to which I shall refer in dealing with the second point before us.

I now pass to the passages of the Hedaya upon which MARKBY, J., based his opinion. I have carefully considered them, and I have come to the conclusion that they do not substantiate the conclusions at which that learned Judge arrived. In the first place, it must be remembered that the work to which he was referring is merely a translation of a translation, leaving room for the remark of Mr. Almaric Rumsey, that it is "much to be desired that a new translation should be made of the Hedaya, this time from the original Arabic, and not from the intermediate Persian." I agree in the observation, especially as the English terms employed in Mr. Hamilton's translation are frequently not the equivalents of the original Arabic terms, and are not used with the degree of definiteness essential for a book on law. In the second place, to use the words of Mr. Rumsey again, the law of inheritance is "a branch of jurisprudence which the Hedaya does not formally discuss, but only mentions incidentally here and there." Moreover—and this is the most important point—most of the passages relied upon by MARKBY, J., relate, not to substantive law, but to procedure, and in particular to the duties of the Kazi in matters connected with partition, compromise, composition, and other similar subjects, whilst some of the passages do not appear to me to apply to the question—I mean the passage in Vol. II of Mr. [831] Hamilton's Hedaya, to be found at p. 599, which belongs to the chapter "*Of bail in which two are concerned*", and at pp 530 and 539 of Vol. IV. The other passages in the Hedaya relied upon by MARKBY, J., I shall presently consider in discussing the second question referred to us.

I now proceed to cite the original authorities of Muhammadan law in support of my view. It is well known that the Muhammadan law of inheritance is based upon a passage in the fourth chapter of the Koran, which in Sale's translation is thus rendered:—"God hath thus commanded you concerning your children:—A male shall have as much as the share of two females, but if they be females only, and above two in number, they shall have two-thirds part of what the deceased shall leave, and if there be but one, she shall have the half. And the parents of the deceased shall have each of them a sixth part of what he shall leave, if he have a child; but if he have no child, and his parents be his heirs, then his mother shall have the third part. And if he

have brethren, his mother shall have a sixth part, *after the legacies which he shall bequeath, and his debts be paid*. Ye know not whether your parents or your children be of greater use unto you. This is an ordinance from God, and God is knowing and wise. Moreover, ye may claim half of what your wives shall leave, if they have no issue; but if they have issue, then ye shall have the fourth part of what they shall leave, *after the legacies which they shall bequeath, and the debts be paid*. They also shall have the fourth part of what ye shall leave, in case ye have no issue; but if ye have issue, then they shall have one eighth part of what ye shall leave, *after the legacies which ye shall bequeath, and your debts be paid*. And if a man or woman's substance be inherited by a distant relation, and he or she have a brother or sister, each of them two shall have a sixth part of the estate. But if there be more than this number, they shall be equal sharers in a third part, *after payment of the legacies which shall be bequeathed and the debts*, without prejudice to the heirs."

In reading this passage, I have emphasized the words "*after the legacies which he shall bequeath and his debts be paid*," and also other phrases to the same effect, which have been repeated after each part of the passage describing the shares to be allotted to the heirs. These phrases gave rise to two difficulties in the minds [832] of the Muhammadan jurists. The first was, whether the circumstance that *legacies* were mentioned before *debts* gave the former precedence over the latter in the administration of the estate of deceased persons; and the second was, whether the word "*after*" related to the devolution of inheritance, or to the ascertainment of the *extent* of the shares to be allotted to the various heirs. There is much learned discussion upon both these points in the Arabic works; but with the former of these points we are not concerned in this case; and in regard to the latter, I will content myself with the explanation of *Bai awi*, one of the greatest commentators on the Koran, whose views have been universally adopted by Muhammadan jurists. He says:—"The words *after the legacies which he shall bequeath or debts* relate to that which precedes relating to the *distribution* of all the inheritance; that is, these are to be the shares of the heirs out of that which remains from legacies or debts (1)." The meaning of the explanation is, that the word "*after*," as used in the Koran, simply refers to the *balance* of the estate after the payment of debts and legacies, but does not affect the question of *devolution*. That this is the interpretation accepted by the Muhammadan jurists in general is best shewn by a passage in *Al Sirajyyah*, a treatise of the highest authority on the Muhammadan Law of inheritance, which Sir William Jones translated about a century ago; and in citing the passage I cannot do better than adopt his words:—"Our learned in the law (to whom God be merciful) say:—There belong to the property of a person deceased four successive duties to be performed by the Magistrate,—first, his funeral ceremony and burial without superfluity of expense, yet without deficiency, next, the discharge of his just debts from the whole of his remaining effects; then the payment of his legacies out of a third of what remains after his debts are paid; and lastly, the distribution of the residue among his successors, according to the Divine Book, to the Traditions, and to the Assent of the Learned"—(Jones's Works, Vol. III, p. 517). I have quoted this passage to show the priority possessed by the three charges to which the estate is [833] subject when inherited by heirs. This order of priority is, as is obvious

(1) من بعد وصية يوصي بها او دين متعلق بما ندمه من قسمة الموارث كلها
اي هذه الانصاء للورثة من بعد ما كان من وصية او دين (بيضاوي) *

from the passage, merely a direction as to the *administration* of the estate, and has no bearing upon the question of the exact point of time when inheritance *devolves* upon the heirs. When they inherit the property, they take it, of course, subject to these three prior charges, as they would subject to mortgages—the difference being (as pointed out by the Privy Council in the case which I have already cited) that an incumbrance by way of mortgage follows the property even in the hands of *bond fide* purchasers for value, with or without notice of the prior incumbrance; whilst the three charges on the estate of a deceased Muhammadan as described in *Al Sirajiyah* cannot do so. It is one thing to say that these three charges take precedence of the inheritance, in the administration of the estate and its distribution among heirs, and it is another thing to say that the inheritance itself does not open up until those charges are satisfied. And it is obvious that all the arguments adopted by MARKBY, J., as to debts, would, according to his hypothesis, necessarily apply also to *funeral expenses* and *legacies*, which, like debts of the deceased, are charges upon his estate. But I am unaware of any rule of Muhammadan Law which would render such charges, or even mortgages, an impediment to the *devolution* of property on the heirs by inheritance. Funeral expenses, debts, and legacies, or any one or more of them, may indeed absorb the estate of the deceased; defeating every succeeding charge; and it is obvious that if nothing is left for the heirs they can take nothing. But this is a proposition widely different from saying that the *devolution* of inheritance is suspended till the various charges are satisfied. Indeed, upon this point, the books of Muhammadan jurisprudence leave no doubt. The author of the *Ashbah*, a most celebrated book on maxims, lays down the following maxim:—“Nothing enters the proprietorship of man without his option (consent), except inherited property;” (1) and the following explanation follows as a commentary:—“They (the Doctors of Law) have differed as to the time of the devolution of inheritance. The learned men of Irak [834] maintain the last part of the ancestor's life, and the learned men of Balakh (maintain that it is) the moment of death.” (2)

These authorities leave no doubt in my mind that the devolution of inheritance takes place *immediately* upon the death of the ancestor from whom the property is inherited. But I wish further to adopt certain tests to confirm my view. The first of them is an absolutely universal rule of the law of Muhammadan inheritance itself. The *jus representationis* being absolutely foreign to the Muhammadan law of inheritance, the question of the devolution of inheritance rests entirely upon the exact point of time when the person through whom the heir claims, died—the order of *deaths* being the sole guide in such questions.

The rule of “perfect” exclusion from inheritance—to use the language of *Al Sirajiyah*—“is grounded on two principles; one of which is, that whoever is related to the deceased through any person, shall not inherit while that person is living; as a son's son with the son; except the mother's children, for they inherit with her, since she has no title to the whole inheritance; the second principle is, that the nearest of blood must take.” To illustrate the principles, I adopt the language of Sir WILLIAM MACNAGHTEN:—“The son of a person deceased shall

(1) لا يدخل في ملك الانسان شيئي بغير اختياره الا الارث (اشباه والنظائر) *

(2) اختلفوا في وقت الارث فقال مشائخ العراق في آخر جزء من اجزاء

حيات المورث وقال مشائخ بلخ عند الموت (اشباه والنظائر) *

not represent such person, if he died before his father. He shall not stand in the same place as the deceased would have done had he been living, but shall be excluded from the inheritance if he have a paternal uncle. For instance, *A*, *B*, and *C*, are grandfather, father, and son. The father *B* dies in the life-time of the grandfather *A*. In this case, the son *C* shall not take *jure representationis*, but the estate will go to the other sons of *A*." Now, in the above illustration, if we suppose that *A* died leaving both *B* and *C*, but *B* died before the debts and legacies were satisfied, the question would arise whether *C* would take a share along with his uncles, the other sons of *A*. The answer to the question depends absolutely upon the answer to the question whether immediately upon the death of *A* any share in the inheritance devolved upon *B*, for, if it did not, then *C* can have no vested interest in the [836] inheritance. According to the views of MARKBY, J., upon the death of *A* "neither his estate vested immediately in his heirs, nor did his heirs become immediately liable to his debts;" for "until the heirs came forward to take possession, the succession was vacant." And, according to this hypothesis, *C* could take no share, because the debts and legacies of *A* not having been paid before the death of *B*, no share of the inheritance vested in him, and his son *C* could take no share along with his paternal uncles. That this would be the necessary result of the reasoning of MARKBY, J., seems to me to be obvious; but it is equally obvious that the Muhammadan rules of inheritance furnish quite the opposite answer. The law upon the subject has been well summarised by Sir WILLIAM MACNAGHTEN, and I adopt his words because they are in perfect accord with the rules contained in *Al Sirajiyah*, *Sharifiyyah*, and other authoritative Arabic treatises on the Muhammadan law of inheritance. Where a person dies and leaves heirs, some of whom die prior to any distribution of the estate, the survivors are said to have vested interests in the inheritance; in which case the rule is, that the property of the first deceased must be apportioned among his several heirs living at the time of his death; and it must be supposed that they received their respective shares accordingly. Mr. Baillie, proceeding even more closely upon the Arabic texts, has enunciated the same rule in his work on Muhammadan inheritance:—"When some of the portions have become inheritances by the death of the parties entitled to them, before the estate has been actually divided among them.....the rule is to arrange the original estate on the principles already explained, and to assign to each original heir his or her share, and then to arrange his or her estate, that is, his or her share of the original estate, on the same principles." It is clear from these passages that in the case supposed by me, *C* would take the share in the estate of *A*—a proposition which directly contradicts the conclusion at which MARKBY, J., arrived. Indeed, I may go the length of saying that some of the most important and undoubted rules of Muhammadan inheritance would become meaningless if any event other than the ancestor's death were to be considered as the point of the devolution of inheritance upon heirs.

[836] It is scarcely necessary for me to pursue the argument much further, but I will, however, take a few illustrations to justify the proposition which I have just laid down. Take the case of missing persons under the Muhammadan Law of inheritance. Not long ago, in the case of *Mazhar Ali v. Budh Singh* (Ante, p. 297) I had occasion to discuss the matter at full length, and here I will only say that the inheritance to his estate opens up at the moment when, by a legal presumption, he is taken to be dead, and all the arguments of the Muhammadan jurists make the presumption of the death of the missing person as the turning point of the devolution of inheritance on his heirs. To use the words of Mr. Almaric Rumsey in his work on

Muhammadan inheritance, it must be remembered that "the lost or missing person is deemed to *die*, not at the date at which he has become such, but at the precise time at which the declaration of his *death* is made; consequently his relations dying before *that time* cannot inherit from him." Now, taking the case of persons dying by a common calamity, it will be found that the rules of Muhammadan inheritance again treat *death* as the turning point of the *devolution*. I will show this by citing a passage from Baillie's Digest, as it is taken from the text of the *Fataw-i-Alamgiri* :—"Where several persons have been drowned or burnt together, and it is not known which of them *died* first, we treat them all as having *died* together. The property of each will accordingly go to his own heirs, and none of them can be heirs to another, unless it is known in what order they *died*, when those who died last will inherit to those who died before them. And the rule is the same when several are killed together by the falling of a wall, or in the field of battle, and it is not known which of them *died* first." I might go further, and show that all the rules relating to the inheritance by or from posthumous children, proceeding upon the analogy of the rules relating to missing persons, render *death* as the only turning point of the *devolution* of inheritance. But I will take a case having even a more directly analogical bearing upon the point now under consideration. It needs no citation of authorities to say that, under the Muhammadan Law, no property or right can be transferred or relinquished by the per-[837] son entitled thereto, unless it is *vested* in him; that no valid will can be made in favour of an heir; that, even in favour of a stranger, a bequest can hold good only to the extent of a third of the property of the testator remaining after payment of his funeral expenses and debts; and that a bequest, notwithstanding these limitations, may be validated, and take effect with the *consent* of the testator's heirs. I have mentioned these rules as a statement of the premises from which I shall draw my conclusion. The question then arises, when should the consent of the heirs be given in order to render effective a will which exceeds the limitations imposed upon the testamentary power by the Muhammadan Law? The answer is furnished by a passage of the Hedaya, which I will translate here from the original Arabic, although a paraphrase of the passage exists in Mr. Hamilton's translations (Vol. IV, p 470) :—"Their (the heirs') consent during his (the testator's) life-time is not acceptable, for the reason that it would be previous to the *establishment* of their right. As their right is established upon the *death* (of the testator), therefore it is for them (*i. e.*, they are at liberty to reject it after his *death*, because it would then be after the establishment of their right, and therefore it is not for them to recede from it (1)." This is the prevalent doctrine of the school of Iman Abu Hanifa which governs this case. But some of the jurists of the same school, whilst doubting the reasoning, have adopted the same doctrine, on the ground that, although a testamentary disposition in contravention of the limitations of law would, in itself, be illegal, yet effect would be given to it, because the consent of the heirs given after the *death* of the testator amounts to dealing with *their own* property, so that not the testamentary disposition, but the consent of the heirs, takes legal effect. This is shown by a passage in the *Fatawa Kazi Khan* :—"As Sheikh-ul-Imam Al-Ali-us-Safdi has said

(1) ولا معتبر باجارتهم في حال حياته لانه قبل ثبوت الحق ان الحق يتثبت

عند الموت فكان لهم ان يردوه بعد وفاته بخلاف ما بعد الموت لانه بعد ثبوت الحق فليس

لهم ان يرجعوا منه (هداية) *

that the answer of Abu Hanifa is difficult. He has allowed composition (regarding legacies) on the ground that the property in reality belongs to the heir on account [838] of the extinction of the ownership of the deceased, and on account of its transfer to the heir, and it remains as if it was the property of the deceased for the needs of the deceased. Therefore *before* it was so employed for the needs of the deceased, it becomes the property of the heir, and when the purposes of the deceased are not attained, the property remains in the ownership of the heir (1)." In these passages there is not the slightest indication that the payment of funeral expenses, debts, or legacies, is a condition precedent to the *vesting* of the inheritance. These, of course, are charges upon the estate of the deceased in the sense in which I have already explained them; and I may concede that no distribution of the assets of a deceased Muhammadan's estate among his heirs can be made irrespective of those charges. But this has no bearing upon the question of the *devolution* of inheritance—a question which rests upon a reasoning analogical in principle to that which relates to the vesting of legacies considered by me not long ago in *Bachman v. Bachman*, I. L. R., 6 All., 583. The inheritance of an heir, like a legacy may be absolutely defeated if the debts of the deceased at the time of the administration of his estate are found to absorb the whole of his property. But this has no more bearing upon the question of the *devolution* of inheritance than upon the vesting of legacies, and I may say that in neither case is distribution or division of the estate a condition precedent to the vesting of the right. In the case of legacies, the terms of a will might, of course, affect the ordinary rule, and division may possibly be made a condition precedent to the vesting of the legacy. But I need not resort to analogies, for the texts of the Muhammadan Law leave no doubt that distribution of the estate, or the payment of debts of the deceased, is not a condition precedent to the *devolution* of inheritance. Here is a passage from *Fatawa Kazi Khan*:—"A man [839] died, and his heirs, by mutual consent, divided the inheritance among themselves, and then one of them, on his own behalf, brought a claim for debt due by the deceased. His claim will be entertained *because debt neither prevents the establishment of the heir's proprietorship nor division* (of the inheritance) (2)." If it were necessary to carry the argument further, I might cite many passages even from the Muhammadan law of slavery (which, happily for mankind, is no longer the law of British India), which would support my view. It is, however, sufficient to say here that "*Itak*" or manumission of slaves is a power which can be exercised only by the full owner of the slave, and if the slave forms part of the inheritance, the heir can emancipate him, and the emancipation will take effect even though such manumission took place *before* payment of the debts of the deceased from whom the slave was inherited, the reason of the rule

(1) قال الشيخ الامام العلي السفدي جواب ابي خليفة مشكل و إنما اجاز الصلح من هذا المال في الحقيقة مال الوارث لزوال ملك الميت و لا ينتقل الي الوارث و إنما يبقى علي حكم ملك الميت لحاجة الميت فقبل ان يصرف الي حاجة الميت يكون المال مال الوارث فاذا لم يحصل غرض الميت بقي المال علي ملك الوارث (قاضي خان جلد رابع) *

(2) رجل مات و اقسمت وراثته التركة يتواضعهم ثم ادعى احدهم لنفسه علي الميت دينا سمع دعوته لان الدين لا يمنع ثبوت الملك للوارث و القسمة (قاضي

being, as stated by *Kazi Khan* (1), that the ownership of the heir was complete at the time of the manumission.

There is one more point to be considered in connection with the first question referred to us in this case. I hope I have said enough to show that the existence of debts due by the deceased does not affect the period of devolution of inheritance; but the point remains whether the *extent* or *amount* of the debts affects the question. Some of the passages quoted from Mr. Hamilton's *Hedaya* in the Full Bench case of *Hamir Singh v. Musammatt Zakia*, I. L. R., 1 All., 57, would go to indicate an affirmative answer. But the translation is only a loose paraphrase of the original Arabic, and is liable to convey a wrong meaning. What is meant by the heirs to an insolvent estate being *prevented* from inheriting, simply refers to the rule that nothing will be left for them to inherit if the liabilities of the deceased swallow up the whole estate. It is only in this sense that Mr. Hamilton's translation can be understood, when it says that "the circumstance of a *small debt* [840] attaching to the estate of a deceased person does not prevent the heirs from inheriting, whereas if the estate were completely involved in debt they would be prevented."—(*Hedaya*, Bk. XXVI.) I do not think it necessary to translate these passages in the *Hedaya* because, after what I have already said, it seems enough to add that the existence of debts, whether large or small, is quite immaterial. Whatever their extent, nature or amount may be, the property of the deceased is liable to their payment, and their extent regulates the *balance* of the estate only, but does not affect its *devolution*.

The second point in F. A. No. 70 is similar to that raised in F. A. No. 50, and I have dwelt upon the first question at such length because it seems to me that the answer to the second question may be regarded as a corollary to the answer to the first. I have considered the passages of the *Hedaya* referred to in the Full Bench case of *Hamir Singh v. Musammatt Zakia*, I. L. R., 1 All., 57, and those cited by GARTH, C.J., and MARKBY, J., in *Assamathem Nessa Bibi v. Roy Lutchmeeput Singh*, I. L. R., 4 Cal., 142. These passages have been understood by those learned Judges as governing the decision of cases like the present. I have also consulted other original authorities, such as *Fatawa Kazi Khan*, *Durrul Mukhtar*, *Shami*, and *Fathul Kadir*. All these books possess high authority, and no doubt there are passages to be found in them, as in the *Hedaya*, which attach significance to such questions as the following:—whether the heir is in possession, whether he is in possession of the whole or only a part of the estate, the amount of the assets in his hands, whether the suit was contentious or non-contentious, whether the decree was passed *ex-parte* or in the presence of the defendant, and these points the authorities treat as regulating or at least affecting the binding effect of the decree upon those heirs who, being either out of possession or absent, are no parties to the litigation. On the other hand, there are passages to show that the decree will bind only the share of the defendant heir, or only so much of the property of the deceased as is in the hands of such defendant; whilst other passages lay down the rule that, even where no property belonging to the deceased has come to the hands of the heirs, the creditor of the deceased must sue them [841] in order to obtain a decree, which might be executed against any such property of the deceased as may be subsequently discovered.

The rule is thus laid down in *Fatawa Kazi Khan*:—"If the debtor has died without leaving any property in the hands of the heir, even then the heir

(1) فانہ بقندا عناق الوارث لان ثم سبب الملك للوارث تام (قاضی خان) *

will be (impleaded as) defendant for the claimant of the debt (that is, the creditor), and evidence will be taken and decree will be passed as to the debt, in order that the creditor may take any assets of the deceased which may be discovered (1)." This rule is the same as that laid down by MORGAN, C.J., and ROSS, J., in *Madho Ram v. Durbur Mahul*, N.-W. P. H. C. Rep., 1870, p. 449, and, although the case related to the estate of a deceased Muhammadan, those learned Judges decided it without any reference to the Muhammadan Law, and treated the question as simply a matter of procedure. Again, according to the authorities of the Muhammadan Law, to which I have referred, the power of one or more heirs to represent absent heirs in a litigation is regulated by the consideration whether the litigant-heir appears in the suit as *plaintiff* or as *defendant*; and the power of representation is materially affected by the position of the litigant-heir as party to the suit. Further, there is authority for the proposition that a decree passed against the heir in possession as representing the whole estate of the deceased in the litigation may, under certain circumstances, be set aside at the instance of the absent heir to the extent of his share, and that, when this is done, the matter should be adjudicated upon *de novo*, involving the production of evidence by the plaintiff *again*, in order to justify the correctness of the former decision. I do not consider it necessary to cite the original texts which go to maintain these propositions, because I am satisfied that these rules of law are provisions which go only to the remedy, *ad litem ordinationem*, being matters purely of procedure as to array of parties, production of evidence, *res judicata*, and review of judgment, etc. Indeed, they are treated as such in the text-books of the Muham-[842] madan Law itself, and are *in pari materia* with some of the most important provisions of our Civil Procedure Code. They are not matters of substantive law; they do not constitute rules of inheritance; and the Courts in British India are no more bound by them than by any such rules of evidence or limitation as the Muhammadan Law may provide, for the simple reason that they fall outside the purview of s. 24 of the Bengal Civil Courts Act, which enumerates the matters in which we are bound to administer the Muhammadan Law. Under the opposite view, these rules would be in the anomalous position of conflicting with the provisions of the Civil Procedure Code upon the same subjects, and at the same time be equally binding upon the Courts. But for the reasons which I have already stated, I do not think any such conflict arises out of the present state of the law in British India. Upon the death of a Muhammadan owner, his property, as I have already shown, immediately devolves upon his heirs, in specific shares; and if there are any claims against the estate, and they are litigated, the matter passes into the region of *procedure*, and must be regulated according to the law which governs the action of the Court. The plaintiff must go to the Court having jurisdiction, and institute his suit within limitation, impleading all the heirs against whose shares he seeks to enforce his claim; and if he omits to implead any of the heirs, the decree would be ineffective as regards the share of those who were no parties to the litigation. The maxim of law, that a matter adjudicated upon between one set of parties in no wise prejudices another set of parties, is, of course, the foundation of one of the rules of *res judicata*, which itself is subject to strict limitation, as shown by s. 13 of the Civil Procedure Code; whilst even *Explanation V* of that section cannot be applied, unless the especial provisions

(1) لو كان الہدیون مات و لم یتوک مالا فی بدوارثہ قال الوارث یكون خصما للموہی الدین و یقبل بینة و یقضي بدینہ حتی لو ظهر للمیت مال اخذہ صاحب الدین (قاضی خان جلد ثالث) *

of s. 30 of the Code are applicable, and have been duly applied by the Court in allowing one party to sue or defend on behalf of all in the same interest. There is, however, no such question in these cases, and to hold that a decree obtained by a creditor of the deceased against *some* of his heirs, will bind also those heirs who were no parties to the suit, amounts to giving a judgment *inter partes*, or rather a judgment *in personam*, the binding effect of a judgment *in rem*, which the law limits to cases provided for by s. 41 of the Evidence Act.

[843] But our law warrants no such course, and the reason seems to me to be obvious. Muhammadan heirs are independent owners of their specific shares, and if they take their shares subject to the charge of the debts of the deceased, their liability is in proportion to the extent of their shares. And once this is conceded, the maxim *res inter alios acta alteri nocere non debet* would apply without any such qualifications as might possibly be made in the case of Hindu co-heirs in a joint family. Now, putting aside questions of fraud or collusion between the creditors of the deceased and the heir in possession, it may well be that such heir, though defending the suit, is incompetent to contest the claim, or, by reason of not being acquainted with the facts of the case, or not possessing evidence, cannot properly resist the claim. There seems no reason why, in such a case, those should be bound by the decree who were no parties to the litigation, and had no opportunity of defending themselves against the creditor's claim by putting forward their own case.

This leads me to the considerations of the various rulings having a bearing upon the question now under consideration. In the case of *Assamatham Nessa Bibi v. Roy Lutchmeeput Singh*, I. L. R., 4 Cal., 142, the judgment of MARKBY, J., proceeds considerably upon the inferences which he drew from cases relating to the joint Hindu family, and the power of one member to represent the whole of the joint estate in litigation. I have already suggested that there are such essential distinctions between the Hindu Law relating to a joint family and the Muhammadan Law of inheritance that it would be unsafe to draw any conclusion by analogical reasoning. On the other hand, it is obvious that the conclusion at which that learned Judge arrived as to the power of the heir in possession to represent the estate in litigation, was materially induced by the opinion which he formed regarding the devolution of Muhammadan inheritance, which he discussed as the first point in the case. Now, I am unable to agree fully in the judgment of GARTH, C.J., in which KEMP and JACKSON, JJ., concurred. There is much in the *ratio decidendi* with which I entirely agree, and there is no doubt that the distinction which the judgment draws between a decree passed by consent and a decree passed in a contested suit, is [844] borne out by certain passages of the Hedaya, to which the learned Chief Justice referred. But, with due deference, I am unable to adopt the distinction, because, as I have already pointed out, those passages lay down rules of *procedure* which are not binding upon us, which are in many important respects inconsistent with the rules of the Civil Procedure Code, and, at all events, we can scarcely adopt some of them with consistency, unless we are prepared to adopt also other rules of the Muhammadan Law of Procedure which are complements of the rules so adopted. According to our own rules of procedure, there is no distinction between the binding effect of a decree passed by consent, and a decree passed in a contested suit. Both render the matter *res judicata*, and neither can bind those persons who were no parties to the litigation. There were, of course, reasons arising from the exigencies of life (such as the difficulty of communication and travelling) which induced Muhammadan jurists in the middle ages to frame rules of procedure in many essentials different from those which regulate

the procedure of our Courts. But those conditions of life no longer exist: the law of British India has framed its own rules of procedure; and bearing in mind the analogy of the principle by which, not the *lex loci contractus*, but the *lex fori*, regulates all matters going to the remedy, *ad litis ordinationem*, I would reject the rules of the Muhammadan Law of Procedure in connection with the binding effect of decrees upon absent heirs. And it follows that a decree obtained in a litigation to which the absent heirs or those who were out of possession were no parties, cannot be executed against them or against their shares in the inherited property. Indeed, such was the view adopted by GARTH, C.J., himself in an earlier case—*Hendry v. Mutty Lall Dhur*, I. L. R., 2 Cal., 395, with which I entirely concur, and which is in accord with the Full Bench ruling of this Court in *Hamir Singh v. Musammat Zakia*, I. L. R., 1 All., 57.

There is, however, one more important case, and the latest ruling upon the subject, which I must consider. This is the case of *Muttyan v. Ahmed Ally*, I. L. R., 8 Cal., 370, in which MORRIS, J., with the concurrence of O'KINEALY, J., went the length of laying down the broad rule that when the creditor of a deceased Muhammadan sues [845] the heir in possession, and obtains a decree against the assets of the deceased, such a suit is to be looked upon as an administration-suit, and those heirs of the deceased who have not been made parties cannot, in the absence of fraud, claim anything but what remains after the debts of the testator have been paid.

For this view of the law the learned Judges relied upon certain rulings, two of them being decisions of the Privy Council. I have consulted these cases, but I confess, with due respect, that I am unable to see how they support the broad rule of law laid down in that case. It seems to me that the nature of an administration-suit is essentially different from an ordinary suit for money brought by a creditor of a deceased person against his heir. I need only refer to s. 213 and to Nos. 105, 130, and 131 of the fourth schedule, read with s. 644 of the Civil Procedure Code, to explain my conception of the nature of an administration-suit. It appears to me that if every suit to recover a debt from the heir of a deceased debtor, irrespective of the form in which it has been instituted, is to be regarded as an administration-suit, any suit for money or any claim, however small, by tradesmen, may be so considered, creating anomalies and difficulties upon which I need not, however, dwell. The rest of the rule laid down by MORRIS, J., is met by what I have already said, and seems to me to be contradicted by the rulings of GARTH, C.J., in the two cases to which I have already referred. My answer to the second question referred to us is, therefore, entirely in the negative, and I give the answer, holding that it is unaffected by the question whether the decree is passed by consent or in a contentious suit, whether the heir is in possession of the whole or only a part of the estate of the deceased, or whether he is present or absent, in possession or out of possession. The same answer applies to the point referred in the connected case F. A. No. 50 of 1883.

The third question referred to us in this case does not depend upon any rule peculiar to the Muhammadan Law; but upon the general principles of equity. The first point involved in the question is, whether in a case such as that contemplated, any equity exists in favour of the auction-purchaser, entitling him to retain the property till the plaintiff recoups him to the extent [846] of his share of the ancestor's debts liquidated by the proceeds of the auction-sale. If so, then the second point is, whether effect can be given to that equity by a decree in this case.

In my opinion both points must be answered in the affirmative.

The general principles of equity in such cases are to be found in ss. 696, 707, and 238 *a* of Story's celebrated work on Equity Jurisprudence, where illustrations are given of the general maxim, that he who seeks the aid of equity must do equity. For instance, as the learned author puts it, "in many cases where the instrument is declared void by positive law, and also where it is held void or voidable upon other principles, Courts of equity will impose terms upon the party, if the circumstances of the case require it." Such seems to be the principle which underlies the judgment of a Division Bench of this Court in *Mirza Pana Ali v. Saiad Sadik Hossein*, N.-W. P. H. C. Rep., 1875, p. 201, in which, although the learned Judges held a deed of sale, whereby the mother of a Muhammadan minor had sold his share in the estate of his deceased father, to be invalid, they dismissed his claim to recover possession of the share from the purchasers, who had redeemed a mortgage existing on the estate created by his father, because the plaintiff did not tender payment of his share of the mortgage debt. The learned Judges, however, do not appear, from the report of the case, to have considered the question whether in such a case a conditional decree could not be passed. The question, however, was decided by a Full Bench of this Court in *Hamir Singh v. Masammatt Zakia*, I. L. R., 1 All., 57, in which it was held that in such a case a decree might be passed for possession in favour of the plaintiff, "but it is only equitable to require that the recovery of her share should be contingent on the payment by her of her share of the debts, for the satisfaction of which the sale was effected. The same rule was adopted by a Division Bench of this Court in *Gulshere Khan v. Naubey Khan*, Weekly Notes, 1881, p. 20. In both these cases the sale was a private alienation, whilst in the present case the sale took place in execution of a decree to which the plaintiff was no party. But in my opinion this distinction does not alter the principle which enables Courts of equity to exercise a vast and flexible jurisdiction for adapting their decrees to the requirements of each case. "Some [847] modifications of the rights of both parties may be required; some restraints on one side or on the other, or perhaps on both sides; some adjustments involving reciprocal obligations or duties; some compensatory or preliminary or concurrent proceedings to fix, contract, or equalize rights; some qualifications or conditions, present or future, temporary or permanent, to be annexed to the exercise of rights or the redress of injuries. In all these cases, Courts of common law cannot grant the desired relief.....But Courts of equity are not so restrained. They may adjust their decrees so as to meet most, if not all, of these exigencies, and they may vary, qualify, restrain, and model the remedy so as to suit it in mutual and adverse claims, controlling equities, and the real, and substantial rights of all the parties"—Story's *Equity Jurisprudence*, ss. 27, 28. And, applying these principles to the present case, my answer to the third question is, that the plaintiff cannot obtain a decree for possession of his share of the property in suit without such decree being rendered contingent upon payment by him of such proportion of the purchase-money as would represent his proportionate share of the liability to the ancestor's debts liquidated by the proceeds of the auction-sale.

I wish to add that I have considered it my duty to consider this case at such length because of the conflict of decision existing in the reports, which has thrown much doubt upon important rules of law governing the inheritance of a population nearly as large as the whole of the German-speaking population of Europe.

NOTES.

[As regards the right of a Mahomedan heir in respect of property, the subject of a decree in which he was not a party-defendant, see (1901) 23 All., 263; (1889) 12 All., 313;

(1888) 10 All., 289. See also (1894) 19 Bom., 273 ; (1907) 6 C.L.J. 719. In (1894) 21 Cal., 311, it was held on the principle of this case, that in a suit against a widow in possession of her husband's estate, the point to be determined is *not* the extent of *her* rights in it but the extent of the *assets* in her hands which she has not yet disposed of.]

[7 All. 847]

The 13th June, 1885.

PRESENT : -

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE STRAIGHT,
MR. JUSTICE BRODHURST, AND MR. JUSTICE TYRRELL.

Indar Sen and another.....Defendants

versus

Naubat Singh and others.....Plaintiffs.*

Landholder and tenant—Ex-proprietary tenant—Relinquishment of ex-proprietary rights—Act XII of 1881 (N.-W. P. Rent Act), ss. 9, 31.

Held by the Full Bench that an ex-proprietary tenant is not competent to relinquish his holding to his landlord by private arrangement.

Per Petheram, C.J.—Section 31 of the N. W. P. Rent Act (XII of 1881) was enacted absolutely in the interests of the cultivator, and provides, in effect, that although the occupancy tenant may not be turned out, and may not transfer his [848] rights, he is not to be regarded as bound to his holding, that he may relinquish it, and that, in that case, he is not liable for rent ; but this provision must not be taken advantage of by letting the zamindar buy the holding, and thus introducing a new cultivator, contrary to the prohibition contained in s. 9.

THE plaintiffs in this case sued the defendants for possession of certain shares in certain mauzas and certain shops, claiming as usufructuary mortgagees under a deed, dated the 3rd April 1882, executed in their favour by the defendants. This deed conveyed to the plaintiffs all the rights and interests appertaining to the shares in the mauzas, together with the "*haq khud kasht*." The Court of First Instance decreed the claim. The defendants appealed to the High Court, contending that "a decree for possession of the *sir-land* was contrary to law." With reference to this contention, the Divisional Bench (PETHERAM, C.J., and BRODHURST, J.), hearing the appeal, referred to the Full Bench the question—"Whether a person who creates a usufructuary mortgage of zamindari property becomes an ex-proprietary or occupancy-tenant of the *sir-land*, under s. 7 of the Rent Act, 1881?" This question having been answered in the affirmative by the majority of the Judges, (*Ante*, p. 553) the case came again before the Divisional Bench. It was then contended, on behalf of the respondents, that the appellants had relinquished their rights in respect of their *sir-land* in a mauza called Rukmipur, their share in which was part of the mortgaged property. The respondents relied on an instrument executed by the appellants, dated the 26th April 1882. This instrument, after reciting the mortgage, continued as follows:—

"Fifty-six *pukta* bighas and sixteen biswas of land have been in our cultivation, and we of our free will and consent have relinquished the said land to the mortgagees, which they have accepted. Therefore we hereby declare that neither we nor our heirs shall have any claim to the rights of cultivation. If we claim them, then our claim will not be cognizable. The mortgagees are

* First Appeal No. 18 of 1884, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 19th May 1883.

at liberty to give the cultivatory land for cultivation to whomsoever they may like, or keep it in their cultivation : we have nothing to do with it. Therefore these few words, by way of relinquishment of cultivation, have been written that they may be of use when needed."

[849] The Divisional Bench thereupon referred to the Full Bench the question— Whether an ex-proprietary tenant could relinquish his holding to his landlord by private arrangement ?

Babu Ratan Chand, for the Appellants.

Mr. J. Simeon, for the Respondents.

The following judgments were delivered by the Full Bench :—

Petheram, C. J.—This was a suit brought by a mortgagee for possession of the mortgaged property, which was a zamindari interest belonging to the defendant, including *sir*-land. The first question which arose in the case was— What is the position of a zamindar who has mortgaged his interest with possession, in reference to his *sir* ? That point was decided by the ruling of the Full Bench, dated the 7th March (*Ante*, p. 553). The Court then held that the zamindar's position was that of an ex-proprietary tenant under the Rent Act, a mortgage being a transfer of a proprietary interest. After this decision, the case came before a Divisional Bench, and a further question then arose. It appears that, after the mortgage and the creation of the ex-proprietary tenancy, the defendant relinquished his ex-proprietary rights in favour of the new zamindar, the mortgagee. The question now is, whether the transaction can be enforced, because, although the ex-proprietary tenancy was relinquished, the mortgagee was never put in possession, and the agreement is still executory.

I am of opinion that the transaction cannot be recognized. The position of an ex-proprietary tenant is defined by the Rent Act. Section 7 creates the tenancy ; s. 9 lays down certain rules relating to transfer, and provides that " the rights of tenants at fixed rates may devolve by succession or be transferred. No other right of occupancy shall be transferable in execution of a decree, or otherwise than by voluntary transfer between persons in favour of whom as co-sharers such right originally arose, or who have become by succession co-sharers therein." The plain meaning of this is, that occupancy-tenants (including all who occupy the land for their subsistence except tenants at fixed rates) are not competent to sell their rights, except to co-sharers in the same interest. Where a number of persons are jointly engaged in the cultivation of land, they may, as between themselves, sell their occupancy-rights. In other words, any one of them may so transfer his rights that, in a case where, for instance, six persons originally were in joint cultivation, one of them has gone, and only five of the original joint cultivators remain. No stranger, however, is introduced into the original body. We here have the case of a mortgage, and a new class of occupancy-tenants created in the person of the mortgagor. The mortgagor then proposes to relinquish his rights in favour of the landlord. Now, if this were a valid transaction, the landlord would in effect become a joint cultivator with the other co-sharers. This means the introduction of an outsider as an occupancy-tenant, and that is exactly what the law prohibits. Section 31 of the Rent Act was enacted by the Legislature absolutely in the interests of the cultivator. It provides in effect that, although the occupancy-tenant may not be turned out, and may not transfer his rights, he is not to be regarded as bound to his holding, that he may relinquish it, and that in that case he is not liable for rent. This provision has been taken advantage of by letting the zamindar buy the holding, and thus introducing a new cultivator. My answer to this reference is,

that the occupancy-tenant's interest is not absolute, and that the mortgagor cannot, under the circumstances, be ejected from the *sir-land* by the new zamindar, the mortgagee.

Straight, J.—As I understand the question put by this reference, it is virtually this:—Can an ex-proprietary tenant relinquish his ex-proprietary tenancy to his landlord by private arrangement?

The circumstances of the case are, that on the 3rd April 1882, a mortgage-deed was executed by the defendant in favour of the plaintiff, and the latter now sues for possession of the property. On the 26th April, a document was executed, which virtually assigned or relinquished the ex-proprietary rights which, under the recent ruling of the Full Bench, the mortgagor had acquired on the completion of the mortgage.

It is contended, on behalf of the mortgagee, that the document is a valid one, and that it should be recognized and enforced. In the first place, it does not recite any consideration; and if a [851] document is executed for no consideration, it cannot be enforced. But it has been said that there *was* some consideration, namely, the release of the mortgagor from payment of the rent, which otherwise would have been due from him. If this is correct, there is a transfer of ex-proprietary rights by the mortgagor in favour of the mortgagee, and that is a transaction in the teeth of s. 9 of the Rent Act. So that, whichever way we look at the matter, the contract is either unenforceable or prohibited by s. 9. I am of opinion that it is not competent for an ex-proprietary tenant, by private arrangement, to transfer his ex-proprietary rights to his landlord; and in this view I concur in the answer given to this reference by the Chief Justice. The result is, that in any decree in this suit giving possession to the mortgagee, he cannot obtain the ex-proprietary rights referred to in the deed.

Brodhurst, J.—I am of the same opinion.

Tyrrell, J.—I am of the same opinion.

[7 All. 851]

The 13th June, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE STRAIGHT,
MR. JUSTICE BRODHURST, AND MR. JUSTICE TYRRELL.

Murli Rai and others.....Plaintiffs

versus

Ledri and another.....Defendants.*

*Landholder and tenant—Mortgage by conditional sale of occupancy rights
to zamindar—Act XVIII of 1873 (N.-W. P. Rent Act), s. 9—
Act XII of 1881 (N.-W. P. Rent Act), ss. 2, 9.*

The occupancy-tenant of certain land, before the N.-W. P. Rent Act (XII of 1881) came into force, mortgaged his rights to his zamindars by a deed of conditional sale. The zamindars sued the heirs of the conditional vendee for foreclosure and possession of the mortgaged property.

* Second Appeal No. 1015 of 1884, from a decree of Babu Mrittonjoy Mukerji, Subordinate Judge of Ghazipur, dated the 14th June 1884, reversing a decree of Babu Nil Madhab Roy, Munsif of Ghazipur, dated the 12th December 1883.

Held by the Full Bench that the terms of the judgment of the Full Bench in *Naik Ram Singh v. Murli Dhar*, I. L. R., 4 All., 371, were directly applicable to the case, and that the transaction of mortgage, which was subsequently to become a sale, was not a transaction to which s. 2 of the Rent Act applied, because the sale would not have effect till after the Act came into operation.

IN this case, the occupancy-tenant of certain land, before the N.-W. P. Rent Act (XII of 1881) came into force, executed a deed of mortgage by conditional sale of his rights and interests in favour of his zamindars. The latter brought the present suit [852] against the heirs of the conditional vendee for foreclosure and possession of the mortgaged property. The defendants pleaded that the property in suit, being an occupancy holding, was not legally transferable. Upon this issue, the Court of First Instance held that the transfer was valid, on the ground that it had been made in favour of the zamindars, and "it would be unreasonable to hold that a landholder should not be free to cause sales in execution of his own decree of the occupancy-right of his own judgment-debtor in land belonging to himself—*Umrao Begam v. The Land Mortgage Bank of India*, I. L. R., 2 All., 451." The Court accordingly decreed the claim. The defendants appealed. The Lower Appellate Court reversed the decision of the Court of First Instance, and dismissed the suit, in the following terms:—"The decision relied on by the lower Court seems to me to have been clearly overruled by *Phalli v. Matabadal*, Weekly Notes, 1883, p. 7, and the mortgage of the right of occupancy, which is the subject matter in dispute in this suit, is absolutely void under s. 9 of the Rent Act. The decision of the lower Court must therefore be reversed."

The plaintiffs appealed to the High Court, on the ground that "the Lower Appellate Court had misconstrued the provisions of Act XII of 1881." The appeal came on for hearing before PETHERAM, C.J., and BRODHURST, J., who referred the case to the Full Bench.

Munshi Kashi Prasad, for the Appellants.

Mr. J. E. Howard, for the Respondents.

Straight, J.—For the purpose of answering this reference, it does not appear necessary to deal with, or to discuss the propriety of the judgment of the Full Bench in *Umrao Begam v. The Land Mortgage Bank of India*, I. L. R., 2 All., 451. The ground upon which I think that the reference should be answered is, that the terms of the judgment of the Full Bench in *Naik Ram Singh v. Murli Dhar*, I. L. R., 4 All., 371, are directly applicable to the present case; and I am of opinion that we ought not to hold that the transaction of mortgage, which was subsequently to become a sale, was a transaction to which s. 2 applied, because the sale would not have effect till after the Act came into operation.

Petheram, C.J., Brodhurst, J., and Tyrrell, J., concurred.

[853] *The 13th June, 1885.*

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE STRAIGHT,
MR. JUSTICE BRODHURST, AND MR. JUSTICE TYRRELL.

Queen-Empress

versus

Laskari.

*Criminal Procedure Code, ss. 17, 435, 437— "Inferior"—"Subordinate"—
First class Magistrate "subordinate" to Magistrate of District.*

A Magistrate of the first class is, within the meaning of s. 437 of the Criminal Procedure Code, "subordinate" to the Magistrate of the District, who is therefore competent to call for the record of the former, and to deal with it under s. 437.

THIS case was referred to the High Court for orders, by the Sessions Judge of Gorakhpur, under s. 438 of the Criminal Procedure Code. The question raised by the reference was, whether a Magistrate of a District was competent to call for the record of a Magistrate of the first class, and to deal with it under the provisions of s. 437 of the Criminal Procedure Code. The reference was made in consequence of the ruling of DUTHOIT, J., in *Jhinguri v. Bachu* (*ante*, p. 134) to the effect that the Magistrate of the District was not competent to send for the file of a first class Magistrate in the manner contemplated by s. 437. The case came on for hearing before STRAIGHT, J., who, in view of the importance of the question involved, and the conflict of opinion that appeared to exist on the subject, referred it to the Full Bench.

The *Public Prosecutor* (Mr. C. H. Hill) for the Crown.

The following **judgments** were delivered by the Full Bench :—

Straight, J.—The question which we are asked by this reference virtually is, whether a Magistrate of the first class is, within the meaning of s. 437 of the Criminal Procedure Code, "subordinate" to the Magistrate of the District. In my opinion this question should be answered in the affirmative ; and I wish to add a few observations with the object of explaining some mistakes which appear to me to have been made in reference to some of the sections in Chapter XXXII of the Code. By s. 435 it is provided that "the High Court or any Court of Session, or District Magistrate, or any Sub-Divisional Magistrate empowered by the Local Government in this behalf, may call for and examine the record of any proceeding before any *inferior* Criminal Court." I am of opinion that the word "inferior" was here used because in former rulings it had been held that the Magistrate of the Dis-[854]trict was not "subordinate" to the Sessions Court. Under s. 435 it is obvious that a Court of Session has a right to call for the record of the Magistrate of the District, not as "subordinate," but as "inferior" to the former Court, and therefore the word "inferior" has been used to meet the rulings to the effect that the District Magistrate is not "subordinate" to the Sessions Court. The section goes on to provide that "if any Sub-Divisional Magistrate, acting under this section, considers that any such finding, sentence or order is illegal or improper, or that any such proceedings are irregular, he shall forward the record, with such remarks thereon as he thinks fit, to the District Magistrate." The result is that, under s. 435, certain tribunals are invested with the power of calling for the records of Courts "inferior" to them, that is, inferior for purposes of jurisdiction. Now, when the record has come up

under s. 435, s. 436 provides that the Court of Session or the District Magistrate alone may do certain things, and s. 437 confers a power upon the Court of Session and the District Magistrate, which they did not possess under the old Code, of directing Magistrates "subordinate" to the District Magistrate to make further inquiry into any case which has been dismissed. The term "subordinate" is explained by s. 17 of the Code, and that section seems to show beyond question that a Magistrate of the first class is subordinate to the District Magistrate. It follows that an order passed by a District Magistrate under s. 437 to a Magistrate of the first class in his District, is an order which the latter is bound to obey, and I am therefore of opinion that this reference should be answered in the affirmative.

Petheram, C. J., concurred.

Brodhurst, J.—I concur in holding that a District Magistrate is competent to call for the record of any Magistrate in his District, and to deal with it under s. 437 of the Criminal Procedure Code.

Tyrrell, J.—I am of the same opinion. In reference to my brother STRAIGHT'S observations as to the reason why the word "inferior" is used in s. 435 instead of the word "subordinate," I may add that the rulings which gave rise to that expression have been embodied in the last sentence of s. 17 of the Code.

NOTES.

[This case was followed in the Full Bench case, (1885) 12 Cal., 473.]

[855] CIVIL REVISIONAL.

The 15th June, 1885.

PRESENT :

MR. JUSTICE STRAIGHT AND MR. JUSTICE TYRRELL.

Surajpal Singh and others.....Petitioners

versus

Jairamgir.....Opposite Party.*

Small Cause Court suit—Suit for enforcement of hypothecation against moveable property—Act XI of 1865 (Mufassal Small Cause Courts Act), s. 6.

A suit was brought in a Small Cause Court to recover a sum of money from the defendants personally, and by enforcement of hypothecation of certain cattle by their attachment and sale. The cattle were in the hands of other persons, who had purchased them at an auction-sale in execution of a decree against the original defendants, and who were added as defendants under s. 32 of the Civil Procedure Code.

Held, that the suit was not cognizable by a Small Cause Court, inasmuch as it did not fall under the category of a "suit for money due on a bond or other contract," or of a "suit for personal property, or for the value of such property," within the meaning of s. 6 of the Mufassal Small Cause Courts Act (XI of 1865). *Ram Gopal Shah v. Ram Gopal Shah*, 9 W. R., 136, and *Godha v. Naik Ram*, ante, p. 152, referred to.

* Application No. 109 of 1885, for revision under s. 622 of the Civil Procedure Code of an order of Munshi Madho Lal, Judge of Small Cause Court of Mirzapur, dated the 6th January 1885.

THE facts of this case are sufficiently stated, for the purposes of this report, in the judgment of the Court.

Pandit *Sunder Lal*, for the Petitioners.

The Opposite Party was not represented.

Straight and Tyrrell, JJ.—This was an application, under s. 622 of Act XIV of 1862, for the revision of an order passed by the Small Cause Court Judge of Mirzapur, on the 6th January 1885, and the applicants before us are the persons who were defendants in that suit. The plaintiff virtually sued to recover Rs. 117-9-0 from the defendants personally, and by enforcement of hypothecation of sixty-nine head of cattle by their attachment and sale. The cattle were in the hands of defendants Nos. 3 to 5, who were added as defendants under s. 32 of the Code, and who had purchased them at an auction-sale held in execution of a decree against the original defendants.

It has been contended by the learned pleader for the applicants that the suit was not cognizable by the Small Cause Court, and [856] that the decree of that Court must therefore be set aside for want of jurisdiction.

The question is a simple one to determine. Section 6 of the Small Cause Courts Act (XI of 1865) enumerates the various classes of suits cognizable by Small Cause Courts. We have to determine whether the present suit can fall under the category of a "suit for money due on a bond or other contract," or of a "suit for personal property."

Now, it is obvious that the suit contemplated in the first case is a suit for the recovery of a sum of money due on a bond, and it was never contemplated that a suit for enforcement of hypothecation against certain moveable property should fall under that category. The questions which might arise with reference to the enforcement of hypothecation might involve serious and difficult considerations which it was not contemplated should be tried by such Courts.

The observations of Sir BARNES PEACOCK, in *Ram Gopal Shah v. Ram Gopal Shah*, 9 W. R., 136, on the point are very apposite; and we are of opinion that the relief sought in the shape of enforcement of hypothecation took the suit out of the jurisdiction of a Small Cause Court.

We have now to consider whether this suit can be said to be a suit for personal property or the value of personal property. It cannot be said that the cattle belonged to the plaintiff. The plaintiff does not claim to obtain possession of the cattle or to recover their value. The cattle had been attached and sold in execution of a decree, and purchased by the defendants Nos. 3 to 5, and the Court had no jurisdiction to hold the defendants liable to the extent of the value of the cattle in their hands. We may add that the principles laid down in *Godha v. Naik Ram*, ante. p. 152, apply to this case also.

The application must be allowed, and we set aside the decree of the Small Cause Court as against the defendants who were subsequently added under s. 32 of the Code, with proportionate costs in both Courts.

Application allowed.

NOTES.

[Following this case, it was held in (1887) 10 All., 20, that assignment by endorsement of a registered bond hypothecating certain crops was a transaction relating to moveable property and that a suit by such assignee was not of a small cause nature.]

[857] APPELLATE CIVIL.

The 24th June, 1885.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND
MR. JUSTICE TYRRELL.

Jagram Das.....Plaintiff

versus

Narain Lal.....Defendant.*

Civil Procedure Code, Chapter XV, ss. 191, 198—Hearing of suit—Power of Judge to deal with evidence taken down by his predecessor.

A Subordinate Judge, having taken all the evidence in a suit before him, and having completed the hearing of the suit except for the arguments of counsel on both sides, was removed, and the case came on for hearing before his successor. The new Subordinate Judge took up the case from the point at which it had been left by his predecessor, and proceeded to judgment and decree.

Held, that the only power given by the Civil Procedure Code in such cases is to allow the evidence taken at the first trial to be used as evidence at the second trial, and not to allow the two hearings to be linked together and virtually made one; that the Subordinate Judge should have fixed a day for the entire hearing of the suit before himself, and should first have heard the opening statement on behalf of the plaintiff, the evidence produced by both sides and the arguments on behalf of both, and then finally decided the case which he had himself heard and tried; that he might, in accordance with the provisions of s. 191 of the Civil Procedure Code, have allowed the depositions which had been taken before his predecessor to be put in; and that, in neglecting to take this course, and in deciding the case upon materials which were never before him, his action was illegal, and the judgment and decree were nullities.

THE facts of this case are sufficiently stated, for the purposes of this report, in the judgment of PETHERAM, C.J.

Messrs *T. Conlan* and *C. H. S. Reid*, for the Appellant.

Pandits *Ajudhia Nath* and *Bishambar Nath*, and *Munshi Kashi Prasad*, for the Respondent.

Petheram, C. J.—I am of opinion that this appeal must be allowed, and the cause remanded to the Subordinate Judge of Aligarh for trial, on the ground that the cause has never really been tried, and that the papers before us, which purport to be a judgment and a decree, cannot properly be so called. The facts of the case are as follows:—Maulvi Samiullah Khan was the Subordinate Judge of Aligarh, and the present suit was instituted in his Court, and the proceedings went on in a perfectly regular and proper manner until the hearing of the case under the provisions of Chapter XV of the Civil Procedure Code. A day was fixed under that chapter for the hearing before Maulvi Samiullah Khan, and [858] the cause came on before him. The plaintiff's counsel opened his case and called witnesses to prove it, who were cross-examined by counsel for the defendant. After this, the defendant's counsel called his witnesses, and they were cross-examined by the other side. All that remained was for the plaintiff's counsel to sum up and for the defendant's

* First Appeal No. 146 of 1884, from a decree of Rai Cheda Lal, Subordinate Judge of Aligarh, dated the 10th September 1884.

counsel to reply. At this point Maulvi Samiullah Khan was sent on a special mission to Egypt, and another Subordinate Judge, named Rai Cheda Lal, was appointed to officiate in his place, and the present case came before him among others which were pending in his Court. His business was to try the case according to law; and if he did not so try it he had no jurisdiction to try it at all. All that he could properly do was to take up the case at the point which it had reached before the commencement of the hearing under Chapter XV of the Code. He should have fixed a day for the entire hearing of the suit before himself, and, in that case, the regular course would have been for the plaintiff's counsel to have opened his case and proved it by evidence, and for the defendant's counsel to have followed him. The Subordinate Judge should then have heard arguments on both sides, and should finally have decided the case which he had himself heard and tried. He might have called in aid the provisions of s. 191 of the Civil Procedure Code, which enacts that a Judge, in the hearing of a cause which was partly heard by another, may allow the evidence which was previously taken, to be used before himself. If he had taken that course, the trial would have been perfectly regular, and if, upon the day fixed for the hearing, he had first heard the opening statement on behalf of the plaintiff, and then allowed the plaintiff to prove his case by putting in the depositions which had been taken before his predecessor, his proceedings would not have been open to objection. But he did nothing of the kind. He fixed no date for the hearing of the case as for a new trial; but he practically arranged that it should be heard from the point at which his predecessor left off. In my opinion, this was an absolutely illegal course, and one which cannot be justified by any system of law, and certainly not by the Civil Procedure Code. The only power given by the Code is to allow the evidence taken at the abortive trial to be used as evidence at the new trial. [859] The law nowhere says that the two hearings may be linked together and virtually made one. That this was not the meaning of the Legislature is shown by s. 199 of the Code, which occurs in Chapter XVII, relating to judgment and decree. That section provides that a Judge who has not heard the case may pronounce the judgment of his predecessor who has heard it, if the judgment is written and signed by him. That shows the intention of the Legislature to have been that the case should be heard by one Judge, and that the judgment should be that of the Judge who has heard the case, though it may be delivered by another. There is nothing to show that a Judge may decide a case upon materials which have never been before him. I am therefore of opinion that the judgment and decree in this suit are absolute nullities, and that therefore the appeal must be allowed, and the cause remanded to the Subordinate Judge, who will fix a day and re-hear it from beginning to end.

I am glad to have an opportunity of expressing my disapproval of any system which makes it possible for a man to decide a case upon materials which are not before him. It may be said that these observations are applicable to the proceedings of an Appellate Court, which is obliged to decide questions of fact upon evidence which it has not itself heard. But it must be remembered that the Appellate Court has the advantage of the judgment of the Judge of First Instance, who had the evidence before him. It is probable that the Subordinate Judges themselves will be glad to be told that they are not to decide questions upon which they have not themselves taken the evidence; and it is obvious that such a course is not in accordance with the interests of justice.

The costs of all proceedings will be costs in the cause.

Tyrrell, J.—I am of the same opinion. It appears to me that the Subordinate Judge who gave the judgment in the case, without having heard a word

of the evidence or the pleadings made by or on behalf of the parties, under Chapter XV of the Civil Procedure Code, cannot be taken to have been a Court competent to proceed to judgment upon evidence duly taken, and after having fully heard the parties, according to the terms of s. 198.

Cause remanded.

NOTES.

[This case was followed in (1885) 8 All., 35, but was explained in the Full Bench Case (1886) 8 All., 576, on the ground that on the facts of the case, the parties must have considered to have waived their right for a fresh trial. But see the judgment of *Mahmood, J.* therein. See also (1887) 10 All. 80.]

[860] *The 29th June, 1885.*

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND
MR. JUSTICE BRODHURST.

Karan Singh and another.....Plaintiffs

versus

Muhammad Ismail Khan and others.....Defendants.*

Pre-emption—Hindu widow—Joinder of plaintiffs, one of whom had no right to sue for pre-emption—Amendment of plaint.

The plaintiffs in a suit to enforce a right of pre-emption based on the *wajib-ul-arz* of a village, which gave the right to "co-sharers," alleged themselves to be jointly interested in the village, and, in their plaint, claimed relief jointly. One of the two plaintiffs was the widow of a co-sharer in the village, who, at the time of his death, was a member of a joint Hindu family.

Held, that, inasmuch as the widow had only a right of maintenance out of the estate of her husband, she was not a co-sharer in the village, and therefore had no right to claim pre-emption.

Held, further, with reference to the manner in which the plaint was framed, that the other plaintiff could not claim pre-emption entirely on his own account without amending the plaint, but that it was too late for him to take such a course. *Damodar Das v. Gokal Chand* (*Ante*, p. 79) referred to.

THE plaintiffs in this suit were Karan Singh, the minor son of Desraj, deceased, and Musammat Lado, calling herself the widow of Balwant Singh, deceased, son of Desraj. Musammat Lado claimed in this suit, on her own behalf, and as the guardian of Karan Singh, to enforce a right of pre-emption in respect of the sale of a share in a village called Alahdadpur. The plaintiffs claimed under the *wajib-ul-arz* as "collateral co-sharers." It appeared that, on the death of her husband Balwant Singh, Musammat Lado's name was substituted for his in the revenue registers. It was denied by the vendees that Lado was the widow of Balwant Singh, and it was a point in dispute whether Balwant Singh had or had not pre-deceased his father Desraj.

The Court of First Instance dismissed the suit on the ground that Lado had no right to sue, not being a "co-sharer," and Karan Singh had lost the

* First Appeal No. 98 of 1884, from a decree of Maulvi Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 17th March 1884.

right of pre-emption by associating with himself a person who was not a "co-sharer." The Court observed as follows :—

"In my opinion, the third point at issue is that which should be tried first. Lado's right of pre-emption cannot be admitted in any way, and she has no right whatever to the property owned by [861] Desraj. It is satisfactorily proved by the evidence on the record that Balwant, who is alleged to be the husband of Lado, died in the life-time of his father Desraj, hence the Musammat had no position; and, assuming that Balwant died after his father, Musammat Lado had no proprietary right to the property in the life-time of Karan Singh, nor was she a share-holder in the village, nor could she be a collateral. As to Balwant, it is alleged by the plaintiffs that he died after Desraj; but they do not say that he divided the property. If therefore the plaintiffs' own statement were admitted in respect of Balwant, Musammat Lado had no right to ancestral property left by Desraj, nor can she be the heir of Desraj under the Hindu Law. She is like a stranger, and even if she had been a woman whose possession during her life-time could have been admitted, she could not have claimed the right of pre-emption, as is evident from the case of *Dula Kuari v Jagarnath Kuari*, Weekly Notes, 1883, p. 177. Therefore, when the Musammat is a perfect stranger and has no concern with reference to the sold property, Karan Singh too has lost any right which he may be supposed to have had, by associating her with himself. In other words, when a claim has been brought in the names of two persons, one of whom is a 'stranger,' it cannot be decreed in the shape in which it has been brought. It would be inconsistent with sound principles to dismiss the claim of Lado and to maintain the claim of Karan Singh as valid, and to adjudicate upon it. This view is supported by the ruling in the case of *Bhawani Prasad v. Damru*, I. L. R., 5 All., 197."

The plaintiffs appealed to the High Court. It was contended on their behalf, *inter alia*, that the lower Court had erred in holding that Lado had no right to sue, and that Karan Singh had lost the right of pre-emption by joining her as a co-plaintiff.

Pandit Nand Lal, for the Appellants.

Pandit Ajudhia Nath, for the Respondents.

Petheram, C. J.—I think that the appeal must be dismissed. The Judge has dismissed the suit upon the ground that one of the plaintiffs is not a co-sharer in the village, and had no right to sue. The relief claimed in the plaint is a joint one, and one of the plain-[862]tiffs cannot succeed without amending the plaint, and striking out the name of the other plaintiff. The facts upon which the judgment of the Judge is founded are as follows :—One of the plaintiffs, Musammat Lado, is the widow of one of the co-sharers of the village. Her husband at his death was a member of a joint Hindu family; his widow, Musammat Lado, therefore, did not succeed to the estate of her husband, which was inherited by the other members of the family. She had only a right of maintenance out of the estate of her late husband; she was therefore not a co-sharer in the village, and therefore had no right to claim pre-emption. She must, for the purposes of this suit, be regarded as a stranger.

Now, in the plaint, both the plaintiffs allege themselves to be jointly interested in the village, and they jointly claimed pre-emption. One of them, Musammat Lado, is not entitled to claim pre-emption, and the other plaintiff therefore cannot claim pre-emption entirely on his own account without amending the plaint. Under a Full Bench ruling of this Court—*Damodar Das v. Gokal Chand* (*Ante* p. 79) the plaint cannot be amended at this time

of day: with the petition of plaint as it now stands, the plaintiffs cannot succeed. The appeal is dismissed with costs.

Brodhurst, J.—I am of the same opinion.

Appeal dismissed.

NOTES.

[See also (1886) 8 All. 462.]

[7 All. 862]

APPELLATE CRIMINAL.

The 3rd July, 1885.

PRESENT :

MR JUSTICE STRAIGHT.

Queen-Empress

versus

Dan Sahai.

*Criminal Procedure Code, s. 288—Trial before Court of Session—
Evidence given before committing Magistrate used
at trial to contradict witnesses.*

Section 288* of the Criminal Procedure Code was never intended to be used so as to enable a Court trying a cause to take a witness's deposition bodily from the committing Magistrate's record, and to treat it as evidence before the Court itself. *Queen v. Amanulla*, 12 B. L. R., App., 15, referred to.

A Judge is bound to put to the witnesses whom he proposes to contradict by their statements made before the committing Magistrate, the whole or such portions of their depositions as he intends to rely upon in his decision, so as to afford them an opportunity of explaining their meaning, or denying that they had made any such statements, and so forth. [863] In a case in which the Sessions Court had neglected to apply the above rules, STRAIGHT, J., quashed the conviction.

IN this case two persons named Hansi and Dan Sahai were tried by the Officiating Sessions Judge of Mainpuri on a charge, under s. 304 of the Penal Code, of culpable homicide not amounting to murder. Both the prisoners were convicted. In the course of his judgment, the Sessions Judge made the following observations :—

“ The statements of the witnesses, Kanahia, Tejraj, and Aman Singh differ from those made before the committing Magistrate in omission of Dan Sahai and accused's name. They state that Hansi alone was the assailant of the deceased.....The witnesses have evidently come into this Court with the intention of screening Dan Sahai, accused. The statements implicating him, made before the committing Magistrate, differ on this point, as already mentioned ; but, under s. 288 of the Criminal Procedure Code, I can use the

* [Sec. 288.—The evidence of a witness duly taken in the presence of the accused before the committing Magistrate may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case.]
Evidence given at preliminary inquiry admissible.

statements made in the Magistrate's Court, and thereby defeat this conspiracy to defeat justice. That Dan Sahai was there I have no doubt. His name has been mentioned all along from the very beginning in the magisterial proceedings, and he made the first report to the Police."

The accused Dan Sahai appealed to the High Court. He was not represented.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji) for the Court.

Straight, J.—The Judge has quite misunderstood the provisions of s. 288 of the Criminal Procedure Code. That section was never intended to be used so as to enable a Court trying a cause to take a witness's deposition bodily from the Magistrate's record, as the Judge has done here, and to treat it as evidence before itself; and I entirely concur in the remarks made on this head by PHEAR, J., in *Queen v. Amanulla*, 12 B. L. R., App., 15. At any rate, the Judge was bound to put to the witnesses he proposed to contradict by their former statements the whole or such portions of their depositions as he intended to rely upon in his decision, so as to afford them an opportunity of explaining their meaning, or denying that they [864] had made any such statements, and so forth. The course adopted by the Judge was contrary to practice, and inconsistent with all the rules regulating the admissibility of evidence, and PHEAR, J., in the case mentioned above, has pointed out the mischief and dangers of such a mode of procedure.

Under the circumstances I cannot allow the conviction of Dan Sahai to stand, and, it being reversed, he is acquitted.

Conviction quashed.

NOTES.

[In (1898) 21 All., 111, it was held that conviction solely based upon evidence before the committing magistrate was illegal, though it would be otherwise if there was corroborative evidence. In (1906) 28, All., 683 it was held that statements made before the committing magistrate but withdrawn in the trial, could be legally admitted as evidence in the case. See also 4 C.W. N. 49.]

[7 All. 864]

APPELLATE CIVIL.

The 3rd July, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND
MR. JUSTICE BRODHURST.

Radhey Lal and others.....Plaintiffs

versus

Mahesh Prasad and another.....Defendants.*

Extinguishment of charge—Equitable estoppel.

An owner of property made a grant therefrom of an annuity, with a proviso that, in case of failure to pay the same, the grantee and her heirs should be entitled to take possession of the property. He subsequently mortgaged the same property, by an instrument which set out that it was his absolutely. After this he paid the annuity till the death of the grantee, whose heir he was. The mortgagees obtained a decree upon their deed, and in execution

* First Appeal No. 139 of 1884, from a decree of Babu Abinash Chander Banerji Subordinate Judge of Allahabad, dated the 24th June 1884.

thereof the property was attached and sold, and the decree-holders obtained possession. The heirs of the mortgagor sued the decree-holders for recovery of possession and for arrears of the annuity, claiming under the terms of the grant.

Held that the charge merged and was extinguished, and as the grantor had professed to transfer the property to the mortgagees unincumbered, he was bound to give it over to them free from incumbrance, and it would not lie in his mouth, nor in the mouths of his heirs, to set up the charge against the mortgagees and their vendees.

IN 1844, one Shaikh Haidar Ali sold certain zamindari property to Sheikh Abdullah, the brother of his wife Musammat Zainab Bibi. As Zainab Bibi's dower was due, Abdullah, on the 8th March 1844, executed in her favour an instrument whereby he promised to pay to her and her heirs, out of the income of the property purchased by him from Haidar Ali, an annuity of Rs. 100 down to the year 1862, and, after that year, of Rs. 200. It was stipulated that, in the event of failure by the grantor or his heirs to pay the said annuity, the property, out of the income [865] of which it was payable, should become the property of the grantee and her heirs, and they should be entitled to obtain possession of it. After the execution of this instrument, Abdullah remained in possession of the property, and paid the annuity. On the 5th June 1868, he mortgaged the property to Mahesh Prasad and Partab Narain, the defendants in the present suit, by a deed in which he described it as his absolutely, and made no mention of the charge held upon it by Musammat Zainab Bibi. In March 1873, the mortgagees obtained a decree on their deed against the mortgagor, and, in execution thereof, the property was attached and put up for sale, and was purchased by the decree-holders themselves, who obtained possession. On the 25th May 1878, Musammat Zainab Bibi died, and Sheikh Abdullah survived her a few days only. The sons of the latter, who were the nephews and heirs of Musammat Zainab Bibi, sold half their rights to one Radhey Lal, by a sale-deed, dated the 29th March 1883.

The present suit was brought by Radhey Lal and the sons of Abdullah to recover possession of the property, and for Rs. 1,200 as arrears of the annuity from 1284 to 1289 fasli, claiming under the terms of the deed of the 8th March 1844. The defendant pleaded (*inter alia*) that, upon the death of Musammat Zainab Bibi, the right to receive the annuity devolved upon the grantor and his heirs, and consequently merged and was extinguished, and could not now be enforced.

The Court of First Instance dismissed the suit on the grounds, first that it was barred by limitation, and, secondly, that the charge was extinguished when the right to receive the annuity devolved upon Abdullah by inheritance from Musammat Zainab Bibi.

The plaintiffs appealed to the High Court.

Mr. N. L. Paliologus and Lala Juala Prasad, for the Appellants.

Mr. W. M. Colvin, Munshi Hanuman Prasad, and Ram Prasad, and Babu Oprokash Chunder Mukarji, for the Respondents.

Petheram, C.J.—I am of opinion that this appeal must be dismissed. The facts are, that one Shaikh Abdullah, being in possession of a certain property, made a grant from it of an [866] annuity to his sister and her heirs, with a proviso that, in case of failure to pay the annuity, the grantee and her heirs should be entitled to take possession of the property. He paid the annuity and kept possession, and subsequently mortgaged the property to the present defendants, and, by the terms of the mortgage, declared that the property was absolutely his own, and that no other person had any interest in it. He remained in possession, and paid the annuity till his sister's death.

He was then her heir, and therefore the whole right to the charge, and the right to possession in default of payment, vested in him.

The charge consequently merged and was extinguished, and as he had previously professed to transfer the property to the defendants unincumbered, he was bound to give it over free from incumbrance. The charge having been extinguished in his hands, he then had what he professed to have at the time when he executed the mortgage, and it would not lie in his mouth, nor in mouths of his two sons, to say that the charge was still existing, and could be set up against the mortgagees and their vendees. This would amount to taking advantage of his own fraud—a course which no Court of law would allow for a moment. I am therefore of opinion that the Subordinate Judge was right, and that the appeal must be dismissed with costs.

Brodhurst, J.—I am of the same opinion.

Appeal dismissed.

[7 All. 868]
FULL BENCH.

The 4th July, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE
STRAIGHT, MR. JUSTICE BRODHURST AND MR. JUSTICE TYRRELL.

Abadi Husain.....Plaintiff
versus

Jurawan Lal and others.....Defendants.*

Landholder and tenant—Transfer of "right of occupancy"—Lease—Mortgage
—"Zar-i-peshgi" lease—Act XII of 1881 (N.-W. P. Rent Act), ss. 8, 9.

The occupancy-tenants of certain land executed a *zar-i-peshgi* lease in favour of certain persons, by which, in consideration of a sum of money, it was agreed that the latter should have the right of occupying and cultivating the [867] occupancy-holding as tenants for a term of years at a nominal rent. In pursuance of this agreement, those persons obtained possession. The zamindar thereupon brought a suit against them for ejectment, and to have the *zar-i-peshgi* lease set aside.

Held by the Full Bench that the *zar-i-peshgi* lease was a transfer of occupancy-rights, within the meaning of s. 9 of the N.-W. P. Rent Act (XII of 1881), and was therefore invalid.

Per PETHERAM, C. J.—A right of occupancy means nothing but the right to live on and cultivate land as one's own.

Per STRAIGHT, J.—The last sentence of s. 8 of the Rent Act should not be read as declaring that any occupancy-tenant may sub-let his land, but that the scope of the proviso is limited to tenants who actually occupy or cultivate land under a written lease, without having acquired a right of occupancy. *Haji Hidayatullah v. Ram Niwas Rai*, Weekly Notes, 1882, p. 80, referred to.

THE occupancy-tenants of certain land, by name Pirthi and Bhabhuti, executed the following instrument in respect of their holding in favour of three persons, named Jurawan Lal, Manick Chand and Ram Charan :—

"We, Pirthi and Bhabhuti....., do hereby declare that seven plots of field, numbered 71, 72, 79, 80, 82, 86 and 88, containing nine bighas and

* Second Appeal No. 950 of 1884, from a decree of Pandit Jagat Narain, Subordinate Judge of Farakhabad, dated the 14th April 1884, reversing a decree of Maulvi Munir-ud-din Ahmed, Munsif of Kanauj, dated the 19th December 1883.

seventeen biswas of *pukhta* land, and paying a yearly rent of Rs. 70, in mauza Usufpur Bhagwan, are held by us from Abadi Husain, and that we, having taken Rs. 500 in advance (*pesghi*), have leased the said fields for cultivation, and given possession of them to Jurawan Lal, Manick Chand and Ram Charan, for twenty-two years, from 1291 fasli to 1313 fasli, with this detail, that half of them are given to Jurawan Lal and half to Manick Chand and Ram Charan. The said persons can either cultivate themselves or give the land to others for cultivation. After paying the rent due to the zamindar, they may appropriate the profits. After the expiration of the twenty-two years, the said persons shall surrender the cultivatory holding, and we shall not claim profits, nor shall the said persons have any claim in respect of the amount advanced (*zar-i-peshgi*) after the expiration of the said term. We have received the money as detailed below—half from Jurawan Lal and half from Manick Chand and Ram Charan. We have therefore executed this deed of *thika*, that it may be an authority, and be of use when needed."

[868] This document was dated the 29th March 1883, and was registered on the 17th April 1883.

Abadi Husain, the zamindar, brought the present suit against the tenants and the persons in whose favour the above document was executed, to have the document set aside, and the latter persons ejected from the land. It was contended on his behalf that the document created a usufructuary mortgage of the land, and such a transfer was void under s. 9 of the N.-W. P. Rent Act, XII of 1881. For the defendants it was contended that the document created a lease only of the land, and such a lease was not a transfer within the meaning of s. 9. The Court of First Instance held that the document created a usufructuary mortgage, and that the transfer was void under s. 9, and gave the plaintiff a decree, setting aside the document, and ejecting the transferees. The Lower Appellate Court, on appeal by the defendants, held that the document created a lease only of the land, and that the transfer was not void under s. 9. The Court therefore dismissed the suit.

The plaintiff appealed to the High Court. The appeal came for disposal before PETHERAM, C. J. and STRAIGHT, J., who referred it to the Full Bench for determination.

Pandit *Ajudhra Nath* and Babu *Jogindro Nath Chaudhri*, for the Appellant.

Mr. *T. Conlan*, Munshi *Danuman Prasad*, and Pandit *Bishambar Nath*, for the Respondents.

The following judgments were delivered by the Full Bench :—

Petheram, C.J.—I am of opinion that this appeal should be allowed. The plaintiff is the zamindar of the village, and some of the defendants had an occupancy-holding in the village. They executed a document in favour of the other defendants, by which, in consideration of a particular sum of money, it was agreed that the latter should have the right of occupying and cultivating as tenants for a term of years at a nominal rent. In pursuance of this agreement, the original occupancy-tenants went out, and the persons who had advanced the money and taken the *zar-i-peshgi* lease, took possession, and are now in occupation and cultivation of the holding, either by themselves or through their servants. The zamindar now sues them for ejectment, alleging that they [869] are not his tenants. The defendants plead that they have the same right as the original occupancy-tenants had. The question is, whether the *zar-i-peshgi* lease has given the defendants such a right, and whether the zamindar is entitled to object to that transaction.

The determination of this question depends on s. 9 of the Rent Act which provides that no right of occupancy, other than the right of tenants at fixed rates, "shall be transferable in execution of a decree, or otherwise than by voluntary transfer between persons in favour of whom, as co-sharers, such right originally arose, or who have become by succession co-sharers therein." The persons now in possession were not co-sharers with the persons from whom they obtained possession, so that the transfer to them cannot be considered a "voluntary transfer between persons in favour of whom, as co-sharers, such right originally arose." The question comes to this:—Is this transaction the transfer of a right of occupancy? And first—What does a right of occupancy mean?

I understand it to mean nothing but the right to live on and cultivate the land as one's own. That is what the original tenants possessed, and they have sold this right to live on the land for twenty years. I cannot follow the contention that this is not a transfer of the right of occupancy. It is a sale of that right, and therefore it is a transfer, and is prohibited by s. 9 of the Rent Act. No interest therefore passed under the transaction, and the persons, now in possession have no right, and are trespassers against the plaintiff, who is entitled to eject them. I am therefore of opinion that the appeal must be allowed with costs, and the decree of the first Court restored.

Straight, J.—I am of the same opinion. I am by no means sure that the Court was wrong in holding that the document by which the sum of Rs. 500 was advanced, and the lenders placed in possession of the holding, was a mortgage in the sense of cl. (d), s. 58 of the Transfer of Property Act. It may, however, be more convenient to regard it as a lease in the sense of s. 105, which defines a lease of immoveable property as a "transfer of a right to enjoy such property under certain special conditions," so that, however the matter is looked at, the transaction was a "transfer," [870] and must be considered a transfer of a right of occupancy; or, in other words, of a right to occupy the land in suit. Two rulings have been cited by the learned Pandit for the respondent. One of these is the case of *Haji Hidayatullah v. Ram Niwaz Rai*, Weekly Notes, 1882, p. 80, in which it was held by the late Chief Justice and OLDFIELD, J., that a *zar-i-peshgi* lease in perpetuity was not a transfer within the meaning of s. 9 of Act XVIII of 1873, the N.-W. P. Rent Act then in force. It must, however, be remembered that the learned Judges who decided that case had not the provisions of the Transfer of Property Act (IV of 1882) to assist them by analogy. I confess that, looking at the terms of the judgment in that case, it appears to me that the learned Judges somewhat misapprehended the meaning of s. 8 of the Rent Act. I do not read the last sentence of that section as declaring that any occupancy-tenant may sub-let his land, but that the scope of the proviso is limited to tenants who actually occupy or cultivate land under a written lease, without having acquired a right of occupancy. In regard to a later unreported case, which was also referred to by the learned Pandit, and which was decided by OLDFIELD and TYRRELL, JJ., I can only say that, looking at the provisions of the Transfer of Property Act which I have mentioned, I am not able to concur in that ruling. Under all the circumstances, I am of opinion that this appeal should be decreed with costs, and the decree of the first Court restored.

Brodhurst, J.—I concur in the judgment of the learned Chief Justice.

Tyrrell, J.—Without entering upon the discussion of the question whether the interest in immoveable property, which is described in the first paragraph of s. 8 of the Rent Act, and known as a "right of occupancy," is the same interest as a right to the occupation of land referred to in the last paragraph of the same section, I concur in the opinion that the document in question in the present

case was unquestionably one which operated as a "transfer," within the meaning of s. 9.

NOTES.

[In (1893) 15 All., 219 F.B., it was held that an ex-proprietary tenant can sub-let, in whole or in part, his occupancy-holding and that sub-letting is not prohibited by s. 9 of Act XII of 1881.

This decision was followed in (1903) 26 All., 78.

But in (1891) 13 All., 403, it was held that both the mortgagees of an occupancy-holding were wrong-doers and that the one cannot sue the other in ejectment.]

[871] *The 4th July, 1885.*

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE STRAIGHT, MR. JUSTICE BRODHURST, AND MR. JUSTICE TYRRELL.

Ishri Prasad

versus

Sham Lal.

Criminal Procedure Code, ss. 195, 476—"Sanction"—"Complaint."

On the 2nd August 1884 a Munsif, who was of opinion that in the course of a suit which had been tried before him, certain persons had committed offences under ss. 193, 463 and 471 of the Penal Code, and that the prosecution of these persons was desirable, made an order which he described as passed under s. 643 of the Civil Procedure Code, and in which he directed that the accused should be sent to the Magistrate, and that the Magistrate should inquire into the matter. In May 1885, upon an application by one of the accused to the District Court to "revoke the sanction for prosecution granted by the Munsif," it was contended that the "sanction" had expired on the 2nd February 1885 and had ceased to have effect.

Held, by the Full Bench that the Munsif's order, whether it was or was not a sanction, was a sufficient "complaint" within the meaning of s. 195 of the Criminal Procedure Code, and that the limitation period prescribed by that section was not applicable to the case.

Per PETHERAM, C.J., and STRAIGHT, J.—That considering that s. 643 of the Civil Procedure Code was closely similar to s. 476 of the Criminal Procedure Code, the Munsif's order might be taken as having been passed under the latter section.

Also per PETHERAM, C.J., and STRAIGHT, J.—The words in s. 195 of the Criminal Procedure Code, "except with the previous sanction or on the complaint of the public servant concerned," must be read in connection with s. 476, which was enacted with the object of avoiding the inconvenience which might be caused if a Munsif, or a Subordinate Judge, or a Judge, were obliged to appear before a Magistrate and make a complaint on oath, like an ordinary complainant, in order to lay the foundation for a prosecution. The language of s. 476 indicates that where a Court is acting under s. 195, a complaint in the strict sense of the Code is not required, and that the procedure therein laid down constitutes the "complaint" mentioned in s. 195.

THE facts of this case were as follows:—The Munsif of Jalesar, on the 2nd August 1884, after recording a proceeding, in which he expressed his opinion that one Ishri Prasad, the plaintiff in a suit decided by him, had given false evidence, and had dishonestly used as genuine a forged document, and that certain witnesses produced by Ishri Prasad had given false evidence, and that one of such witnesses had committed forgery, made the following order:—"That the case be entered in the miscellaneous register under s. 643 of Act XIV

of 1882, and Ishri Prasad, for punishment under ss. 193, 463, and 471 of the Indian Penal Code, Tulshi Ram and Kamlapat for punishment under s. 193 of the [872] Indian Penal Code, and Sobha Ram patwari for punishment under ss. 193 and 463 of the Indian Penal Code, together with a copy of the proceeding of this Court, he sent to the Magistrate of Etah. A bail of Rs. 400 was asked for from Ishri Prasad, and a bail of Rs. 100 from each of Tulshi Ram, Kamlapat, and Sobha Ram, but they did not give it; hence the criminals in custody of the Jalesar police should be sent to the Magistrate of Etah. The Magistrate may also be requested to send for the evidence mentioned below for inquiry and finding on the aforesaid charges, and whatever proof is required the Court may be informed in respect thereof, and it will send it." On the 8th September 1884, Ishri Prasad applied to the District Court to revoke the "sanction for prosecution granted by the Munsif under s. 195 of the Criminal Procedure Code." At the hearing of the application by the District Judge, it was contended for the applicant that the "sanction" expired on the 2nd February 1885, and had ceased to have effect. On the 27th May 1885, the District Judge rejected the application, holding that the Munsif did not merely sanction the prosecution, but himself instituted the complaint, and that s. 195 did not limit the period within which "complaints," as distinguished from "sanctions," should be made. Ishri Prasad subsequently received a summons from the Deputy Magistrate of Etah, to appear before the Court for inquiry into the charges preferred against him. He then applied to the High Court to revise the order of the District Judge and of the Munsif on the following grounds:—"(1) because the sanction given by the Munsif has expired; (2) because the Munsif held no preliminary inquiry as he was bound to do under the law; (3) because on the facts the sanction is improper."

The application was made before the Full Bench.

Mr. C. Dillon, for the Applicant.

Mr. J. Niblett, for the Opposite Party.

The following judgments were delivered by the Full Bench:—

Straight, J.—The question raised by this reference is, whether the terms of the order of the Munsif which was passed on the 2nd August 1884, amounted to a "sanction" or to a "complaint" under s. 195 of the Criminal Procedure Code. It seems that in [873] the course of a suit which had been heard before him, and which had closed, the Munsif was of opinion that certain persons had committed offences under ss. 193, 463, and 471 of the Penal Code, and, having all the materials before him, he came to the conclusion that a prosecution should be instituted. He accordingly directed that they should be sent to the Magistrate of Etah under bail, and the Magistrate should inquire into the matter.

It is said on behalf of the persons prosecuted that the Munsif's order was a "sanction" and not a "complaint" under s. 195 of the Criminal Procedure Code. Upon this point I may observe that every such order must in a sense be a sanction, because it implies that the Judge wishes and authorizes that a prosecution should take place. The law does not require that the sanction should be expressed in any special terms. It need not (though it is desirable that it should) expressly name the person at whom it is directed so long as its meaning and intention are clearly shown. It does not appear to me that the order in the present case must necessarily be construed to be a sanction within the meaning of s. 195. The question then arises whether or not the order amounted to a "complaint." During the argument I intimated my opinion that the words in s. 195—"except with the previous sanction or on the complaint of the public servant concerned"—

must be read in connection with s. 476, and s. 476 affords a clear indication of what was contemplated by the Legislature regarding the nature of the complaint of a Civil Court under s. 195. It is easy to imagine the inconvenience which might be caused if a Munsif, or a Subordinate Judge, or a Judge were obliged to appear before a Magistrate and make a complaint on oath in order to lay the foundation for a prosecution, and for this reason the Legislature thought it desirable that the procedure to be followed in case of complaint by a Court should be different from that which has to be observed by an ordinary complainant. Section 476 is in the following terms:—"When any Civil, Criminal, or Revenue Court is of opinion that there is ground for inquiring into any offence referred to in s. 195, and committed before it or brought under its notice in the course of a judicial proceeding, such Court, after making any preliminary inquiry that may be necessary, may send the case [874] for inquiry or trial to the nearest Magistrate of the first class, and may send the accused in custody or take sufficient security for his appearance before such Magistrate, and may bind over any person to appear and give evidence on such inquiry or trial." In the first place, there is here a distinct reference to s. 195, and therefore a complaint under that section must be shaped according to the provisions of s. 476. The Munsif in the present case did comply with those provisions. It is true that he refers to s. 643 of the Civil Procedure Code, but I think that this circumstance is of no great importance; and that, considering that s. 643 of the Civil Procedure Code is closely similar to s. 476, the order may be taken as having been passed under the latter section; and, looking at the matter in this way, I think that the Munsif's order, whether it was or was not a sanction, was a sufficient "complaint," and satisfied the requirements of the law under ss. 195 and 476. In my opinion the language of such last-mentioned section indicates that where a Court is acting under s. 195, a complaint in the strict sense of the Code is not required, and that the procedure therein laid down constitutes the complaint mentioned in s. 195. This being so, there is nothing to prevent the prosecution being proceeded with, and the Magistrate, with reference to the last paragraph of s. 476, should entertain and dispose of the matter.

Petheram, C.J.—I am of the same opinion.

Brodhurst, J.—The grounds for revision are, in my opinion, invalid. The Munsif's proceedings were taken under s. 643 of the Civil Procedure Code; no inquiry other than was made was required by law; and the limitation period referred to by s. 195 of the Criminal Procedure Code does not apply to this case.

The case would in all probability have been decided long ago, had it not been for the delay that occurred in the Judge's Court in disposing of the petitioner's application.

The District Judge's view of the law is correct, and his order is a proper one. I would reject the application.

Tyrrell, J.—Chapter XV of the Criminal Procedure Code lays down rules governing proceedings in prosecutions. Part B prescribes the "conditions requisite for initiation of proceedings." [875] Section 191 gives the general rule that "any" offence may come to the cognizance of the Criminal Court: (a) by complaint of individuals, (b) by police report, (c) or by other informations. But this rule is specially limited by s. 195, which prohibits the prosecution of certain specified offences, except (a) on the complaint of certain Courts, or (b) on sanction given to individuals by such Courts. In the latter case, the individual would proceed to lay his complaint under s. 191; in the other case, the Court contemplated by s. 195 would take action by way of "complaint,"

and the procedure to be followed by such Court is prescribed in Chapter XXV, s. 476, referred to by my learned brother STRAIGHT.

NOTES.

[I. For the distinction between *sanction* granted and *complaint* lodged by court, see (1888) 13 Bom., 109; (1907) 17 M.L.J., 584 F.B.; 31 Mad., 140 F.B.; 26 Mad., 98.

II. As regards whether the order passed under s. 476 is capable of being revised by the High Court under s. 439, there has been a conflict of opinion.

The following cases held there was *no* revision:—(1903) 26 All., 249 F.B.; (1902) 26 Mad., 98 F.B.; (1904) 31 Cal., 664.

The *contrary* decisions are:—(1901) 23 All., 249; (1897) 21 Mad., 124; (1892) 20 Cal., 349; (1902) 26 Bom., 785; (1905) 29 Mad., 100; (1907) 31 Mad., 140 F.B.; (1908) 32 Mad., 49 F.B.; (1909) 19 M.L.J., 766 F.B.]

[7 All. 875]

The 4th July, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE STRAIGHT,
MR. JUSTICE BRODHURST, AND MR. JUSTICE TYRRELL

Surta and others.....Petitioners

versus

Ganga and others.....Opposite Parties.*

*Civil Procedure Code, s. 206—Order amending decree—High
Court's powers of revision.*

A District Judge, by an order passed under s. 206 of the Civil Procedure Code, altered a decree passed by his predecessor in the terms, "I dismiss the appeal," to read "I accept the appeal," on the ground that his predecessor had obviously meant to say he accepted the appeal, and that the decree as it stood failed to give effect to the judgment.

Held by the Full Bench that an order passed under s. 206 of the Civil Procedure Code constituted an adjudication separate from that concluded by a decree under the Code passed after the parties had been heard and evidence taken, and that the order in the present case was therefore a separate adjudication, and was not appealable under s. 588. Also that, in saying that by "dismiss," his predecessor had meant "decree," the Judge had altered the decree in a manner not warranted by the terms of s. 206, that he had therefore exercised his jurisdiction "illegally and with material irregularity," within the meaning of s. 622 of the Code, and that the High Court was consequently competent to reverse his order.

The judgment of OLDFIELD, J., *ante*, p. 412, reversed and that of MAHMOOD, J., *ante*, p. 412, affirmed.

THIS was an application by the plaintiffs in a suit, for revision, under s. 622 of the Civil Procedure Code, of an order amending the appellate decree in the suit passed by the District Judge of Saharanpur. The application was heard by OLDFIELD and MAH-[876]MOOD, JJ., and the facts of the case, and the judgments of the learned Judges, will be found reported at p. 411, *ante*. Their Lordships differed in opinion, OLDFIELD, J., holding that the application should be dismissed, on the ground that the Court had no jurisdiction to entertain it, and MAHMOOD, J., holding that it should be allowed. An appeal was preferred by the applicants to the Full Court, from the judgment of OLDFIELD, J., under s. 10 of the Letters Patent for the N.-W. Provinces.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the Appellants.

Babu *Ram Das Chakarbat*i and Munshi *Ram Prasad*, for the Respondents.

* Appeal No. 1 of 1885, under s. 10, Letters Patent.

The following judgments were delivered by the Full Bench :—

Petheram, C.J.—For the reasons stated in the judgment of Mr. Justice MAHMOOD, I am of opinion that this application must be allowed with costs. **Straight, Brodhurst, and Tyrrell, JJ.**, concurred.

NOTES.

[This is the Full Bench decision on (1885) 7 All., 411.

On the same principle, it was held in (1900) 28 Cal., 177, that there is no remedy, except by Revision, in respect of an order passed under s. 206 C. P. C. So also in (1892) 14 All., 226 F.B., it was held that there was no appeal under s. 10 Letters Patent in respect of an order made by one only of the Judges, directing amendment of a decree passed by himself and another forming a Division Bench.

So also (188 6) 8 All., 519 ; (1887) 10 All., 51; (1892) 16 Mad., 424.]

[7 All. 876]

The 4th July, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE STRAIGHT,
MR. JUSTICE BRODHURST, AND MR. JUSTICE TYRRELL.

Raghunath Das..... Petitioner

versus

Raj Kumar.....Opposite Party.*

Civil Procedure Code, ss. 206, 622—Order amending decree in respect of court-fee in pre-emption suit —High Court's powers of revision.

An order as to costs, contained in a decree for pre-emption, directed that the pleader's fees should be calculated with reference to the value of the claim as set forth in the plaint. Subsequently the Court, professing to act under s. 206 of the Civil Procedure Code, passed an order directing the amendment of the decree by calculating the pleader's fees upon the actual value of the property.

Held by the Full Bench that the alteration of the decree was improper, and was not an amendment of the kind authorized by s. 206 of the Civil Procedure Code.

An order passed under s. 206 amending a decree is a separate adjudication, and is not merely a part of the original decree, and such an order is not appealable under s. 588 of the Code. Such an order, therefore, can be revised by the High Court, under s. 622.

The judgment of OLDFIELD, J., (*Ante*, p. 277) reversed, and that of MAHMOOD, J., (*Ante*, p. 278) affirmed.

[877] IN this case, a decree in a suit to enforce a right of pre-emption was passed by the Subordinate Judge of Bareilly on the 24th March 1884, and the order contained in that decree as to costs directed that the pleader's fees should be calculated with reference to the value of the claim as set forth in the plaint. On the 18th April 1884, the defendant applied to the Court to amend its decree in regard to costs, on the ground that the pleader's fees should be calculated with reference to the actual value of the property to which the suit related. On the 6th May 1884, the Court passed an order as follows :—
" In pre-emption cases, fees should be calculated upon the actual value of the property, and not upon any other value. In preparing this decree, the value of the property was not regarded, and fees were computed on the amount of the claim. The decree should be corrected, and it is therefore ordered that the original decree be amended, and after the copy thereof has been amended, it may be returned to the applicant."

* Appeal No. 3 of 1885, under s. 10, Letters Patent.

The defendant applied for revision of this order to the High Court. It was contended that the pleader's fees had been wrongly computed with reference to the actual value of the property, and that the amendment of the decree by the lower Court was not an amendment of the kind authorized by s. 206 of the Civil Procedure Code.

The application came for hearing before OLDFIELD and MAHMOOD, JJ. The former learned Judge was of opinion that the High Court had no power to revise the order of the lower Court in this case, and that the application should therefore be dismissed. MAHMOOD, J., on the other hand, was of opinion that the Court was competent to revise the order, and that the order was not justified by the provisions of s. 206 of the Civil Procedure Code, and should be set aside as *ultra vires*. The judgments of their Lordships will be found reported at p. 277, *ante*.

Under s. 10 of the Letters Patent for the High Court, N.-W. Provinces, the applicant appealed to the Full Court from the judgment of OLDFIELD, J., on the ground that the order of the Subordinate Judge was open to revision by the High Court, and that it ought to be revised.

[878] Babu Dwarka Nath Banarji for the Appellant.

Munshi Sukh Ram for the Respondent.

The Full Bench (Petheram, C. J., and Straight, Brodhurst and Tyrrell, JJ.,) concurring with the judgment of MAHMOOD, J., allowed the application with costs to the petitioner.

[7 All 878]

The 6th July, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE STRAIGHT,
MR. JUSTICE BRODHURST, AND MR. JUSTICE TYRRELL.

Jhinguri Tewari and others.....Plaintiffs

versus

Durga and others.....Defendants.*

Act XVIII of 1873 (N.-W. P. Rent Act), s. 9—Sale of occupancy-rights with zamindar's consent—Acceptance of rent by zamindar from vendees—Act

IX of 1872 (Contract Act), ss. 2, 23—Estoppel—Act I of 1872

(Evidence Act), ss. 115, 116.

Under a deed dated in 1879, the occupancy-tenants of land in a village sold their occupancy rights, and the zamindars thereupon instituted a suit for a declaration that the sale deed was invalid under s. 9 of Act XVIII of 1873 (the N.-W. P. Rent Act in force in 1879), and for ejectment of the vendees, who had obtained possession of the land. It was found that the zamindars had consented to the sale to the vendees, and received from them arrears of rent due on the holding by the vendors, and had recognized them as tenants.

*Appeal No. 4 of 1885, under s. 10, Letters Patent.

Held by the Full Bench that the sale-deed was invalid with reference to the provisions of ss. 2 and 23* of the Contract Act, inasmuch as its object was the transfer of occupancy-rights, which was prohibited by s. 9 of Act XVIII of 1873.

Held also, that s. 115 of the Evidence Act implies that no declaration, act, or omission will amount to an estoppel, unless it has caused the person whom it concerns to alter his position, and to do this he must both believe in the facts stated or suggested by it, and must act upon such belief; that in the present case it could not be said that the vendees were misled by the fact that the zamindars were consenting parties to the sale-deed; that they could not plead ignorance that the deed was unlawful and void; that it had not been shown that they acted upon the zamindars' agreement to take no action, so as to alter their position with reference to the land; and that, under these circumstances, the zamindars were not estopped from maintaining that the sale-deed was invalid.

Held also that the zamindars having accepted the vendees as tenants and taken rent from them, a tenancy was thereby constituted under the Rent Law; that the vendees were therefore not trespassers; and that therefore the question as to ejectment did not fall within the jurisdiction of the Civil Court.

The judgment of OLDFIELD, J., (*ante*, p. 515) reversed, and that of MAHMOOD, J., (*ante*, p. 512) affirmed.

[879] UNDER a deed dated the 5th July 1879, Gopal and Jai Ram, the occupancy-tenants of certain land in a village called Shikaripur, sold their rights to Durga and Mahadeo, the defendants in this suit, for Rs. 700. The present suit was brought by the zamindars of the village, in July 1883, for a declaration that the sale-deed was invalid under s. 9 of Act XVIII of 1873 (the N.-W.P. Rent Act in force in 1879), and for ejectment of the vendees, who had obtained possession of the land.

The Court of First Instance (Munsif of Benares) dismissed the suit, on the ground that the plaintiffs had consented to the sale, and had recognized the vendees as tenants by accepting rent from them, and that Act XVIII of 1873 did not prohibit a sale of occupancy-rights made with the consent of the landlord. On appeal by the plaintiffs, the District Judge of Benares reversed the Munsif's decision, and decreed the claim. He did not, however, record any definite findings as to whether or not the plaintiffs had consented to or acquiesced in the sale. The defendants appealed to the High Court. The Court (OLDFIELD and MAHMOOD, JJ.) remitted issues for trial by the Lower Appellate Court, and from the findings upon those issues, it appeared that the plaintiffs had consented to the alienation, and had recognized the defendants as tenants.

On the case coming again before the Court, OLDFIELD, J., was of opinion that the decree of the Lower Appellate Court should be reversed, and that of the first Court restored, dismissing the suit with all costs. MAHMOOD, J., on the other hand, was of opinion that the decree of the Lower Appellate Court should be upheld so far as it declared the sale-deed to be void, and that the suit should be dismissed so far as the claim for ejectment was concerned, leaving the plaintiffs to their proper remedy in the Revenue Court. The judgments of their Lordships will be found reported at pp. 512 and 515, *ante*. The plaintiffs

What considerations and objects are lawful and what not. * [Sec. 23 :—The consideration or object of an agreement is lawful, unless—

it is forbidden by law; or
is of such a nature that, if permitted, it would defeat the provisions of any law; or
is fraudulent; or
involves or implies injury to the person or property of another; or
the Court regards it as immoral or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful, is void.]

appealed, under s. 10 of the Letters Patent, to the Full Court, from the judgment of OLDFIELD, J.

Munshi Hanuman Prasad and Lala Juala Prasad, for the Appellants.

Lala Lalta Prasad, for the Respondents.

[880] The following judgment was delivered by the Full Bench:—

Petheram, C. J., Straight, Brodhurst, and Tyrrell, JJ.—The order we propose to pass in this case is that proposed by Mr. Justice MAHMOOD, namely, “that the decree of the Lower Appellate Court should be upheld so far as it declares the sale-deed to be void, and that the suit should be dismissed so far as the claim for ejectment is concerned, leaving the plaintiff to his proper remedy in the Revenue Court.”

The reasons for this order have been so fully explained in the judgment of Mr. Justice MAHMOOD, that it is unnecessary for us to say more than that we agree with him.

NOTES.

[See also (1893) 15 All., 219 F.B. ; (1890) 19 Bom., 374.]

[7 All. 880]

The 6th July, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE STRAIGHT,
MR. JUSTICE BRODHURST, AND MR. JUSTICE TYRRELL.

Sheobaran.....Defendant

versus

Bhairo Prasad and others.....Plaintiffs.

Landholder and tenant--Suit by landholder for declaration of right to take land from occupancy-tenant for cultivation of indigo—Wajib-ul-arz—

Act I of 1877, Specific Relief Act, s. 42.

The zamindars of a village sued an occupancy-tenant for a declaration of their right to maintain a custom which was thus recorded in the *wajib-ul-arz* :—“when necessary, one or two bighas out of the tenants’ lands are taken with their consent (*ba khushi*) for sowing indigo.” Upon the basis of this entry, they claimed to be entitled to take a portion of the occupancy-holding at a certain period of the year, for the purpose of cultivating indigo.

Held by the Full Bench that the word “*khushi*” used in the *wajib-ul-arz* indicated that the land was only to be taken with the occupancy-tenant’s consent, and the document created no right of the nature alleged, namely, to take the land despite the tenant.

Per TYRRELL, J.—That the suit was not maintainable under the special provisions of the Specific Relief Act (I of 1877).

THE plaintiffs in this case, Bhairo Prasad Singh and Bageshar Singh, the zamindars of a village named Pipri, claimed a declaration of their right to take a portion of the cultivatory holdings of the tenants of the village for sowing indigo. The claim was based on custom. The defendant, by caste a *Lunia*, was an occupancy-tenant of land in the village. It appeared that the plaintiffs had

* Second Appeal No. 1141 of 1884, from a decree of G. J. Nicholls, Esq., Offg. District Judge of Azamgarh, dated the 12th June 1884, affirming a decree of Kazi Muhammad Wais Munsif of Azamgarh, dated the 20th March 1884.

[881] sown a part of his land with indigo seed, whereupon he had instituted proceedings against them in the Revenue Court, alleging illegal ejectment, and claiming to recover possession of the land; and that he had, on the 17th September 1883, obtained a decree for possession.

The plaintiffs produced in evidence of the custom the sixth clause of the fourth chapter of the *wajib-ul-arz* of the village, framed in or about the year 1870. The chapter was entitled "Rights of the tenants in general," and the clause was headed "Dues received by the proprietors of the village from the cultivating and non-cultivating tenants." It was in the following terms:—

"In this mahal, all the cultivating and non-cultivating tenants render services to us (zamindars) according to the custom of the country. Excepting Brahman and Chhatri tenants, all the cultivating tenants of low castes, Chamars and others, give one ploughman with a plough and bullocks in Asarh, and one in Kartik, and each tenant gives one basket of chaff. Those tenants who have sugarcane mills, give daily one pitcher of sugarcane. When necessary, one or two bighas out of the tenants' lands are taken with their consent (ba khushi) for sowing indigo."

When the *wajib-ul-arz* was attested, the tenants were not present, and this gave rise to a case for the correction of the *wajib-ul-arz* between the zamindars and some of the tenants. This was decided by the Settlement Officer, by an order, dated the 23rd May 1872, which maintained the wording of the *wajib-ul-arz* (sixth clause) in respect to the ploughing of the land and cultivation of indigo.

The Court of First Instance decreed the claim. On appeal by the defendant, the Lower Appellate Court affirmed the decree. In reference to the sixth clause of the *wajib-ul-arz*, above set out, the Court made the following observations:—

"It is argued that the meaning of this passage is that, in this village (or pargana) it frequently, very generally, happens that, with the permission of the tenant, a zamindar takes up a small portion of an occupancy as well as of a non-occupancy ryot's land to sow indigo, etc. From this it is argued that the tenant can, when he likes, refuse permission, that, if the ryot pleases, he can stop [882] the zamindar and upset all his plans, prospects, and arrangements, and that the latter has no right to take the land. This custom is entered solemnly in the *wajib-ul-arz*, in the official record of village rights and customs. Such a meaning has never before been attached to the passage, and if this had been the true state of affairs, it was ridiculous to enter anything whatever about indigo cultivation, based on contract between the parties, in the *wajib-ul-arz*. It would have no more practical meaning than if the Settlement Officer had entered:—'In this village, the zamindars blow their noses if they have pocket-handkerchiefs.' The words '*ba khushi*' in this place are surplusage, except in as far as they record a pleasant historical fact that, up to 1872 A.D., the ryots had not objected to the custom, and the zamindars had not given them cause to object to it."

The defendant appealed to the High Court, upon the following grounds:—

"(1) The decision is bad in law, as the Civil Court had no jurisdiction to set aside the decree passed by the Revenue Court, whereby the appellant recovered possession of his holding.

(2) The decision is bad in law, as the alleged custom is neither proved, nor such as would be recognized and enforced by the Civil Court.

(3) The entry in the *wajib-ul-arz* is not binding on the appellant, who had successfully objected thereto when that document was prepared; moreover, the lower Courts have placed a wrong construction on its terms."

The Divisional Bench (PETHERAM, C.J., and STRAIGHT, J.), before which the appeal came for hearing, referred it to the Full Bench.

Lala Juala Prasad, for the Appellant.

Munshi Kashi Prasad, for the Respondents.

The following judgments were delivered by the Full Bench :—

Straight, J.—The plaintiffs in this case, who are zamindars, sue the defendant, who is an occupancy-tenant, for a declaration of their right to maintain a custom contained in the sixth clause, fourth head, of the *wajib-ul-arz*. The material portion of that document is as follows:—"When necessary, one or two bighas [883] out of the tenants' lands are taken with their consent for sowing indigo." Upon the basis of this, the plaintiffs claim to be entitled to take 16 biswas and 9 dhurs out of the occupancy-holding at a certain period of the year for the purpose of cultivating indigo. In other words, they claim that, notwithstanding the occupancy-tenancy, they may go upon the holding when they please, and plant and grow indigo there, and may oust the tenant for the time being.

If I were asked whether I, sitting here as a Judge, should countenance a custom of this kind, I should reply that I regard such a custom as preposterous, and such as no Court of law should recognize. It is unnecessary, however, to deal with the case upon this ground, because the term "*khushi*" used in the *wajib-ul-arz*, indicates that the land is only to be taken with the occupancy-tenant's consent, and the document creates no such right as that alleged, which is to take the land despite the tenant. It has been suggested that, under the further order of the Settlement Officer in reference to this claim, the position of the parties was altered. I do not concur in this view. The order must be taken in connection with the earlier clause of the *wajib-ul-arz*, and the words which show the necessity of the tenant's consent being obtained must take effect. I will only add that I am unable to follow the reasoning of the District Judge, much of which appears to be irrelevant in presence of the word *khushi* in the *wajib-ul-arz*; while the analogy which he employs to illustrate his observations in reference to this word is somewhat out of place in the judgment of a Court of justice.

I am therefore of opinion that the alleged custom has not been established, and that it is not contemplated by the *wajib-ul-arz*. The appeal must be decreed with costs, and the suit dismissed with costs.

Brodhurst, J.—I am of the same opinion.

Tyrrell, J.—I am of the same opinion. It appears to me that the suit is open to objection on the further ground that it is not maintainable under the special provisions of the Specific Relief Act. Its object is to obtain a declaration that a custom prevails in this village which enables the landlord to take land for the purpose of cultivating indigo. No other relief is expressly [884] sought, but the real object aimed at is the temporary ejectment of the occupancy-tenant. The suit is one which, professing to be based on custom, and on the good-will and consent of all concerned, seeks to force the custom upon a most unwilling tenant, who has successfully resisted the landlord in the Revenue Court.

Petheram, C.J.—I am of the same opinion.

[7 All. 884]

APPELLATE CIVIL.

The 8th July, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE STRAIGHT.

Ram Sarup and another.....Plaintiffs

versus

Rukmin Kuar and others.....Defendants.*

*Suit to set aside a decree on the ground of fraud—Act I of 1877
(Specific Relief Act), s. 42.*

Subsequent to a decree for partition of an ancestral estate the creditors of one of the parties thereto who, from the time of the suit, had borrowed money from them on the security of his rights and interests in the estate, brought a suit against their debtor, and obtained a decree for the monies due to them. They then sued all the parties to the partition for a declaration that the decree then passed was, so far as it affected their (the plaintiffs') interests, fraudulent and collusive, and of no effect.

- - *Held*, that the suit was not maintainable.

THE facts of this case were as follows :—One Jai Singh had two wives. By his first wife he had a son called Beni Singh, and by his second, two sons called Dammar Singh and Shib Sahai. Beni Singh sued his father for partition of a moiety of the ancestral estate of the family, and obtained a decree.

This decree was followed by a partition of the estate between him and his father. Subsequently Rukmin Kuar, the wife of Beni Singh, sued her husband and her minor sons, for a one-third share of the estate, on the ground that she was entitled to such share on partition. On the 27th July 1883, she obtained a decree for a one-fifth share of the estate, that is to say, to an equal share with her husband and his three sons.

From the time Beni Singh sued his father for partition, he commenced to borrow money from the plaintiffs in the present suit, [886] Ram Sarup and Behari Lal, on the security of his rights and interests in the estate. In November 1883, the plaintiffs obtained a decree against him for the monies due to them. They then brought the present suit against him, Jai Singh, Rukmin Kuar, Dammar Singh and Shib Sahai, to have it declared that the decree which Rukmin Kuar had obtained on the 27th July 1883, was, so far as it affected their interests, fraudulent and collusive, and of no effect. The Court of First Instance gave the plaintiffs a decree. On appeal by all the defendants excepting Beni Singh, the Lower Appellate Court dismissed the suit, on the ground that it was not established that Rukmin Kuar's decree had been obtained by fraud and collusion. Both the Courts held that the suit was maintainable, being of opinion that that decree was a sufficient ground for the admission of a suit under s. 42 of the Specific Relief Act.

In second appeal, it was contended for the plaintiffs that the Lower Appellate Court had wrongly decided that the decree of the 27th July 1883, had not been obtained by fraud and collusion.

Pandit Bishambar Nath, for the Appellants.

* Second Appeal No. 1263 of 1884, from a decree of A. F. Millett, Esq., District Judge of Shahjahanpur, dated the 12th May 1884, reversing a decree of Mirza Abid Ali Beg, Subordinate Judge of Shahjahanpur, dated the 25th January 1884.

Mr. T. Conlan and Babu Dwarka Nath Banerji, for the Respondents.

Petheram, C.J.—I think that this appeal must be dismissed with costs. The action was brought to set aside a decree which was passed in a Court of competent jurisdiction, and which could have been appealed, and was subject to be set aside if wrong. If the decree in the first suit was wrong, it was one that was subject to appeal as between the parties. If the decree was between other parties, and was obtained by fraud, that fraud may be subject of a suit when it has affected the rights of persons other than the parties to the fraudulent decree. I cannot see how a suit of this kind will lie. Section 42 of the Specific Relief Act does not authorize it, nor does any other law or rule.

The learned Judge was right in deciding as he did, and this appeal must be dismissed with costs.

Straight, J.—I concur in the order of the learned Chief Justice that this appeal must be dismissed with costs.

Appeal dismissed.

[886] *The 9th July 1885.*

PRESENT :

MR. JUSTICE STRAIGHT AND MR. JUSTICE BRODHURST.

Imtiaz Begam and others.....Defendants
versus
Liakat-un-nissa Begam.....Plaintiff.*

Act XXIII of 1871 (Pensions Act), s. 12—Assignment of pension before passing of Act.

On the 12th February 1865, A, who was in receipt of a *zihakhi* pension from Government, assigned by deed a portion thereof to his wife, in lieu of her dower. After his death, disputes arose between the wife and the heirs of A in regard to a portion of the amount thus settled on her ; and she instituted a suit, on a certificate granted by the Collector under s. 6† of the Pensions Act (XXIII of 1871), in which she prayed for a declaration of her proprietary right in respect of the said money and of her power to transfer the same.

Held, that the assignment of the 12th February 1865, having been made before the passing of the Pensions Act, was not invalidated by s. 12 of that Act, which had no retrospective operation.

The former judgment of the Court in this appeal (I. L. R., 6 All., 630), reversed.

THIS was an appeal which was heard and determined in favour of the appellant by the High Court on the 14th July 1884, and the facts of the case

* Second Appeal No 125 of 1884, from a decree of Pandit Jagat Narain, Subordinate Judge of Farakhabad, dated the 3rd January 1884, affirming a decree of Maulvi Zakir Husain, Munsif of Farakhabad, dated the 26th September 1883.

† [Sec. 6 :—A Civil Court, otherwise competent to try the same, shall take cognizance of any such claim upon receiving a certificate from such Collector, Deputy Commissioner, or other officer authorized in that behalf that the case may be so tried, but shall not make any order or decree in any suit whatever by which the liability of Government to pay any such pension or grant as aforesaid is affected directly or indirectly.]

and the judgment of the Court will be found reported in I. L. R., 6 All., 630. At the hearing of the appeal, the respondent did not appear. An application was subsequently made on her behalf, under s. 560 of the Civil Procedure Code, for the re-hearing of the appeal, on the ground that she was prevented by sufficient cause from attending when the appeal was called on for hearing on the former occasion. The Court passed an order granting the application, and the appeal came on for re-hearing.

Mr. *Amiruddin*, for the Appellant.

Mr. *W. M. Colvin* (with him Pandits *Ajudhia Nath* and *Bishambar Nath*) for the Respondent, contended that, as the deed of the 12th February 1865, which was an assignment of Rs. 8 out of a *zihakhi* pension from Government of Rs. 17-12-11 per mensem, in favour of the plaintiff in the suit, in lieu of her dower, and upon which her title was based, was executed at a date prior to the passing of the Pensions Act (XXIII of 1871), the provisions of s. 12 of that Act did not apply to the case, and the assignment was [887] therefore valid. On this ground, he submitted that the former judgment of the Court should be reviewed and set aside.

Straight and Brodhurst, JJ.—There is no doubt that the former decision of this Court is open to the objection now urged by the counsel for the respondent, who did not appear on the first trial of the appeal; and it is clear to our mind that s. 12 of Act XXIII of 1871 has no retrospective operation, so as to invalidate assignments made before the passing of such Act. There is nothing in it to show that it was intended to interfere with rights vested, or interests acquired, and, unless there are clear words to show that it was, we are, according to a well-understood canon of construction of statutes, bound to infer to the contrary, and not to give it retrospective operation. The technical difficulty thus being cleared out of the plaintiff's way, we think that the lower Courts properly decreed her suit, and in this view of the matter we dismiss the appeal with costs.

Appeal dismissed.

[7 All. 887]

The 9th July, 1885.

PRESENT :

MR. JUSTICE BRODHURST AND MR. JUSTICE TYRRELL.

Rup Singh and another.....Judgment-Debtors

versus

Mukhraj Singh.....Decree-holder.*

" Decree "—*Order rejecting memorandum of appeal for deficiency of court-fee—Act XV of 1877 (Limitation Act), sch. ii, No. 179 (2).*

An appeal from a decree dated the 8th July 1879, was rejected by the High Court on the 11th June 1880, in consequence of the failure of the appellants to pay additional court-

* First Appeal No. 96 of 1885, from an order of R. S. Aikman, Esq., Offg. District Judge of Aligarh, dated the 7th April 1885.

fees declared by the Court to be leviable. On the 23rd December 1882, an application was filed by the decree-holder for execution of the decree.

Held, with reference to Act XV of 1877 (Limitation Act), sch. ii, No. 179 (2), that the order of the 11th June 1880, rejecting the appeal on the ground of deficient payment of court-fee, was equivalent to a decree, and therefore the application, being made not more than three years from the date of that order, was not barred by limitation.

IN this case, an application was filed in the Court of the officiating District Judge of Aligarh, for execution of a decree dated the 8th July 1879. The application was presented on the 23rd December 1882, *i.e.*, upwards of three years from the date of the decree. It appeared that an appeal from the decree was presented by the judgment-debtors to the High Court, but the appeal [888] was rejected on the 11th June 1880, in consequence of the failure of the appellants to pay additional court-fees declared by the High Court to be leviable.

The District Judge was of opinion that the decree-holder was entitled to claim that limitation for execution of the decree should run from the 11th June 1880, the date of the order of the High Court rejecting the appeal. The Court referred to the case of *Ajudhia Pershad v. Ganga Pershad*, I. L. R., 6 Cal., 249, in which it was held that an order rejecting a plaint as insufficiently stamped was a "decree," and was of opinion that, for the same reasons, an order rejecting a memorandum of appeal for deficient payment of court-fee should be held to be a "decree" of the Appellate Court. It accordingly held that the application for execution was within the period of limitation prescribed by Act XV of 1877, sch. ii, No. 179 (2).

The judgment-debtors appealed from this decision to the High Court.

Munshi *Sukh Ram* for the Appellants.

Babu *Jogindro Nath Chaudhri* for the Respondent.

Brodhurst and Tyrrell, JJ.—The order made in this case by the Judge of this Court, exercising jurisdiction in respect of the registering of appeals which are challenged on the ground of deficient payment of the court-fees required by law, is equivalent to a decree, and therefore the decree-holder has rightly been held to be within time in making his present application, which is not more than three years from the date of that order.

The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[See also (1907) 6 C. L. J., 472.]

[7 All. 888]

The 13th July, 1895.

PRESENT :

MR. JUSTICE BRODHURST AND MR. JUSTICE TYRRELL.

Bajnath.....Plaintiff

versus

Lachman Das and another.....Defendants.*

Registered and unregistered documents—Mortgagee under registered deed not entitled to priority over holder of subsequent decree on prior unregistered deed—Act III of 1877 (Registration Act), s. 50.

The mortgagee under an unregistered hypothecation bond, of which the registration was optional, obtained a decree thereon, and, in execution of such decree, attached the hypothecated property.

[889] *Held*, with reference to the terms of s. 50 of the Registration Act (III of 1877) that the bond, having merged in the decree, was entitled to take effect against a registered bond relating to the same property, and which was executed subsequently to the unregistered bond, but prior to the decree *Kanhaya Lal v. Bansidhar*, Weekly Notes, 1884, p. 136, and *Shahi Ram v. Shib Lal*, Weekly Notes, 1885, p. 63, distinguished.

THE facts of this case were as follows :—Two persons named Bansidhar and Shankar Das, by an unregistered bond dated the 27th December 1878, hypothecated a house of value less than Rs. 100 to Bhagwan Das and Lachman Das, who, on the 21st July 1882, obtained a decree upon the bond, and subsequently attached the hypothecated property in execution of the decree. Bansidhar, by a registered bond dated the 27th January 1880, hypothecated the same house to one Bajnath. The latter brought a suit on his bond against the decree-holders and Shankar Das, heir of Bansidhar, to recover the sum of Rs. 145, principal and interest, and to have it declared that his deed, being registered, was entitled to preference over the unregistered deed of Bhagwan Das and Lachman Das, and alleging that the decree of the 21st July 1882, had been fraudulently and collusively obtained by the defendants. The Court of First Instance found that the decree was not fraudulent or collusive, and decreed the claim, observing as follows :—“As the bond in favour of the plaintiff was executed on the 27th January 1880, and was registered, it took precedence of the bond dated the 27th December 1878, as regards the hypothecated house, and the latter became inoperative against the property; and hence the decree passed on the 21st July 1882, in favour of the defendants, on the basis of that ineffectual bond, can have no preference over the plaintiff's bond. Had the decree been passed before the 27th January 1880, i.e., before the execution of the bond in favour of the plaintiff, the plaintiff's registered bond would have had no preference over the decree. But the decree was passed when the bond in favour of the defendant had become ineffectual by reason of the plaintiff's registered bond, and when the debt due to the plaintiff had become preferable.” In support of this view, the Court referred to the case of *Madar v. Subbarayalu*, I. L. R., 6 Mad., 88.

* Second Appeal No. 1356 of 1884, from a decree of J. C. Leupolt, Esq., District Judge of Moradabad, dated the 20th June 1884, modifying a decree of Babu Bunwari Lal, Munsif of Bilari, dated the 14th December 1883.

The defendant appealed to the District Judge of Moradabad, who reversed the Munsif's decision. The Court observed :—"The [890] defendant-appellant in appeal urges that the Judges of the High Court, Allahabad, whose rulings this Court is bound to follow, do not agree with the Madras High Court's rulings—see *Parshadi Lal v. Khushal Rai*, Weekly Notes, 1882, p. 15. This is entirely opposed to the Madras ruling. Secondly, the respondents' unregistered deed is now merged in their decree, and by the wording of s. 50 of Act III of 1877, the plaintiff's registered deed cannot affect their decree. It seems to me that the High Court of these Provinces does not entirely agree in its view of s. 50 with the Madras High Court. In the precedent referred to, a decree on the basis of a registered bond was not given preference over a decree on the basis of an unregistered bond; much less then can a mere registered bond take preference over a decree on the basis of an unregistered bond. I find therefore in favour of the appellant, that the plaintiff's registered bond is not to have preference over the appellant's decree."

The plaintiff appealed to the High Court. It was contended on his behalf that the judgment of the Lower Appellate Court was wrong, inasmuch as it was founded on the ruling of the High Court in *Parshadi Lal v. Khushal Rai*, Weekly Notes, 1882, p. 15, which was reconsidered in *Kanhaiya Lal v. Bansidhar*, Weekly Notes, 1884, p. 136, and was no longer law.

Babu Ratan Chand, for the Appellant.

Munshi Hanuman Prasad, for the Respondents.

Brodhurst and Tyrrell, JJ.—The case of *Kanhaiya Lal v. Bansidhar*, Weekly Notes, 1884, p. 136, differs in essential respects from the present case. In it the defendant held not only the registered document, but also a prior decree based on it. Again the case of *Shahi Ram v. Shib Lal*, Weekly Notes, 1885, p. 63, is inapplicable, for in it the rival parties held contemporaneous decrees. In the case before us, the defendants had attached in execution the property in question under a good decree they had obtained on an unregistered bond; and the plaintiff brought this suit on a registered bond affecting the attached property, seeking for a decree on his registered bond, and a declaration that the defendant's decree should not operate against the property, because it was fraudulent and collusive. It has been found, and is admitted, that this decree was not false, collusive or otherwise bad, but it is contended that the plaintiff's registered [891] instrument must prevail under s. 50 of the Registration Act against that of the defendant. This would be so if that instrument had not at the time of the plaintiff's suit been merged in a decree. The words "not being a decree or order" in the section in question are conclusive against the plaintiff's claim to get the declaration he sought in his suit. The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[This case was dissented from in (1900) 28 Cal., 139.]

[7 All. 891]

The 17th July, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE TYRRELL.

Shib Shankar Lal.....Plaintiff

versus

Banarsi DasDefendant.*

Act XII of 1881 N.-W. P. Rent Act, s. 93 (h)—"Recorded co-sharer."

Held that a co-sharer of a mahal whose share was recorded in "*shamilat*" with all the other pattidars, but was not specifically defined in the *khewat* in a fractional or separate form, was a "recorded co-sharer," within the meaning of s. 93 (h) of the N.-W. P. Rent Act (XII of 1881).

On the 12th July 1882, the arbitrators appointed to divide a mahal among several co-sharers, awarded a one-fifth share to the plaintiff in this case, Shib Shankar Lal. He contested the award in the civil Courts, but it was eventually upheld. On the 1st December 1883, he was recorded in the *khewat* as owner of a one-fifth share of the mahal. The present suit was brought by the plaintiff under s. 93 (h) of the N.-W. P. Rent Act (XII of 1881) in respect of profits which became due on the 1st July 1883. Both the Court of First Instance (Assistant Collector of Etawah) and the Lower Appellate Court (officiating District Judge of Mainpuri) dismissed the claim, on the ground that the plaintiff was not a "recorded sharer" of the mahal, within the meaning of s. 93 (h) of the Rent Act, at the time when the profits sued for became due, and he was therefore not competent to maintain the suit. The plaintiff appealed to the High Court. It was contended on his behalf that, at the time of the institution of the suit, he was a recorded co-sharer, within the meaning of the section, though his share had not been specifically defined.

Munshi Hanuman Prasad, for the Appellant.

Babu Ratan Chand, for the Respondent.

[892] Petheram, C. J., and Tyrrell, J.—The plaintiff sues in the Revenue Court for a one-fifth share in certain profits of a village, which were divisible on the 1st July 1883. The defendant-lambardar resists the claim, on the ground that the plaintiff was not recorded as a recorded co-sharer on the 1st July 1883. The Judge and the Assistant Collector allowed this contention, and dismissed the plaintiff's suit; but this is an erroneous view of s. 93 (h) of the Rent Act. In July 1883, the plaintiff was a recorded co-sharer, though his share was not specifically stated. The plaintiff was recorded in "*shamilat*" with all the other pattidars.

This is an entry of a share of a co-sharer amounting to an interest within the meaning of s. 93 (h). The lower Courts have wrongly held that, because this interest was not specifically defined in a fractional or separate form the suit would not lie. The order of the Lower Appellate Court is reversed, and this appeal decreed, and the case remanded, under s. 562 of the Code, for a decision on the merits. The costs of this appeal to be costs in the cause.

Cause remanded.

* Second Appeal No. 1398 of 1884, from a decree of H. G. Pearce, Esq., Offg. District Judge of Mainpuri, dated the 18th June 1884, affirming a decree of P. Gray, Esq., Assistant Collector of Etawah, dated the 10th May 1884.

[7 All. 892]

The 17th July, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE TYRRELL.

Ajudhia Bakhsh Singh.....Defendant

versus

Arab Ali Khan and others.....Plaintiffs.*

Pre-emption—Right pleaded in defence to suit for possession by purchaser of co-sharer's rights and interests.

A co-sharer of a village, who is in possession, cannot plead the existence of a right of pre-emption in defence to a suit for possession by the purchaser of the rights and interests of another co-sharer.

ONE Zaman Khan died in 1878, leaving a share in a village called Pauri, and another share in a village called Madhopur. He had three sons named Murtaza Khan, Sadik Khan, and Ali Muhammad Khan. In execution of a decree, dated the 2nd September 1879, in favour of one Muhamdi Khanam, against Murtaza Khan and Sadik Khan as heirs of Zaman Khan, the rights of the judgment-debtors in Pauri were sold ; and in execution of a decree in favour of one Arab Ali Khan, their rights in Madhopur were sold. In each case the property attached was described as the [893] property of Zaman Khan in the possession of Murtaza Khan and Sadik Khan, sons and heirs of Zaman Khan. In both sales, one Ajudhia Bakhsh Singh was the purchaser, and he took possession of all the rights and interests of Zaman Khan in both villages. Throughout these proceedings no mention was made of Ali Muhammad Khan, third son of Zaman Khan, and who was a minor. On the 27th May 1883, Ali Muhammad Khan sold his rights in the villages Pauri and Madhopur to the plaintiffs in this case, who brought the present suit to recover possession from Ajudhia Bakhsh Singh. The defendant pleaded—(1) that the whole of Zaman Khan's estate was liable to sale, and was, in fact, sold in execution of the decrees passed in favour of Muhamdi Khanam and Arab Ali Khan ; (2) that he (the defendant) as a co-sharer had a right of pre-emption in the two villages, which he was entitled to set up in answer to the claim ; and (3) that the sale of the 27th May 1883, was collusive and without consideration.

The Court of First Instance (Subordinate Judge of Allahabad) and the Lower Appellate Court (District Judge of Allahabad) found that Ali Muhammad Khan's share was not sold in execution of the decrees of Muhamdi Khanam and Arab Ali Khan ; and, holding that the right of pre-emption could not be pleaded by the defendant as an answer to the plaintiff's claim, decreed the suit.

In second appeal, the plea as to pre-emption was again raised on behalf of the defendant.

Babu Dwarka Nath Banarji, for the Appellant.

Pandit Ajudhia Nath, for the Respondent.

* Second Appeal No. 1278 of 1884, from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 1st August 1884, affirming a decree of F. S. Bullock, Esq., Subordinate Judge of Allahabad, dated the 15th December 1883.

Petheram, C.J.—I think that we cannot interfere in this case. The only question which we have to decide is, whether the existence of a right of pre-emption in a person who is a co-sharer in possession enables him to resist an action for possession by the purchaser of the rights of another co-sharer. Before a right of pre-emption can be claimed, several things, such as tender of the price and refusal, must be alleged. The argument that the plaintiff has not paid the price is not one that helps the appellant. If he has a right of pre-emption, he is competent to assert that right [894] in a separate suit, but not as defendant in this suit. The plaintiffs-purchasers are entitled to possession, and we must therefore affirm the decision of the Courts below, and dismiss this appeal with costs.

Tyrrell, J.—I concur in the decision of the learned Chief Justice that this appeal must be dismissed with costs.

Appeal dismissed.

NOTES.

[For cases following this case, see (1903) 26 All., 61; (1904) 27 All., 78. But this was distinguished in (1890) 13 Mad., 490, as the *otti-right* under Malabar Law was different from the right of pre-emption under Mahomedan Law.]

[7 All. 894]

The 18th July, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND
MR. JUSTICE BRODHURST.

Bhola and others.....Plaintiffs

versus

Ramdhin and others:.....Defendants.*

Question of proprietary right decided by Revenue Court under Act XIX of 1873 (N.-W. P. Land Revenue Act), s. 113—Omission by Revenue Court to frame decree—Decision of Revenue Court not open to attack by suit in Civil Court—Act XIX of 1873, s. 113.

A Revenue Court acting under the provisions of ss. 112 and 113 of the N.-W. P. Land Revenue Act (XIX of 1873) recorded a proceeding declaring the nature and extent of the respective rights of the parties before the Court, and prescribing the mode in which partition should be effected. No decree was framed in accordance with this proceeding.

Held, that the proceeding of the Revenue Court was a decision by a Court of competent jurisdiction, and could not be interfered with by a suit in the Civil Court disputing its correctness.

THIS was a suit for possession of a one-fourth share of certain khatas of land in a village called Basehra, and for a declaration that the defendants were not entitled to possession thereof. It appeared that in 1883 the defendants applied to the Revenue Court for partition of the shares in the land in question, and that the plaintiffs objected that the applicants, having been out of possession for more than twelve years, were not competent to obtain partition, and that they themselves, by long-continued possession and cultivation, had

* Second Appeal No. 1354 of 1884, from a decree of A. Macmillan, Esq., District Judge of Meerut, dated the 10th June 1884, affirming a decree of Maulvi Munir-ud-din Ahmad, Munsif of Gaziabad, dated the 31st March 1884.

acquired exclusive proprietary rights in the land. The Revenue Court decided this point adversely to the plaintiffs, and recorded a proceeding declaring the nature and extent of the respective rights of the parties, and prescribing the mode in which partition should be effected. No decree was framed in accordance with this proceeding.

[895] The plaintiffs subsequently brought the present suit against the same defendants in the Court of the Munsif of Ghaziabad. The Munsif was of opinion that the suit would not lie, inasmuch as the Revenue Court had acted under the provisions of ss. 112 and 113 of the N.-W. P. Land Revenue Act (XIX of 1873), and its decision was, under s. 114, equivalent to a decision of a Civil Court, and, as such, open to appeal to the District or High Court; but that the plaintiffs could not, without instituting such appeal, attack that decision by suit. The Court accordingly dismissed the claim. On appeal, the District Judge of Meerut affirmed the decree. The Lower Appellate Court observed :—“ It appears from the ruling in *Ranjit Singh v. Ilahi Bakhsh*, I. L. R., 5 All., 520, that the Civil Courts could have been moved to direct the Revenue Court to frame a decree in accordance with the proceedings declaring the nature and extent of the interests of the parties, and that an appeal could have been laid from that decree. The decision of the Revenue Court, as set forth in its proceeding, though not followed by a decree, was a decision by a competent Court, and is a bar to the institution of this suit.”

The plaintiffs appealed to the High Court, on the grounds that “ the lower Courts were wrong in holding that the finding of the Revenue Court in the partition suit barred the present suit, because the said finding was not an order or decision in conformity with the provisions of s. 113 of the Revenue Act ; ” and that “ inasmuch as the question of right raised in the partition case was not inquired into in the manner provided by s. 113, there could be no such determination of title as would bar the present suit.”

Babu *Jogindro Nath Chaudhri*, for the Appellants.

Mr. *J. E. Howard*, for the Respondents.

Petheram, C. J., and Brodhurst, J.—We think that this appeal must be dismissed. The simple question before us is, whether the Civil Court can interfere with the decision of a question decided by a Court of competent jurisdiction by a suit filed for that purpose. It is urged that the Revenue Court, whose decision is impugned, did not act in conformity with the provisions of the [896] law. That would be a good reason probably for an application to correct that decision; but, so long as it stands, it is a decision of a Court of competent jurisdiction, and cannot be interfered with by the present proceedings. If the parties wish to dispute the correctness of the decision, they should take other steps. The decree of the Lower Appellate Court is affirmed, and this appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[See also (1894) 16 All., 464.]

[7 All. 896]

The 18th July, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND
MR. JUSTICE STRAIGHT.

Debi Das.....Defendant

versus

Lachman Singh.....Plaintiff.*

Small Cause Court suit—Suit to recover a share of money recovered by co-plaintiff under a decree—Act XI of 1865 (Mufassal Small Cause Courts Act), s. 6.

Debt, that a suit to recover a share of money which had been recovered by a co-plaintiff under a decree was a claim for money due on a contract, within the meaning of s. 6 of the Mufassal Small Cause Courts Act (XI of 1865), and was therefore a suit of the nature cognizable by a Court of Small Causes, in which, under s. 586 of the Civil Procedure Code, no second appeal could lie.

THE facts of this case are sufficiently stated for the purposes of this report, in the judgment of PETHERAM, C.J.

Pandit *Ajudhia Nath*, for the Appellant.

Babu *Jogindro Nath Chaudhri*, for the Respondent.

Petheram, C.J.—When this case was called on, it was urged as a preliminary objection that, the suit being one cognizable by a Court of Small Causes, and being in respect of a claim of less than Rs. 500 in value, there was no second appeal to this Court. This objection has been argued at some length before us, and I am of opinion that it must prevail, and that the appeal to this Court will not lie. The action was brought to recover a share of money recovered under two decrees passed in suits in which the plaintiff and defendants, or the persons through whom they claim, were plaintiffs-decree-holders. The plaintiff and defendants in this suit, or those through whom they claim, were joined in these two suits as plaintiffs, and this suit is brought to recover the share which belonged to one of those plaintiffs as between him and his co-plaintiff. In my opinion, the suit is founded on a contract, and is with-
[897] in the terms of s. 6 of the Mufassal Small Cause Courts Act, which runs as follows :—“The following are the suits which shall be cognizable by Courts of Small Causes, namely, claims for money due on bond or other contract, etc.”

In my opinion, this is a claim for a debt due on a contract. When parties are jointly interested in money, and one of them becomes possessor of a larger share than properly belongs to him, there is an obligation or contract implied that he will pay to the other the portion he has become possessor of in excess of that to which he was entitled. The best way of describing a contract is to say that it is a state of things in which two or more minds mutually agree upon the same thing, and in respect of some object in which all are interested. It may be the express agreement of the parties, stating in terms their intentions and wishes, or it may be an agreement implied from their acts. Where there is no express agreement, the state of mind or the agreement may be gathered or implied from the acts of the parties. In the case before us, it is clear that the parties, or the persons through whom they claim,

* Second Appeal No. 1276 of 1884, from a decree of Maulvi Muhammad Sami-ulla-Khan Subordinate Judge of Aligarh, dated the 23rd July 1884, affirming a decree of Pandit Rajnath, Munsif of Aligarh, dated the 30th August 1883.

joined together for the purpose of recovering money in which they were jointly interested. Now, it is clear that it was implied that they should divide the moneys so realized. It was implied also, in the absence of an express agreement, that if one party recovered or realized more than his share, that party was under an obligation to the other in respect of the excess so recovered to pay the same to him. That being so, the suit was one based on a contract within the meaning of s. 6 of the Mufassal Small Cause Courts Act, and was cognizable by the Court of Small Causes. By s. 586 of the Code, second appeals in such cases are prohibited. The preliminary objection must prevail, and this appeal must be dismissed with costs.

Straight, J.—I am of the same opinion. It appears to me that this suit is of a description very common in England. It is a receipt of money by a person with a legal obligation on him to pay the same to another person. There are two questions to be considered. First, does the money belong to the plaintiff? And secondly, was it received for the plaintiff? If these questions are answered in the affirmative, the case involved all the conditions of [898] a contract. It was a debt between the parties which could be recovered. The learned Chief Justice has defined a contract, and has shown that the facts alleged by the plaintiff constitute a contract within the meaning of s. 6 of Act XI of 1865. I never had any doubt that the preliminary objection to the hearing of this appeal was a sound one, and that the suit was of the nature of those cognizable by Small Cause Courts.

I may add that there are no less than nine cases reported in the *Weekly Notes* and the *Indian Law Reports* of decisions of this Court on this point, that a contract exists under circumstances such as that asserted by the plaintiff in this suit. Under these circumstances, an appeal does not lie to this Court, and this appeal must be dismissed with costs.

Appeal dismissed.

[7 All. 898]

The 18th July, 1885.

PRESENT :

MR. JUSTICE STRAIGHT AND MR. JUSTICE TYRRELL.

Shib Lal.....Decree-holder

versus

Radha Kishen.....Judgment-debtor.*

Act XV of 1877 (Limitation Act), sch. ii, No. 179—" Step in aid of execution of decree."

R, in a suit against S and other persons, obtained a decree on the 24th December 1878, S being exempted from the decree, and being awarded costs against the plaintiff. In executing his decree, R, on the 16th June 1880, sought to set off the costs awarded to S against

* Second Appeal No. 51 of 1885, from an order of W. T. Martin, Esq., Officiating Additional Judge of Aligarh, dated the 27th March 1885, affirming an order of Maulvi Muhammad Sami-ulla Khan, Subordinate Judge of Aligarh, dated the 9th May 1884.

the amount due to himself. On the 6th August 1880, S preferred objections to this course. On the 19th July 1883, S applied for execution of his decree for costs.

Held, that the application was barred by limitation, inasmuch as art. 179 (4) of the Limitation Act requires that the decree-holder should make a direct and independent application for execution on his own account, and it was not sufficient to satisfy the requirements of the law to offer objections under the circumstances under which they were offered in the present case.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Pandits *Ajudhia Nath* and *Nand Lal*, for the Appellant.

Babu *Jogindro Nath Chaudhri*, for the Respondent.

Straight and Tyrrell, JJ.—This appeal is presented under the following circumstances:—The plaintiff-respondent sued the defendant-appellant and certain other persons. He got a decree [899] against those other persons, but the defendant was exempted from the decree, and costs were awarded to him against the plaintiff-respondent, and the former was thus a decree-holder for the amount of costs against the plaintiff-respondent. This decree was dated the 24th December 1878. On the 16th June 1880, the plaintiff sought to execute his decree against those other persons, and he sought to set off the costs awarded to the respondent against the amount due to him. On the 6th August 1880, the appellant preferred objections to his costs being set off in this manner, and, on the 2nd September 1880, his objections were disposed of. The appellant then, on the 19th July 1883, applied for execution of his decree for costs. The application has been rejected on the ground that it was not made within three years from the date of the decree. The appellant contends that his application was within time; that is, within three years from the date of the objection to the application of June 1880. In other words, he contends that by filing his objections he took a step in aid of the execution of his own decree.

This contention is not sustainable. We think that art. 179 of the Limitation Act requires that the decree-holder should make a direct and independent application for execution of his own decree on his own account; and it is not sufficient to satisfy the requirements of the law to offer objections under the circumstances under which they were offered in the present case. Were we to allow this contention, we should have to hold that resistance to another person's decree is a step in execution of a man's own decree. In this view of the matter, we dismiss the appeal with costs.

Appeal dismissed.

The 18th July, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE STRAIGHT,
MR. JUSTICE BRODHURST AND MR. JUSTICE TYRRELL.

Bradley.....Defendant

versus

Atkinson.....Plaintiff.*

Landlord and tenant—Notice to quit—Act IV of 1882 (Transfer of Property Act), s. 106.

On the 11th December 1882, A, who had, on the 1st July 1882, let rooms in a dwelling-house to B, sent a letter to the tenant in the following terms: —[900] "If the rooms you occupy in the house No. 5, Thornhill Road, are not vacated within a month from this date, I will file a suit against you for ejectment, as well as for recovery of rent due at the enhanced rate." On the 1st February 1883, the lessor instituted a suit against the tenant for ejectment, with reference to the above letter.

Held, by the Full Bench, with reference to the terms of s. 106 of the Transfer of Property Act, that the letter was not such a notice to quit as the law required, inasmuch as it was not a notice of the lessor's intention to terminate the contract at the end of a month of the tenancy.

Per STRAIGHT, J., *quære*, whether the letter was a notice to quit at all.

Also *per* STRAIGHT, J.—A notice to quit must be certain, at all events in respect of the date of the determination of the tenancy: in other words, there must be a clear and explicit intimation to the tenant as to the date after which he will, if he remains in occupation of the premises, become a trespasser. *Ahearn v. Bellman*, L. R., 4 Exch. Div., 201, distinguished.

The judgment of MAHMOOD, J., *Ante*, p. 599, reversed, and that of OLDFIELD, J., *ante*, p. 597, affirmed.

THIS was an appeal to the Full Court, under s. 10 of the Letters Patent, from a judgment of MAHMOOD, J., in a second appeal, in which that learned Judge differed in opinion from OLDFIELD, J., who held that the appeal should be allowed. The facts of the case and the judgments of OLDFIELD and MAHMOOD, JJ., will be found reported at p. 596, *ante*. It will be sufficient here to state that, on the 11th December 1882, Mr. R.A. Fairlie, the agent of the plaintiff, Mrs. Elizabeth Mary Atkinson, who had, on the 1st July of the same year, let rooms in a dwelling-house to the defendant Mr. John Bradley, sent a letter to the tenant in the following terms:—"If the rooms you occupy in the house No. 5, Thornhill Road, are not vacated within a month from this date, I will file a suit against you for ejectment, as well as for recovery of rent due at the enhanced rate." On the 1st February 1883, the rooms not having been vacated, the plaintiff instituted a suit against the defendant for ejectment, with reference to the above letter. At the hearing of the appeal, MAHMOOD, J., concurring with the Courts below, was of opinion that the letter was a valid notice to quit under ss. 106 and 111 of the Transfer of Property Act (IV of 1832), and that the suit for ejectment was maintainable. OLDFIELD, J., was of the contrary opinion. The defendant appealed to the Full Court.

* Appeal No. 2 of 1885, under s. 10 of Letters Patent.

[901] *Mr. C. H. Hill*, for the Appellant.

Mr. G. E. A. Ross, for the Respondent.

Petheram, C J.—I am of opinion that in this case the judgment of Mr. Justice OLDFIELD was right, and that the notice to quit, which was given by Mr. Fairlie on the 11th December 1882, was not such a notice as could terminate the contract of tenancy. The law on the subject is contained in s. 106 of the Transfer of Property Act, and the portion of that section which applies to the present case provides that "a lease of immoveable property for any other purpose" than agricultural and manufacturing purposes "shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice, expiring with the end of a month of the tenancy." This provision is incorporated in every contract of tenancy of this kind; and, this being so, the contract between the lessor and the lessee was a contract of monthly tenancy: that is, a tenancy at a rent which was payable monthly. Further, one incident of such a contract was that either party might terminate the arrangement at the end of any current month by giving fifteen days' notice of his intention to do so. This would be the only right which the parties had to terminate the contract. The meaning of such an arrangement is that the rent was to be paid monthly, and that there should be no broken rent, so that the tenancy was one from month to month, and terminable at the end of the month at the will of either party.

Now, in order to terminate the tenancy, either party must give the other notice of his intention; but it must be a notice of his intention to do what he is legally competent to do. The question here really is, whether the notice in question was a notice of Mr. Fairlie's intention to terminate the contract at the end of a month of the tenancy. I am of opinion that it cannot be so considered. The words of the notice are:—"If the rooms you occupy in the house No. 5, Thornhill Road, are not vacated within a month from this date, I will file a suit against you for ejectment, as well as for recovery of the rents due at the enhanced rate." It is obvious that the words "the enhanced rate" referred to something before. Then, was this an intimation of an intention to terminate the tenancy on the 31st December 1882? I am clearly of opinion that it was not. [902] It is an intimation on the part of the lessor that, if the rent should not be paid within a month's time from that date, he would bring a suit against the lessee. He merely tells the lessee to vacate the rooms or to pay the penalty. This is not a notice which can terminate the tenancy, and therefore the tenancy was not determined. Under these circumstances, judgment should be for the defendant. The appeal must be decreed with costs of all Courts. The decree of the Lower Appellate Court will be varied to this extent, that the portion decreeing ejectment will be set aside with costs, and the residue of the claim will stand as decreed with costs.

Straight, J.—I have considerable doubts as to whether the document in question is a notice to quit at all. I am inclined to think that it was only a demand for possession of the premises: in other words, it was an intimation by the plaintiff that, within a period not exceeding a month from that date, the defendant should deliver up possession of the rooms which he then occupied. But as the document has, throughout the case, been treated as a notice to quit, it will be convenient if I deal with it on that assumption, and state the view which I hold upon the question whether it sufficiently complies with the provisions of the law. A notice to quit has been described as "a certain reasonable notice required by law, or by custom, or by special agreement, to enable either the landlord or the tenant, or the assignees or representatives of either of them, without the consent of the other, to determine a tenancy from year to

year, from two years to two years, or other like indefinite period." Documents of this kind must be certain, at all events in respect of the date of the determination of the tenancy; in other words, there must be a clear and explicit intimation to the tenant as to the date after which he will, if he remains in occupation of the premises, become a trespasser. In the notice now in question, no date is specified, but the lessee is informed that "if the rooms you occupy in the house No. 5, Thornhill Road, are not vacated within a month from this date, I will file a suit against you for ejectment, as well as for recovery of the rent due at the enhanced rate." It has been argued by Mr. Ross that the defendant, being presumed to know the law, must consequently be presumed to know that, under the notice, he would have to leave the premises by the 1st January 1883, and that if he remained in [903] possession after that date he would become a trespasser; that is to say, he was to read a notice which gave him till the 11th January as meaning the 1st January. It appears to me that if the plaintiff, between the 11th December 1882, and the 12th January 1883, had attempted to take steps for the ejectment of the defendant, the latter would have had a good answer by setting up that he was in possession with the leave and license of the plaintiff. Under these circumstances, I am of opinion that the document is not one which gave the lessee notice to quit on the 1st January 1883.

The learned Chief Justice has referred to the provisions of the law upon this point. It appears to me that the words in s. 106 of the Transfer of Property Act—"fifteen days' notice expiring with the end of a month of the tenancy"—mean what they purport to mean. In the present case, the tenancy began on the 1st July 1882, and a good notice to quit would have to be so dated as to require the tenant to quit upon the first of a month.

Mr. Justice MAHMOOD has referred in his judgment to several cases. Of these I need only mention *Ahearn v. Bellman*, L. R., 4 Exch. Div., 201. There the lessor gave the lessee notice in writing to quit upon a specified day, and then went on to say—"and I hereby further give you a notice that, should you retain possession of the premises after the day before-mentioned, the annual rent of the premises now held by you from me will be £160, payable quarterly in advance." In that case, there was a difference of opinion. BRAMWELL and COTTON, L. JJ., were of opinion that the clear and explicit first portion of this notice was not impaired or rendered nugatory by the alternative given by the second portion, of continuing to hold the premises at an increased rent. As I understand those learned Judges, all they said was that the document constituted a determination of one tenancy, and was not invalidated because it proposed another. No doubt BRETT, L. J., differed, and his judgment mainly proceeded on a well-known dictum of Lord MANSFIELD; but neither from his remarks nor from those of his colleagues do I find any authority for the view that a document of the character before us would constitute a legal notice to quit, or that any notice not stating with certainty the correct date the tenancy should determine would be legally good.

[904] I am therefore of opinion that my brother OLDFIELD was right; and I concur in allowing the appeal with all costs, and in varying the decree of the lower Court as proposed by the learned Chief Justice.

Brodhurst, J.—I am of the same opinion.

Tyrrell, J.—Under s. 106 of the Transfer of Property Act, the notice to quit the tenancy of a house may be in excess of fifteen days, at the pleasure of the lessor; but it is imperative that a valid notice must be such a notice that its last day will be the same as the last day of a month of the tenancy.

NOTES.

[WHAT IS SUFFICIENT NOTICE TO QUIT ?

The sufficiency of a "notice to quit" depends upon the definiteness with which the legal date on which the tenancy is to be determined, is mentioned :—(1896) 22 Bom., 241.

A notice to the effect that the tenant must either vacate or pay an enhanced rent from a particular date was held to be good in (1913) 19 Ind. Cases, 758 (Allahabad). But see (1912) 15 Ind. Cases, 906 (Cal.), for a contrary opinion under similar circumstances.

In (1906) 16 M.L.J., 533 : 30 Mad., 109, it was held that parties can agree to change the date of tenancy from the date of entry or lease.]

[7 All. 904]

APPELLATE CRIMINAL.

The 20th July, 1885.

PRESENT :

MR. JUSTICE TYRRELL.

Queen-Empress

versus

Tulla and others.

*Practice—Trial in Sessions Court—Non-production of material witnesses
for Crown—Duty of Public Prosecutor.*

It is the duty of the Public Prosecutor at a trial before the Court of Session to call and examine all material witnesses sent up to the Court on behalf of the prosecution, and the Judge is bound to hear all the evidence upon the charge.

The Public Prosecutor is not bound to call any witnesses who will not, in his opinion, speak the truth or support the points he desires to establish by their evidence ; but in such circumstances he should explain to the Court that this is his reason for not calling these witnesses, and he should offer to put them in the box for cross-examination by the accused at their discretion. In the absence of any such explanation, or of other reasonable grounds apparent on the face of the proceedings, inferences unfavourable to the prosecution must be drawn from the non-production of its witnesses.

IN this case, six persons named Tulla, Chidda, Chiddu, Jairam, Kallu and Lalji, were tried before the Sessions Judge of Moradabad, under s. 411 of the Penal Code, for dishonestly receiving stolen property, knowing or having reason to believe the same to be stolen property. All the accused were convicted and were sentenced, the first four to six months' rigorous imprisonment, and the last two to three and two years' rigorous imprisonment respectively with reference to the provisions of s. 75 of the Penal Code. Five of the witnesses for the Crown, who had been present on the various occasions when the premises of the accused were examined, and who had been sent up to the Sessions Court, were not called, and no reason for the exclusion of [908] their evidence appeared on the record. The accused appealed to the High Court. They were not represented by counsel.

The Junior Government Pleader (Babu Dwarka Nath Banarji) for the Crown.

Tyrrell, J.—(after examining the evidence on the record in detail, continued) :—It is obvious that the trial of this case has been in all respects inadequate, and, so far as regards the evidence for the prosecution, only half completed. In view of the order that I must make in the case, I refrain from comment on the evidence on the record further than to remark that, as it stands, it would not be sufficient to prove that the accused had the stolen articles in their possession, so as to make them guilty under s. 411 of the Penal Code. It has not been established that the stolen goods were in such places that the

accused must necessarily have been privy to their deposit there, or that the places are not equally accessible to other persons; but in the imperfect state of the record, it is impossible to say whether these defects in the proof of the case for the prosecution might or might not have been removed by the evidence which has been excluded. It is true that the rule of the Criminal Procedure Code simply requires in general terms that the witnesses for the prosecution shall be called and examined before the accused is put on his defence, and contains no special prohibition of the exclusion of one or more of them from examination; but it does not require a rule stating in express terms that *all* the witnesses must be examined to indicate the necessity or propriety of examining all material witnesses sent up to the Sessions Court on behalf of the prosecution. It is the duty of the Public Prosecutor to call and examine all such witnesses, and the Judge is bound to hear all the evidence upon the charge. It is true that the Public Prosecutor is not bound to examine persons who will not, in his opinion, speak the truth or support the points he desires to establish by their evidence; but in such circumstances he should explain to the Court that this is his reason for not calling these witnesses, and he should offer to put them in the box for the cross-examination of the accused at their discretion. In the absence of any such explanation or of other reasonable grounds apparent on the face of the proceedings, inferences unfavourable to the prosecu-[906]tion must be drawn from the non-production of its witnesses. If, however, the witnesses in the present case are excluded only because the Public Prosecutor or the Court thought their evidence superfluous, it would still have been proper to tender them for cross-examination by the accused. In the state of the record indicated by the foregoing observations, it is obviously impossible to deal justly with the appeal; for, while there may not be sufficient evidence on the record to support the conviction, it is very possible that the Court has illegally excluded evidence which would have sufficed to prove the guilt of the accused, in which case the determination of the case as it stands might result in a deplorable miscarriage of justice.

Under these circumstances, it is necessary—and I make this order with great reluctance—to cancel all the proceedings in the Sessions Court, and to direct a new trial of the accused according to law with the least possible delay.

New trial ordered.

NOTES.

[See the Full Bench decision in (1893) 16 All., 84, on the same point.]

[7 All. 906]

EXTRAORDINARY ORIGINAL CRIMINAL.

The 21st July, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE.

Laidman

versus

Hearsey.

Defamation—Justification—Express malice—Evidence of complainant having previously acted as alleged in the libel—Act XLV of 1860 (Penal Code), s. 499.

In a prosecution for defamation under s. 500 of the Penal Code, the alleged libel accused the complainant, who was a judicial officer, of (i) having, upon a particular occasion, used abusive

language to certain respectable native litigants appearing before him in Court, and (ii) having upon other occasions not specified, treated other respectable natives (not named), "in a similar manner." This latter accusation was contained in a postscript. The complaint filed by the complainant in the Court of the committing Magistrate, and the charge-sheet in which the Magistrate committed the defendant for trial, covered the whole of the document complained of, except the postscript. At the trial of the case, the defendant pleaded not guilty, and also relied on the first, eighth, and ninth exceptions to s. 499 of the Penal Code. The prosecution gave evidence to prove that, in making the charges contained in the alleged libel, the defendant was actuated by express malice towards the complainant.

Held, with reference to the terms of s. 499 of the Penal Code, that evidence of particular instances of abusive language applied by the complainant upon former occasions to natives appearing in his Court was admissible, first as relating to the question what was the reputation which the defendant was said to [907] have injured, and secondly because it must be gathered from the document complained of as a whole whether it showed a malicious intention or not.

THIS was a prosecution for defamation under s. 500 of the Penal Code, which was brought by Mr. George J. Laidman, Subordinate Judge and Judge of the Small Cause Court at Dehra Dun, against Captain A. W. Hearsey. The alleged libel was contained in a letter which was admittedly written by the defendant on the 25th February 1885, to the Government of India, and to the Government of the N.-W. Provinces, and published by him. The letter was in the following terms :—

"I was in the Court of the Sub-Judge of Dehra Dun and Mussoorie, on the 9th February, to give evidence in a law suit.

"Whilst waiting there, three respectable Rajpoot zamindars (nephews of the late Saroop Dass, Mohunt of Dehra) entered the Court, where a case in which they were interested, and which had been returned to the Sub-Judge's Court by the High Court for rehearing and revision was to be heard on that day.

"When Mr. Laidman, C.S., the Sub-Judge, looked up and saw them, he burst out into abuse in the following words :—' Soors (pigs), badmashes (bad characters), *haramzadas* (bastards), ' *Tum hamare degree High Court ko appeal kiya*;' and then again repeated the three obnoxious and abusive epithets, ordering them out of the Court till their case was called on.

"As I left the Court, these three men (whom I have known for upwards of twenty years to be quiet, respectable, high caste Rajpoot zamindars), came and asked me if I had heard the Sub-Judge *gali karo* (abuse) them, and if I had noticed what he said. I replied that I had. They then inquired "Where shall we get justice? This is the Magistrate (*Hakim*) who will have to re-hear our case. We are poor men : will you on our behalf report this *zulum* (injustice, oppression) that we have suffered from the Sub-Judge?" I said I would, as I thought it most disgraceful and contrary to law that a Covenanted Bengal Civilian, holding the position of a Sub-Judge, should be guilty of such a gross abuse of authority whilst sitting on the Bench to administer JUSTICE! That the conduct of Mr. Laidman was a criminal offence, he having been guilty of criminal defamation of character by the use of offensive, abusive, and [908] injurious expressions to respectable native litigants, who, in the ordinary course of business, had to appear before him for the purpose of urging a just claim in the prosecution of a civil suit : and also criminally, as

such language, if used to any Englishman, would most undoubtedly have led to a breach of the peace.

"In my humble idea, I consider it a public duty to bring such a gross and wanton dereliction of duty to your notice, as a continuance of such unjust and oppressive conduct and language is liable, in the eyes and opinion of the natives of this country, to bring general discredit and contumely on the whole Civil Service of India, unless some wholesome example is made. I consider the conduct on the part of the Sub-Judge in question not only illegal and cruelly oppressive, but also ungentlemanly and cowardly in the extreme, as he would not have dared, under the circumstances we have related, to have addressed such language to any of his own countrymen. I have only further to add that the Sub-Judge Mr. Laidman, when officiating for the Superintendent of the Dun in the end of 1883, fined a gentleman in Mussoorie the sum of Rs. 300 for saying in a privileged conversation that the Municipality were a se of pigs: so he should have been the last person in India to have used the^t offensive epithet *soor* to any individual, still less to respectable Hindu zamindars who appeared before him for justice!!!

"In conclusion, I feel confident that after the perusal of this, you will grant these men full investigation and ample redress from the insults they have received from a member of the Covenanted Civil Service of India. Mr. Laidman, still more to annoy and distress these men, has already postponed the rehearing of their case on three occasions, thus causing them unnecessary expense and delay. I have the honor to be, your most obedient servant, A. W. HEARSEY, *Captain, Retired List, Her Majesty's Service.*"

"This is not an isolated case of Mr. Laidman's abusing respectable natives in his Court. When the time comes, I can produce several others whom he has treated in a similar manner"

Upon obtaining a copy of this letter, Mr. Laidman, to whom sanction was given by Government for the prosecution of Captain [909] Hearsey, demanded an apology, and, this having been refused, instituted proceedings, which resulted in the committal of the defendant for trial by the High Court. The complaint filed by Mr. Laidman in the Court of the Assistant Magistrate of Dehra Dun, and the charge-sheet in which the Magistrate committed the defendant for trial, substantially covered the whole of the letter of the 25th February, with the exception of the postscript, which referred to alleged previous instances of abusive expressions applied by the complainant to respectable natives in his Court.

At the trial of the case before PETHERAM, C.J., and a jury, the defendant admitted having written and published the matter complained of, but pleaded not guilty, and also relied upon the first, eighth, and ninth exceptions to s. 499 of the Penal Code. The prosecution gave evidence suggesting the inference that, in making the charges contained in the alleged libel, the defendant was actuated by express malice. This evidence consisted of, (1) decisions passed by the complainant in cases in which the defendant was more or less directly interested, (2) a judgment in which the complainant commented in severe terms upon the defendant's conduct and demeanour in Court, and (3) a letter written by the defendant to the Registrar of the High Court, in which he imputed dishonesty to the complainant in the conduct of a particular case.

The complainant was the first witness called by the prosecution. In cross-examination, Mr. J. D. Gordon, for the defence, asked the following question:—

"Will you swear that you have never in Court used any offensive expression to any native of this country?"

Mr. G. E. A. Ross, (with him Babu Dwarka Nath Banarji), for the prosecution, objected to this question. He submitted that particular instances of abusive expressions used by the complainant on former occasions were not relevant under s. 138 of the Evidence Act; and that, assuming questions relating to such instances to be admissible as being directed to *shaking* the credit of the witness, under s. 146, it would not, under s. 153 be open to the defence to give evidence contradicting his statements.

[PETHERAM, C. J.—We are not trying the defendant for telling a falsehood, but for defaming the complainant in his character as a [910] Judge. Upon this issue I am of opinion that the whole of the complainant's character as a Judge is relevant.]

The first witness called by the defence was Mr. E. G. Mann, who deposed to having practised for some time as a pleader in the complainant's Court at Mussoorie.

Mr. Gordon.—Have you ever heard the complainant use abusive language in Court to natives who had to appear before him?

Mr. Ross.—I object to the question. The charge as laid and to which the inquiry should be confined, is a charge of particular acts of misconduct alleged to have been committed at a specified time and place towards a specified individual. Upon this issue, instances of other acts committed at other times and towards other persons are not admissible in evidence either as facts in issue or as relevant facts. They do not fall within the definition of "facts in issue" given in s. 3 of the Evidence Act, because the general conduct of Mr. Laidman in Court is not in issue, and the truth of the specific charge as to the complainant's conduct in Court on the 9th February does not "necessarily follow" from anything he may have done upon other occasions. Nor do they come within any of the provisions of ss. 6—14 of the Evidence Act, showing what facts are relevant; and hence there is no section in the Act which warrants the introduction of the evidence. Under s. 5, therefore, it is inadmissible.

[PETHERAM, C. J.—The question is, whether the defendant's letter of the 25th February defamed the complainant or not. The prosecution have gone into the past relations of the parties to show that the defendant acted with a malicious intention. Mr. Gordon now seeks to show that Mr. Laidman, as a Judge, has no character to be defamed. This is a fact in issue. A statement which is defamatory of one person is not necessarily defamatory of another. The defendant is not being tried for telling a falsehood, but for filching a man's character. Upon this question it is necessary to consider what the complainant's character is.]

Mr. Ross.—Assuming that a man's character is bad, that cannot justify another in making false statements concerning him.

[PETHERAM, C. J.—If this were a civil action, the case might be different. But here you put the law in motion against a man [911] whom you accuse of committing a crime, and with a view to his punishment.]

Mr. Ross.—The case of a civil action is closely analogous. In such an action, evidence of particular facts tending to show the plaintiff's misconduct might possibly be admissible in reduction of damages, but not to support a plea

of justification. For the latter purpose, there is not a single precedent or provision of the law which warrants the admission of such facts in evidence. The case of *Scott v. Sampson*, L. R., 8 Q. B. D., 491, and in particular the judgment of CAVE, J., who fully reviewed the authorities on the subject, supports this contention. The grounds of the rule there laid down are, that statements of this description are so vague and general that to admit evidence upon them would be, in effect, "to throw upon the plaintiff the difficulty of showing an uniform propriety of conduct during his whole life," and "would give rise to interminable issues which would have but a very remote bearing on the question in dispute, which is to what extent the reputation which he actually possesses has been damaged by the defamatory matter complained of." These grounds are equally applicable to criminal proceedings, which, therefore, should be governed by the same rule; and hence it follows that evidence of this description, even assuming it to be admissible in mitigation of punishment, is not admissible for the purpose of justification.

(PETHERAM, C. J.—In that case there was no attempt on the part of the prosecution to prove express malice. In this case you charge express malice, and then seek to confine the inquiry to a particular part of the document, though the question is whether the defendant acted maliciously, and whether the document as a whole is true. If in *Scott v. Sampson*, L. R., 8 Q. B. D., 491, the general character of the plaintiff had been attacked, I should think that the defence would have been entitled to give evidence adverse to his general character. The libel there charged a theatrical critic with abusing his position by attempting to extort money, and it was held that this charge could not be justified by showing that he had abused his position in other ways. All that the Court really decided was that if, for example, a libel charged a man with having been drunk on a particular [912] occasion, it could not be justified by evidence showing that on other occasions he had committed theft. There is nothing in the reports to exclude evidence of particular instances of the same kind of misconduct as that alleged in the libel. In the present case this document is only a part of the matters put before the jury to support the charge of malice, and which do prove malice if they are not contradicted. You virtually claim that the prosecution may go into these general matters, but that the defence may only contradict you as to a part. The case of *Lawson v. Labouchere*, not reported, appears to me to be more in point than *Scott v. Sampson*, L. R., 8 Q. B. D., 491. In that case the complainant was cross-examined at great length upon his conduct as a journalist, and in order to contradict him files of the *Daily Telegraph* for some years back were put in. Apart from this, however, I am of opinion that, in the present case, Mr. Laidman's character is a fact in issue.)

Mr. Ross.—It is in issue, not generally, but with reference only to particular expressions said to have been used on a particular occasion. This is shown by the complaint filed by the prosecution, and by the charge framed by the committing Magistrate. The prosecution has not been instituted in respect of every allegation contained in the defendant's letter of the 25th February, but only in respect of such of the allegations as are sufficiently specific to admit of an answer. It was necessary to put in the whole document, but the defendant has not been required to plead to any points other than the statements relating to the 9th February and to the adjournments. The other imputations were not made the subject of charge, because they are so indefinite and general, specifying neither time, place, nor person, that it was impossible to bring evidence regarding them or to meet them in any way. Any evidence therefore upon these allegations must necessarily take the complainant by surprise, and subject him to great hardship.

[PETHERAM, C. J.—If the complainant had chosen to take civil proceedings, the difficulty would have been avoided. Not having done so, he must take the consequences.]

Mr. Ross.—The rules of the service practically made such a course impossible. The official reputation of a civil servant is considered as being in the hands of his superiors, and the complainant [913] was bound, as a matter of fact, to take only such action as they approved. The learned Counsel referred to the *Manual of Government Orders, North-Western Provinces*, Vol. I, p. 156, (Judicial Criminal):—"All officers must obtain the authorization of Government before having recourse to the Courts for vindication of their public acts or their character as public functionaries from defamatory attacks. This order does not affect an officer's right to defend his private dealings or behaviour in any way that may seem to him fit; but his official reputation is in the charge of the Government which he serves."]

[PETHERAM, C. J.—That rule does not appear to me to apply to charges of this kind, but to charges relating to a man's competency in his work, and to the fairness of his decisions. In using offensive expressions from the Bench, a man does not, in my opinion, act in his "official" character, but out of his own folly. I regard the matter as a vulgar little quarrel, and as having nothing of the character of a state trial about it.]

Mr. Ross.—It is not merely a prosecution brought by a private person, but a prosecution brought by a public official to vindicate his character. For this purpose he is entitled to use the remedy provided by law.

[PETHERAM, C. J.—I shall tell the jury that he cannot use a criminal prosecution for that purpose. The object of such proceedings is not to seek a remedy for an individual injury, but to punish a crime, and the complainant is only interested, like any other member of the public, in seeing that justice is done. With reference to the alleged hardship caused to the complainant, it will be for the jury to consider whether he has been so taken by surprise that they should regard the evidence with suspicion.]

Mr. Ross asked that the point might be reserved under the Charter for decision by the Full Court.

Mr. Gordon, for the defence, was not called on to reply.

Petheram, C. J.—The whole question which has been raised by this objection turns upon the construction to be placed upon the language of s. 499 of the Penal Code. That section creates the criminal offence of defamation, and whoever is guilty of the offence as therein defined, is liable to punishment in the public [914] interests. The question of guilt is for the jury to consider, who must have before them all the evidence, and who must consider it without reference to the interests of any other person than the public and the prisoner. The words of s. 499 are as follows:—"Whoever, by words either spoken or intended to be read, or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing, or having reason to believe, that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person."

The question here is whether, with reference to these words alone, and apart from the rest of the section, Captain Hearsey intended to harm the

reputation of Mr. Laidman. Before this question can be answered, it is essential to see what Mr. Laidman's reputation is, and, moreover, Mr. Ross puts the case for the prosecution on the ground that Captain Hearsey acted with a malicious intention to injure the complainant by telling a falsehood, and not with a genuine intention to furnish proper information to the public. Upon this issue, it must be material to ascertain whether Captain Hearsey, in his letter *as a whole*, was telling the truth or not.

For these reasons I rule that this evidence is admissible, that is to say, first, because it relates to the question what is the reputation which the defendant is said to have harmed; and secondly, because it must be gathered from the document *as a whole* whether it shows a malicious intention or not. I decline to reserve the point for the Full Court, being of opinion that to do so would not serve the interests of either party.

[7 All. 914]

CIVIL REVISIONAL.

The 23rd July, 1885.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND
MR. JUSTICE TYRRELL.

Baldeo Das.....Petitioner

versus

Gobind Shankar.....*Opposite party.*

Act XL of 1858 (Bengal Minors Act), s. 3—Certificate of administration—

*Right of holder of certificate to defend suits connected with minor's
estate —High Court's powers of revision—Civil*

Procedure Code, ss. 2, 622.

Under s. 3 of the Bengal Minors Act (XL of 1858), the Civil Court has no power to refuse to admit a person who has obtained a certificate of administration [915] under the Act, to defend a suit on the minor's behalf, as guardian of such minor.

Where a Subordinate Judge had so acted,—*held*, that the High Court had no power to revise his order under s. 622 of the Civil Procedure Code.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of PETHERAM, C. J

Mr. G. E. A. Ross, Babu Dwarka Nath Banarji, and Pandit Ajudhia Nath, for the Petitioner.

Mr. T. Conlan, Munshi Hanuman Prasad, Lala Juala Prasad and Munshi Madho Prasad, for the Opposite Party.

* Application No. 147 of 1885, for revision under s. 622 of the Civil Procedure Code, of an order of Babu Kashi Nath Biswas, Subordinate Judge of Benares, dated the 5th June 1885.

Petheram, C. J.—I think that this application must be rejected. It is an application under s. 622 of the Civil Procedure Code, against an order of the Court of the Subordinate Judge, in which that Court refused to exercise a jurisdiction vested in it by law. The plaintiff brought an action against a particular person who did not appear in the suit. A third person came forward, who is the applicant before us, and claimed to be put on the record as defendant. The Subordinate Judge refused to admit him to defend the suit. I think he had no power to make that entry on the record. This third person urged that he had a right to come in under s. 3 of Act XL of 1858. Now, the application is based on the fact that the applicant has obtained a certificate, and no person, by s. 3 of Act XL of 1858, is entitled to institute or defend any suit for a minor unless he has obtained a certificate under the Act. The latter part of that section makes a certificate necessary, and by implication it gives him the right when he has obtained the certificate. Subsequent to the passing of Act XL of 1858, the Civil Procedure Code was passed; but, after looking at s. 464 of that Code, it would appear that we must look at this application as if these provisions, from s. 442 to s. 462, did not exist. Now, the words contained in s. 3 of Act XL of 1858, and the prohibition therein contained, cannot be made larger than they are. After a person has obtained a certificate, he may take the conduct of the minor's estate in his hands, and bring and defend suits. Supposing that this third party is right in his claim, he may ask to defend the suit, not in his own name, but as guardian of the minor.

[916] The Judge had no power to pass the order he did; but we cannot interfere in revision, and this application must be rejected with costs.

Tyrrell, J.—I agree with the learned Chief Justice's view of this application. I think also that it is very questionable whether any application to this Court would lie as made before us. The application to the lower Court, if made under s. 32 of the Act, is not appealable. There is no appeal under s. 588, but there is the question whether the order of the lower Court could not be considered a decree, within the meaning of the definition section (2) of the Civil Procedure Code. The petitioner claimed to appear as guardian. The Court decided he had not that right. That order decided his position in the suit. It seems to me that an appeal might have been preferred, and for this reason also this application must be rejected with costs.

Application rejected.

[7 All. 916]

APPELLATE CIVIL.

The 23rd July, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE AND
MR. JUSTICE TYRRELL.

Hira and another.....Plaintiffs

versus

Kallu and others.....Defendants.*

Pre-emption—Hindus—Local custom—Sale to a stranger.

The right of pre-emption, when it exists among Hindus, is a matter of contract or custom agreed to by the members of a village or community. Such a custom is not properly described as attached to the land, and as soon as any members of a Hindu community, who have agreed to be governed by it, sell to any one who is a stranger to the agreement, the land is no longer subject to pre-emption.

THIS was a suit to enforce a right of pre-emption, and was founded upon an alleged custom of a *mohalla* in the city of Muzaffarnagar, in which the pre-emptive property, which was part of a house, was situated. All the parties to the suit were Hindus. The defendant-vendee pleaded, *inter alia*, that her right to the property was preferential to that set up by the plaintiffs, inasmuch as she had lived for many years in the house in question, which had formerly belonged to her husband. The Court of First Instance (Munsif of Muzaffarnagar) found that the existence of the alleged custom in the part of the town in which the property was situate was [917] not proved, and accordingly dismissed the claim. On appeal, the District Judge of Saharanpur affirmed the decree, being of opinion that the plaintiffs had not established a right preferential to that of the defendant-vendee.

In second appeal, it was contended on behalf of the plaintiffs that, "as it was admitted that in the town of Muzaffarnagar the custom existed, it must be presumed to exist in this *mohalla* also," and that "the appellants as neighbours have a preferential right to purchase."

Lala *Latta Prasad*, for the Appellants.

Munshi *Kashi Prasad*, for the Respondents.

Petheram, C. J—This appeal must be dismissed with costs. I agree with the learned Judge in his decision, but not altogether for the reasons assigned by him. The suit was based on a wrong idea as to the custom of pre-emption asserted by Hindus. Pre-emption is a right which is known to the Muhammadan Law. It is not fixed to the land or country, but follows the persons of Muhammadans wherever they may be in the world. Among Hindus, on the other hand, it is a matter of contract or custom agreed to by the members of a village or community. When it is said that such a custom is attached to the land, I do not think that is a correct description. A community of Hindus may agree to be governed by the custom of pre-emption, but the moment they sell to a stranger to the agreement, there is no pre-emption attaching to the land. I think there is no ground for declaring such a cus-

* Second Appeal No. 1481 of 1884, from a decree of C. W. P. Watts, Esq., District Judge of Saharanpur, dated the 10th June 1884, affirming a decree of Maulvi Muhammad Said Khan, Munsif of Muzaffarnagar, dated the 7th December 1883.

tom to exist. The Judge was right in his decision, and this appeal must be dismissed with costs.

Tyrrell, J., concurred.

Appeal dismissed.

[7 All. 917]

The 24th July, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE AND MR. JUSTICE TYRRELL.

Hanuman Rai.....Plaintiff

versus

Udit Narain Rai and others.....Defendants.*

Pre-emption—Wajib-ul-arz—Transfer under compromise and decree thereon to person claiming pre-emption.

An appeal having been preferred from a decree in a suit for pre-emption, based on the *wajib-ul-arz* of a village, the parties to the suit entered into a compromise [918] whereby the plaintiff-pre-emptor relinquished his claim to a part of the property in dispute in favour of the defendants-vendees, and the latter admitted his claim with respect of the remainder of the property. Upon this compromise a decree was passed. Subsequently a co-sharer in the village where the property was situate brought a suit for pre-emption upon the contention that the compromise and the decree passed thereon amounted to a transfer to the plaintiff in the former suit, within the meaning of the *wajib-ul-arz*.

Held that the suit was not maintainable.

THIS was a suit to enforce a right of pre-emption based on the *wajib-ul-arz* of a village, which gave the right to co-sharers in cases of "transfers" or sales to strangers. The plaintiff Hanuman Rai, together with defendant No. 2, Ganga Din (who was a stranger) and other persons, had purchased shares in two villages, Siri and Kharang, under a joint sale-deed. Thereupon the respondent in this case, Udit Narain Rai, brought a suit for pre-emption in respect of the sale, excluding the share purchased by the plaintiff, and obtained a decree, and paid the consideration-money into Court within the period prescribed. An appeal was preferred from the decree, and the parties entered into a compromise, whereby the plaintiff-pre-emptor relinquished his claim to a two pies share in each village in favour of the defendants-vendees, and the defendants-vendees admitted the plaintiff-pre-emptor's claim with respect to the remainder of the property transferred. Upon this compromise a decree was passed.

The present suit was brought by the plaintiff upon the contention that the proceedings just described amounted to a transfer, within the meaning of the *wajib-ul-arz*, and therefore gave rise to the right of pre-emption; and alleging further that he was a nearer co-sharer in the two villages than Udit Narain Rai,

* Second Appeal No. 1501 of 1884, from a decree of Lala Mata Din, Officiating Sub-ordinate Judge of Gorakhpur, dated the 16th June 1884, reversing a decree of Maulvi Ahmad Ali Khan, Munsif of Bansgaon, dated the 19th March 1884.

and therefore entitled, under the *wajib-ul-arz*, to enforce the right against him. The defendants (the parties to the compromise and the decree) contended that the transaction referred to was not a transfer, within the meaning of the *wajib-ul-arz*, in respect of which a right of pre-emption could be enforced. The Court of First Instance (Munsif of Bansgaon) decreed the claim, holding that the transfer effected by the compromise and decree in favour of Udit Narain Rai "had all the incidents and properties of a sale," and therefore gave rise to the right of pre-emption. On appeal, the Subordinate Judge of Gorakhpur, being of the contrary opinion, reversed the decree.

[919] In second appeal, it was again contended on the plaintiff's behalf that the transfer to Udit Narain Rai, under the compromise, was a transfer of the nature contemplated by the *wajib-ul-arz*.

Munshi Sukh Ram, for the Appellant.

Lala Juala Prasad, for the Respondents.

Petheram, C. J.—I am of opinion that this appeal must be dismissed with costs. The sale, in respect of which the right of pre-emption is claimed, is a sale in which the right was claimed by another party, and was the subject of a compromise. The appellant urges that this compromise of a former suit had all the virtue of a private sale, and that, he being a nearer co-sharer, his right of pre-emption accrued in consequence. This action is, in effect, to have it established that another suit by the present defendant Udit Narain Rai was wrongly decreed. If we were to allow this, it would be reducing the right of action and proceedings for pre-emption to an absurdity. No sooner one suit was decreed for pre-emption, than another would be filed, and so it might go on from the nearest co-sharer's suit to the next and the next, down to the person whose interest in the village was the smallest and most remote. The Lower Appellate Court was right in dismissing the suit, and this appeal must be and is dismissed with costs.

Tyrrell, J.—I am of the same opinion.

Appeal dismissed.

NOTES.

[This case was followed in (1913) 18 Ind. Cases 957 (Punjab). (1903) 25 All., 334 is also to the same effect.]

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VOL. VIII.

THE INDIAN LAW REPORTS, ALLAHABAD SERIES,
CONTAINING CASES DETERMINED BY THE HIGH
COURT AT ALLAHABAD, AND BY THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL ON APPEAL
FROM THAT COURT.

ALLAHABAD—Vol. VIII-1886.

APPELLATE CIVIL.

The 12th June, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE
BRODHURST.

Parbati.....Defendant

versus

Sundar.....Plaintiff.*

*Hindu Law—Brahmans—Adoption of sister's son—Suit for partition of
property by person in possession making a false claim thereto.*

According to the Hindu Law, a Brahman cannot validly adopt his sister's son.

B, a childless Hindu and a Brahman, adopted *X*, his sister's son, and, subsequently apprehending that the adoption was invalid, executed a will by which he left his estate to *X*. After *B*'s death, *X* obtained possession and remained in possession of the estate till his death, which occurred before he had attained majority. After this, joint possession of the estate was obtained by *P* and *S*, two widows of *B*, who set up a right of inheritance from *X*, as being in the position of mothers to him, in consequence of his adoption by their deceased husband. A suit was brought by *S* against *P* for partition of the estate.

Held that the adoption of *X*, by *B*, a Brahman, was invalid, and that *P* and *S* were not entitled to succeed as his heirs.

Held also that, inasmuch as the parties had set up a false claim to the estate, and had no estate in law which they could divide, the suit for partition was not maintainable merely by reason of the fact that they were in possession. *Armory v. Delamirie*, Smith's L. C. 6th edn., 313, and *Asher v. Whitlock*, L. R., 1 Q. B. 1, referred to.

The facts of this case are sufficiently stated for the purposes of this report in the judgments of the Court.

Mr. *T. Conlan* and Pandit *Ajudhia Nath*, for the Appellant.

Mr. *C. H. Hill* and Pandits *Bishambar Nath* and *Sundar Lal*, for the Respondent.

* First Appeal No. 37 of 1884, from a decree of Maulvi Muhammad Maqsood Ali Khan, Subordinate Judge of Saharanpur, dated the 27th February 1884.

Petheram, C. J.—This is a suit instituted by one Musammat Sundar against Musammat Parbati, both of them being the widows [2] of one Baldeo Sahai, for partition of the property in suit said to be held jointly by them. As it is of great importance in the case to ascertain precisely the grounds upon which the claim is made, and the grounds upon which the defence is based, I will first proceed to explain them.

The plaintiff states in her petition of plaint as follows :—

"1. That the properties mentioned in the accompanying schedules form part of the estate of Lala Baldeo Sahai, deceased, who, being childless, declared Prem Sukh Das in his lifetime to be his adopted son and heir, solemnly executing a will in his favour in 1875. He died in December 1878.

"2. That on the death of Lala Baldeo Sahai, the plaintiff and the defendant undertook to maintain Prem Sukh, minor, and to look after the affairs connected with the property.

"3. That Prem Sukh Das, who had not contracted a marriage, died during his minority, on the 3rd December 1879.

"4. That the parties, who are the widows of Lala Baldeo Sahai, and mothers of Prem Sukh Das, obtained joint possession of all the moveable and immoveable properties, and lived together in commensality."

That is, in her petition of plaint she says in effect that, at the time of the death of Baldeo Sahai, he left an adopted son as his heir. Plaintiff and respondent took possession of the estate of Baldeo Sahai on behalf of Prem Sukh Das, the adopted son, who was a minor. The minor died a year after. Since then the plaintiff and defendant remained in joint possession of the estate. Now the defendant is dealing with the property in a way to which she (the plaintiff) objects, and she asks for a division of the estate between them.

The defendant pleads that "Prem Sukh Das was not an adopted son of Baldeo Sahai, nor could he be adopted; the disputed property was acquired by him under a will executed by Baldeo Sahai. The plaintiff has no right in respect of the property in suit, and her claim in respect of it should be dismissed."

The parties went to trial upon the question of adoption, and in proving that Baldeo Sahai had adopted the minor Prem Sukh [3] as his son, it was proved that Prem Sukh was the son of Baldeo Sahai's sister. It is not necessary for us to consider the evidence as to the fact of adoption. The question is, had the adoption of his sister's son by Baldeo Sahai any legal validity? Baldeo Sahai himself had doubts about its validity. The will would not have been necessary had the adoption been a good one.

We have then to consider what was the position of the two ladies on the death of Baldeo Sahai. A form of adoption had been gone through and a will made. Prem Sukh was entitled to the same interest either under the will or by reason of the adoption. Whoever got possession of the estate, got it on behalf of Prem Sukh.

Both the ladies state that they maintained and brought up Prem Sukh, and they got their names, registered as mothers of Prem Sukh.

During the lifetime of Prem Sukh, then, the two ladies were in possession of the minor's property, whom they recognised as their son. The result of this is, that they constituted themselves trustees for the minor. As such, they continued to be in possession of the property till the death of the minor in December 1879. After his death they continued in possession. They placed themselves in the position of his mothers, and as heiresses to him, and not in the position of the widows of Baldeo Sahai. That is the right which both

claimed in the property, and upon the basis of which they remained in possession of the estate since the death of Prem Sukh.

Two contentions have been raised before us. The first is that the two widows are actually heirs; that the adoption was legal and valid; and that Prem Sukh was therefore the son of Baldeo Sahai and his two widows.

The question then is, can a Brahman (for the parties in this suit are Brahmans) in this country validly adopt his sister's son?

It is urged that the earlier authorities on Hindu Law do not prohibit such an adoption; that the view taken by the two *Mimansas* is opposed to these earlier authorities; and that the ancient texts upon which the *Mimansas* profess to base their view do not support that view. It is admitted that all the Courts have hitherto [4] adopted the view which the *Mimansas* take; but it is urged that as that view is wrong, the decisions based upon it are wrong also. I do not propose to re-open the question. All the Courts have acted upon the view taken by the two *Mimansas*, and we are bound to follow the authority of a long and uniform course of decisions. Sitting as a Division Bench of this Court, it is not competent for us to disturb the long and uniform course of decisions by all our Courts, from the earliest times, upon this point. If the respondent wishes to re-open the whole question, she must go to the Privy Council. It must therefore be held that the adoption of Prem Sukh Das was invalid, and that upon the death of Baldeo Sahai he took the estate under the will.

The question then arises:—What is the position occupied by the two ladies since Prem Sukh's death? They had no rights as mothers. They took possession of the estate on behalf of Prem Sukh, and their possession was that of trustees on his behalf. They remained in possession as heiresses, and as such set up a claim to his estate. That claim has failed.

It is then contended that, even allowing that they have no right to the property as the heiresses of Prem Sukh, still, inasmuch as they are in possession of the estate, they are competent to maintain a suit for its partition between themselves. Various authorities have been cited in support of this contention.

The first case cited to us was the case of *Armory v. Delamirie*, Smith's L. C. 6th edn., 313. We were also referred to some of the cases mentioned in the note to this case.

Now in the first case, the plaintiff, who was a chimney sweeper's boy, had found a jewel. He carried it to the defendant's shop, and delivered it into the hands of the defendant's apprentice. The apprentice, under the pretence of weighing it, took out the stones, and returned the empty socket. In an action for trover by the plaintiff, it was held in this case that the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet has such a property as will enable him to keep it against all except the rightful owner.

Now in that case no false claim was set up: the claim was a claim to bare possession.

[5] The other case cited was *Asher v. Whitlock*, L. R. 1 Q. B. 1, a case relating to land.

In that case a person had enclosed from the waste of a manor a piece of land by the side of the highway in 1842. In 1850 he enclosed more land adjoining, and built a cottage. He occupied the whole till his death in 1860. By his will this person devised all his property to his wife for and during so much of her natural life as she might remain unmarried, and from and after her

decease or second marriage, whichever event might first happen, to his only daughter in fee. After the death of this person, his widow remained in possession with the daughter, and in 1861 married the defendant. Early in 1863 the daughter died, and the mother also died soon after. The defendant continued to occupy the property, and the heir-at-law of the daughter brought this suit for ejectment against him. It was held in that case that a person in possession of land without other title has a devisable interest, and the heir of his devisee can maintain ejectment against a person who has entered upon the land and cannot show title or possession in any one prior to the testator. Possession is a good title against all the world, except against one who can show better title. By reason of his possession such person has an interest which can be sold or devised. If this person had devised his interest to two others, they might divide it among themselves.

In this case there is nothing of the kind. Parties come and claim an estate to which they are not entitled. They set up a false claim. They have no estate in law which they could divide. We cannot recognize such a claim; to do so would be to recognize an illegal transaction, and we should be dividing an estate which has no legal existence. The suit is not maintainable, and we must allow this appeal, and dismiss the connected appeal No. 55 of 1884. No costs on either side in any of the Courts.

Brodhurst, J.—The plaintiff, the younger widow of Baldeo Sahai, Brahman, instituted a suit in the Court of the Subordinate Judge of Saharanpur, against the defendant, the elder widow of the said deceased person, for partition, and for separate and complete possession of a half share of certain houses, and for other reliefs as contained in the plaint.

[6] The Subordinate Judge partly decreed and partly dismissed the claim, and from his decree the defendant has now appealed.

It is proved that Baldeo Sahai went through the form of adopting Prem Sukh, his sister's son, and, subsequently having reason to believe that such an adoption was invalid, he, on the 21st July 1875, executed a will in favour of Prem Sukh.

Baldeo Sahai died in 1878, and Prem Sukh succeeded to possession of his estate; but he died in 1879 during his minority.

The adoption of a sister's son by one of the twice-born has been held in numerous rulings, and by every one of the High Courts in India, to be invalid under the Hindu Law, and the proposition of the plaintiff-respondent's learned counsel to the contrary, in my opinion, has not been and cannot be sustained.

The plaintiff-respondent did not obtain possession of the property in suit as a widow of Baldeo Sahai, but Prem Sukh succeeded to possession under the will, and on his demise the plaintiff was not entitled to the property, and had no right to bring the suit.

I therefore concur with the learned Chief Justice in allowing the appeal and in dismissing the suit without costs.

Appeal allowed.

NOTES.

[See the Notes to (1895) 17 All., 294.]

[8 All. 6]

PRIVY COUNCIL.

The 19th June, 1885.

PRESENT :

SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH,
AND SIR ARTHUR HOBHOUSE.

Alexander Mitchell.....Defendant
versus
Mathura Das and others.....Plaintiffs.

[On appeal from the High Court for the North-Western Provinces.]

Act III of 1877, (Registration Act), ss. 17, 49—Effect of a registered instrument confirming a prior one of the same purport not registered.

An instrument purporting to assign a right in immoveables of more than the value of Rs. 100 (s. 17, sub-section b of Act III of 1877) being unregistered, was ineffectual to affect the title of the purchaser.

Some years after, the parties executed a deed of conveyance, making the same assignment, confirming the former instrument, and setting it forth in a schedule. The latter instrument was registered.

In a suit in which the ownership of the property was contested—*held*, that the fact of the prior deed not having affected the property being unregistered, [7] was no reason why the deed afterwards registered should not be admitted as evidence of title. In this there had been nothing contravening the objects of the Registration Act.

APPEAL from a decree (16th January 1882) of the High Court, I.L.R., 4 All., 206, reversing a decree (9th September 1880) of the District Judge of Cawnpore.

The respondents, who had obtained a decree for Rs. 2,036, dated the 9th June 1879, under an arbitration award against William Mitchell, formerly carrying on the business of cotton-screwing at Cawnpore, in execution attached the screwing-house and a bungalow adjoining in his occupation. Alexander Mitchell, resident in Scotland, father of William Mitchell, claimed the property as owner, alleging that the latter was merely his tenant; and obtained its release on the 11th August 1879, under s. 280 of Act X of 1877 (Civil Procedure Code). Another son, Francis J. Mitchell, took possession as agent for his father.

On the 14th June 1880, Mathura Das and others, now respondents, holders of the decree of the 9th June 1879, sued both William and Alexander Mitchell, to obtain establishment of right in the property in dispute (in accordance with the right of suit given in s. 283), on the ground that the property belonged exclusively to William. The defence was that the elder Mitchell had purchased from Messrs. Nicol, Fleming and Co., in 1873, and had continued to be owner.

The District Judge, into whose Court the suit was transferred, found that the property in suit, which was of upwards of Rs. 12,000 in value, had been acquired in good faith by A. Mitchell, the father, on payment of Rs. 12,406-12-0 to Messrs. J. Nicol, Fleming and Co., in September 1873, as an investment for himself, and with the object of enabling his son, William Mitchell, whose possession thereof after such purchase was merely permissive, to make a

favourable start in business ; that the deed of the 25th September 1873, was not produced for registration, through oversight, but that such omission had been supplied by the execution of the deed of the 31st December 1878, to which the earlier deed was appended as a schedule ; that the two instruments formed, in truth, one document, which was validly registered ; and that if there were any [8] irregularity or defect in such registration by reason of the certificate of registration not being endorsed on the paper on which the later deed was written, such defect or irregularity was one merely of procedure, and did not render the registration of the document invalid. The Judge also found that, even if the registration were invalid and the deed inadmissible in evidence, there was enough to show that the property belonged to the elder Mitchell. The suit was accordingly dismissed.

The plaintiffs having appealed, the High Court found, with reference to a mistake under which the Registrar's certificate had not been written on the confirming document, but on the schedule containing the deed of 1873, that the provisions of ss. 58, 59, and 60 of Act III of 1877 had not been complied with. They concluded, therefore, that neither of the documents was admissible in evidence, and that in admitting that of 1878 the Judge had decided erroneously. They intimated that there was much force in the suggestion of the counsel for the plaintiff, that registration of the deed of 1873 was intentionally not made, in order to let it appear that William Mitchell was the owner of the premises. The material part of the judgment is set forth by their Lordships.

The claim having been decreed in the High Court, Alexander Mitchell appealed to Her Majesty in Council.

For the appellant, Mr. *R. V. Doyne*, and Mr. *Woodroffe* argued that any *prima facie* case of ownership on the part of William Mitchell, consequent on his having been seen in occupation, had been rebutted by proof of the purchase of the property by his father. The title of the latter was established by the deed of the 31st December 1878, which with its schedule was admissible in evidence. That the endorsement of the Registrar was on the wrong document was not a material mistake, and did not invalidate the registration.

Reference was made to Act III of 1877, *Muhammad Ewaz v. Birj Lal*, L. R., 4 Ind. Ap., 166; *Sah Makhan Lal Panday v. Sah Kundan Lal*, L. R., 2 Ind. Ap., 210.

The respondents did not appear. Their Lordships' judgment was delivered by

Sir B. Peacock.—Their Lordships are of opinion that the decision of the High Court in this case was erroneous, and that it ought to be reversed.

[9] It appears that an action was brought on the 14th June 1880, praying:—"That a decree for establishment of right, as provided by s. 283 of Act X of 1877, be passed, with the order that the disputed property is the property of W. Mitchell, judgment-debtor, and is liable to be sold by auction in execution of the plaintiff's decree." On the 11th June 1879, the plaintiffs obtained a decree under an arbitration award against William Mitchell. In execution of that decree a screw-house, which was in the possession of William Mitchell, was attached. Upon that attachment being made, Alexander Mitchell, the father of the defendant William, objected, and claimed that the property was not the property of William, but was the property of him, Alexander. The matter was investigated by the Court out of which the execution issued, in accordance with the provisions of the Code of Civil Procedure ; and having received evidence in the case, the Court decided that the property belonged to Alexander and not to William, and released it from execution. That order was not appealable ; but the plaintiff, the then execution creditor, being dissatisfied with the

order, the present suit was commenced, in accordance with the provisions of the Code of Civil Procedure, to have it declared that the property was the property of the son, and liable to be seized in execution; it was in substance to reverse the order of the Court out of which the execution issued.

The way in which the father endeavoured to make out his title was this:—He said that on the 25th September 1873, he purchased the property from Messrs. Nicol, Fleming and Co. It appears that the deed of conveyance which he attempted to put in evidence to prove that Messrs. Nicol, Fleming and Co. conveyed the property to him had not been registered. By the Registration Act—Act III of 1877, s. 49—it is enacted that “no document required by s. 17 to be registered,”—and the document of 1873 was a document of that nature—“shall, unless it be registered, be received as evidence of any transaction affecting such property or conferring such power.” The deed, therefore, not having been duly registered, was not admissible in evidence. But Alexander Mitchell produced a subsequent deed, namely, a deed which was executed on the 31st December 1878. That deed is set out in the record. It refers to the deed of 1873, which is set out in a schedule as part of the deed of 1878. The memorandum of registration was written, not on the [10] first sheet of the deed of 1878, but at the end of the deed which was annexed as a schedule to, and was consequently part of, the deed of 1878. The deed of 1878 not only confirmed the deed of 1873, but it went on to state that the parties to the deed did, and each of them did, “according to their and his respective estates and interests, grant, convey, assign, and confirm unto the said Alexander Mitchell, his heirs, executors, administrators and assigns, the piece or parcel of land” which is the subject-matter of the dispute in this case. So that the deed of 1878 was an actual conveyance from Messrs. Nicol, Fleming and Co. to Alexander Mitchell. Nicol, Fleming and Co. were proved to have purchased it from Gavin Sibbald Jones, who had mortgaged it to a person of the name of Churcher. There is no doubt that the property, having been the property of Nicol, Fleming and Co., passed by that deed from Nicol, Fleming and Co., to Alexander Mitchell. But it was alleged in the plaint that that deed was fraudulent and void. The fourth paragraph of the plaint says:—“The said property belongs exclusively to W. Mitchell, and he is in proprietary possession thereof; the sale deed is quite fictitious, collusive and invalid, and executed without receipt of consideration money.” It is not attempted to impute any fraud to Nicol, Fleming and Co. They received the consideration money of Rs. 12,406 and conveyed the estate. The fraud attempted to be made out is that the conveyance was to Alexander Mitchell instead of the son, William Mitchell. The question is, who paid the consideration money for the conveyance? Was it William Mitchell or Alexander Mitchell? There is no evidence to show that William Mitchell had the means of purchasing the property. He had been acting merely as assistant of Nicol, Fleming and Co. in conducting the mill for them before the sale, and he continued to occupy the premises afterwards.

It was proved that the consideration money for the conveyance was paid by Alexander Mitchell. It was not paid by William Mitchell in Cawnpore, but to Nicol, Fleming and Co. in England by Alexander Mitchell, who lived in Scotland.

There was no evidence whatever to show that William Mitchell was the real purchaser, or that Alexander was merely benami for him; and their Lordships think that the decision of the first Judge, [11] that the property was Alexander Mitchell's and not William Mitchell's, was correct.

It has been urged by Mr. Woodroffe, and very properly urged, that it required some strong evidence to overturn the decision of the Judge of the execution Court, who, upon hearing the evidence, came to the conclusion that the property was Alexander Mitchell's; and he asked—Was there any sufficient evidence that it was the property of William given before the Judge of the first Court, who decided in accordance with the view of the Court of execution? There appears to be no evidence. The evidence, on the contrary, shows that the money was paid by Alexander.

The Judges of the High Court place some reliance upon the fact that the first deed was not registered in 1873. They say:—"Having established this lengthened possession on the part of their judgment-debtor, the plaintiffs, reasonably enough, contend that they have made out a *prima facie* case, which it lies upon the defendants to rebut. We think that this is the correct view of the position, and that it rests with Alexander Mitchell to prove his title. This he seeks to do in a fashion which is, to say the least of it, extraordinary. He produces two documents, one purporting to be a deed of conveyance of the screw-house to himself, dated the 25th September 1873, and the other a confirmation bond, executed by the same parties as the conveyance, and dated the 31st December 1878. Now it is obvious that the true document of his title is the conveyance of 1873, but unfortunately for him it is unregistered, and therefore inadmissible in evidence." That document was not proved. It could not be proved because it could not be given in evidence. But the fact that the deed itself could not be given in evidence was no reason why the deed of 1878 should not be given in evidence, and that deed, referring to the deed of 1873, was proved to have been executed, and their Lordships consider that it was duly registered. "Now it is obvious"—the Judges say—"that the true document of his title is the conveyance of 1873; but unfortunately for him it is unregistered, and therefore inadmissible in evidence. So the expedient of the confirmation bond had to be resorted to, and in March 1879, it was presented to the Collector for registration. Now, even supposing registration had been formally and properly completed, we should [12] have been very strongly disposed to hold that such an obvious attempt to defeat the provisions of the registration law should not be permitted to succeed. Indeed, to allow a transaction of such a kind to pass as legitimate would be to throw the door open to the very mischief at which this branch of legislation is aimed." Their Lordships do not understand what is the mischief to which the Judges allude. The Registration Act was not passed to avoid the mischief of allowing a man to be in possession of real property without having a registered deed, but as a check against the production of forged documents, and in order that subsequent purchasers, or persons to whom subsequent conveyances of property were made, should not be affected by previous conveyances, unless those previous conveyances were registered. The Registration Act, as regards real property, was not intended to be a clause similar to that which is in the Bankrupt and Insolvent Acts, by which persons who are allowed to be in the order and disposition of goods, with the consent of the real owners, are, as against creditors, to be considered the real owners.

Their Lordships therefore think that the second deed of conveyance, being registered, was a valid conveyance of the property from Messrs. Nicol, Fleming and Co. to Alexander Mitchell, and that it passed that property to Alexander, unless there was fraud either between those who conveyed the property to Alexander, or between Alexander and his son, in taking the conveyance to Alexander as the person who had really purchased the property, instead of to the son, who was in possession of the property, and who it is said paid the

purchase money. Their Lordships see no evidence at all to show that there was any fraud of that kind, or between Alexander and his son, in having the confirmation deed of 1878 executed to the father.

With reference to the persons who paid the money, it was stated by the brother of William that the father had advanced the money for the purpose of promoting the interests of his son. There was some evidence given of rent having been paid by William Mitchell to his father for this property. It certainly was not very clearly proved that the rent was regularly paid. It was said there were letters showing that the different payments had been made, [13] but those letters were not produced. There certainly was one letter produced, in which Messrs. Nicol, Fleming and Co. admitted to have received a sum of Rs. 2,000 from William, in order to make a remittance to the father of £150. But the Judges put it in this way:—"Not a single entry under the head of 'rent' in the account-books of the firm of Mitchell and Co. is forthcoming, nor is a letter or receipt produced from Alexander Mitchell acknowledging any one of the payments which are alleged to have been made on account of rent. That moneys may have from time to time been remitted from Mitchell to his father, by way of interest on the advances made to start him in business, is likely enough; but, be this as it may, there is not a particle of satisfactory proof to show that rent was ever paid by William Mitchell to his father in respect to the screw-house." Whether the rent was ever paid by William Mitchell to his father is not the question. The question is, who paid the consideration money for the conveyance from Messrs. Nicol, Fleming and Co. to Alexander? Their Lordships think that the evidence clearly shows that the consideration money was paid by the father, and that he took the conveyance to himself. There was no evidence to show that the father lent the money to his son, and that the son was the real purchaser. Even if the father lent the money to the son, it is natural that he should take the conveyance to himself as a security for repayment of the loan.

Under these circumstances, Their Lordships are of opinion that the *prima facie* case, which was made out by showing that William Mitchell was in possession, has been rebutted by the evidence showing that the father paid the consideration money for the conveyance to himself, and that the property was conveyed to him. Their Lordships therefore think that the decision of the Judge of the execution Court, that the property was the property of Alexander, and not the property of William, was correct, and that this suit must fail in asking to have that judgment reversed. The Court of First Instance, in the suit which is now under consideration, concurred with the decision of the Judge of execution.

Their Lordships think the decision of the First Judge was correct, and that the High Court were in error in reversing that decision.

[14] Under these circumstances, Their Lordships will humbly advise Her Majesty to reverse the decision of the High Court, and to order that the suit be dismissed with the costs in the High Court. The costs of this appeal must be paid by the respondents.

Solicitors for the Appellant—Messrs. Sanderson and Hoiland.

NOTES.

[See also (1886) 12 Cal., 696; 4 Bom. L. R., 893.]

[8 All. 15]

APPELLATE CRIMINAL.

The 26th September, 1885.

PRESENT :

MR. JUSTICE BRODHURST.

Queen-Empress
versus

Sukha and others.

*Criminal Procedure Code, ss. 423, 436, 439—Appellate Court, powers of—
Commitment.*

The Appellate Court referred to in s. 423 of the Criminal Procedure Code can, in an appeal from a conviction, only order an accused person to be committed for trial when it considers that the accused is triable exclusively by the Court of Session.

The meaning of the words in s. 423 (b) of the Criminal Procedure Code, "or order him to be tried by a Court of competent jurisdiction subordinate to such appellate Court, or committed for trial," is as follows:—If in an appeal from a conviction, the Appellate Court finds that the accused person, who was triable only by a Magistrate of the first class, or by a Court of Session, has, by an oversight or under a misapprehension, been tried, convicted and sentenced by a Magistrate of the second class, the Appellate Court may in that case reverse the finding and sentence, and order the accused to be retried by a Magistrate of the first class or by the Court of Session; and, in like manner, when the appellant, who was triable solely by the Court of Session, has been tried, convicted and sentenced by a Magistrate of the first class, the Sessions Judge, in disposing of the appeal, is empowered to reverse the finding and sentence, and to order that the accused be committed for trial.

IN this case five persons, named Durga, Sukha, Ballu, Ram Din, and Dhani, were originally tried by the Deputy Magistrate of Pilibhit, a Magistrate of the first class, under s. 325 of the Penal Code, for intentionally causing grievous hurt to one Misri. Durga was, on the 4th March 1885, acquitted, and the remaining four were convicted of the offence above-mentioned, and they were each sentenced to be rigorously imprisoned for three months, and to pay a fine of Rs. 10, or, in default, to undergo a further term of one month's rigorous imprisonment.

The four prisoners preferred an appeal to the Sessions Judge, who, in an order dated the 16th April 1885, observed that the sentences that had been passed by the Magistrate were "wholly inadequate for the offences of which appellants have been found guilty by him;" and he added:—"Two courses appear open to me—one to report the case to the High Court for enhancement of punishment; the other, under s. 423 of the Criminal Procedure Code, to direct the committal of the appellants to this Court, sitting as a Court of Session, for trial. The latter course appears to me to be the most appropriate in the present instance. The Magistrate's order is accordingly annulled, and he is directed to commit the appellants to this Court for trial."

The four prisoners were accordingly committed to the Court of Session, and tried by the Sessions Judge under s. 325 of the Penal Code, and also under s. 335, for causing grievous hurt on grave and sudden provocation; and the Sessions Judge, on the 12th June 1885, convicted the four accused persons under the latter section, and sentenced them each to two years' rigorous imprisonment, inclusive of the terms they each had already undergone under the orders of the Deputy Magistrate.

The four prisoners appealed to the High Court. They were not represented either by counsel or pleader, and they did not take any special objection either of law or fact to their convictions and sentences.

The *Public Prosecutor* (Mr. G. E. A. Ross), for the Crown.

Brodhurst, J., (after stating the facts as above, continued):—When the case came before me for hearing, I saw reason to doubt the legality of the Sessions Judge's proceedings, and, at my request, first the Senior Government Pleader, and subsequently the Public Prosecutor, appeared to argue the legal point that arises in the case.

The point for consideration is, whether the Sessions Judge was, as he supposes, competent, when the appeal was preferred to him, to have adopted either of the courses he mentions; or was merely empowered, if he considered the sentences inadequate, to have dismissed the appeal, and to have referred the case to the High Court for enhancement of sentences, under s. 439 of the Criminal Procedure Code.

[16] Had Act X of 1872 been still in force, the Sessions Judge, in disposing of the appeal, might, under the provisions of s. 280 of that Code, have enhanced the sentences to any punishment that the Magistrate of the first class was competent to inflict—*i.e.*, to imprisonment of either description not exceeding two years and fine, or he might, under the same section amended by s. 28 of Act XI of 1874, have ordered the appellants to be re-tried; but he could not have ordered their commitment under s. 284, because their offence was triable by the Magistrate of the first class. It was only in sessions cases, in which the Court of Session considered that an accused person had been improperly discharged, that it was competent, under s. 296, to direct that the accused person be committed for trial, and, under the same section, the Court was empowered to report the proceedings for the orders of the High Court, if it was of opinion that the punishment was too severe or was inadequate.

The High Court of these Provinces held on more than one occasion, as will be seen by referring to the judgment of JARDINE, J., in *Queen v. Seetul Pershad*, N.-W. P. H. C. Rep., 1873, p. 168, that the Court of Session can only order the commitment of an accused person in cases exclusively triable by it; and I entertain no doubt that this was a correct exposition of the law during the time that Act X of 1872 was in force.

Act X of 1882 did not, so far as I am aware, extend the powers of the appellate Courts; on the contrary, it curtailed them by depriving those Courts of the power of enhancing sentences. That power was, by s. 439 of the Criminal Procedure Code now in force, conferred, under certain restrictions, solely upon the High Courts as Courts of revision. Under the latter section it is laid down that "where the sentence dealt with under this section has been passed by a Presidency Magistrate or a Magistrate acting otherwise than under s. 34, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed, than might have been inflicted for such offence by a Presidency Magistrate or a Magistrate of the first class."

Had the Sessions Judge referred the case under appeal to this Court for orders, the sentences could not have been enhanced to [17] more than a total punishment of two years' rigorous imprisonment and fine—*i.e.*, to the punishment that the Magistrate of the first class was competent to inflict.

If the Sessions Judge was competent to order the commitment in the present case, he could do so only under cl. (b), s. 423 of Act X of 1882. If he is empowered by that section to order the commitment, the result of the

amendment of the Criminal Procedure Code is that, whilst the Court of Session is, by Act X of 1882, deprived of the power of enhancing a sentence of, say three months' rigorous imprisonment under s. 325 of the Penal Code into a sentence of two years' rigorous imprisonment and fine, it is nevertheless empowered to reverse the conviction under s. 325, and the sentence of three months' rigorous imprisonment and fine, to order a commitment under the same section, and to sentence the accused to rigorous imprisonment for seven years and to fine.

The meaning of the sentence "or order him to be re-tried by a Court of competent jurisdiction subordinate to such appellate Court or committed for trial," in cl. (b), s. 423 of the Criminal Procedure Code, is, in my opinion, as follows:—If in an appeal from a conviction, the appellate Court finds that the accused person, who was triable only by a Magistrate of the first class, or by a Court of Session, has, by an oversight or under a misapprehension, been tried, convicted and sentenced by a Magistrate of the second class, the appellate Court may in that case reverse the finding and sentence, and order the accused to be re-tried by a Magistrate of the first class, or by the Court of Session; and, in like manner, when the appellant who was triable solely by the Court of Session has been tried, convicted and sentenced by a Magistrate of the first class, the Sessions Judge, in disposing of the appeal, is empowered to reverse the finding and sentence, and to order that the accused be committed for trial.

Reading ss. 423, 436, and 439 of the Criminal Procedure Code now in force together, I am of opinion that the appellate Court referred to in s. 423 can, in an appeal from a conviction, only order an accused person to be committed for trial when it considers that the accused is triable exclusively by the Court of Session.

[18] Under this view of the law, the proceedings of the Sessions Judge are, I consider, illegal, and I therefore reverse them.

I nevertheless agree with the Sessions Judge that the sentences that were passed by the Deputy Magistrate were inadequate; I also think that the convictions and sentences contained in the Sessions Judge's judgment are appropriate; and I therefore, under the provisions of s. 439 of the Criminal Procedure Code, direct that each of the four prisoners (appellants) be rigorously imprisoned for two years, under s. 335 of the Indian Penal Code, the sentences commencing from the 4th March 1885, the date of the Deputy Magistrate's judgment.

NOTES.

[NO LONGER LAW—

This was **dissented** from in (1893) 15 All., 205. See the Notes to that case.]

[8 All. 18]

CRIMINAL REVISIONAL.

The 26th October, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE.

Queen-Empress

versus

Mitthu Lal.

*Act I of 1879 (Stamp Act), s. 61—Abetment of making an unstamped receipt—
Act XLV of 1860 (Penal Code), s. 107.*

A debtor, having paid a sum of money to his creditor, accepted from the latter an unstamped receipt, promising to affix a stamp thereto.

Held, that this did not constitute abetment, within the meaning of s. 107 of the Penal Code, of the offence of making an unstamped receipt. *Empress v. Bahadur Singh*, Weekly Notes, 1885, p. 30, distinguished; *Empress v. Janki*, I. L. R., 7 Bom., 82, and *Empress v. Bhairon*, Weekly Notes, 1884, p. 37, referred to.

THIS was a case in which one Mitthu Lal was convicted, under s. 109 of the Penal Code and s. 61 of Act I of 1879, of abetment of the offence of making an unstamped receipt.

It appeared that an unstamped receipt had been impounded in the Tahsildar's Court, and a prosecution of the maker ordered by the Collector. During this trial the Assistant Magistrate summoned Mitthu Lal, and charged and tried him and convicted him. He found that Mitthu Lal had accepted the unstamped receipt and had promised to stamp it, and had thus intentionally aided the illegal omission. The Magistrate sentenced the accused to pay a fine of Rs. 10.

[19] In reporting the case to the High Court for orders, the Sessions Judge observed as follows:—

"*Empress v. Janki*, I. L. R., 7 Bom., 82, and *Empress v. Bhairon*, Weekly Notes, 1884, p. 37 were cited; but he (Assistant Magistrate) was of opinion that these cases had been overruled by the recent decision in *Empress v. Bahadur Singh*, Weekly Notes, 1885, p. 30. As each of the Allahabad cases was the ruling of one Judge, he was at liberty to follow either; but the cases do not conflict with each other or the Bombay ruling. There it was held that merely taking an unstamped receipt was no offence. In *Bhairon's* case, the Magistrate found that a bond had been executed on plain paper owing to the obligee's consent to take it. The Judge, in referring the case, said there was no evidence whatever of this, and the conviction was quashed. In the last case, the abettor convicted was a money-lender, who got a debtor to sign an unstamped acknowledgment. Here the abetment is that the payer took the receipt and promised to stamp it. There is evidence of this. It seems a very strained interpretation of the law to say that this is abetment; and it would be just as reasonable to say a payer of money intentionally aids the making of an unstamped receipt by taking it without any promise to stamp it. The conviction should be quashed, I submit: anyhow it is bad, as the prosecution was not sanctioned by the Collector."

Petheram, C. J.—I am of opinion that the accused, Mitthu Lal, has not been guilty of the offence of abetment as defined by s. 107 of the Indian Penal

Code. The facts, as proved, are that the accused paid a sum of money to a creditor, and that when the money was paid and he was to receive a receipt, the creditor said that he could not give a stamped one as he had no stamp. Upon this the accused accepted a receipt without a stamp, and promised himself to affix one. Upon these facts it is clear that the accused did not aid the offence by any act, because he did nothing; and the only question is, whether he illegally omitted to do anything which he was bound by law to do. As far as I can see, he did all that he could do; he asked for a stamped receipt, and, on being informed that it was impossible to give him one, as the creditor had no stamp, he took the only thing he could get, that is, the [20] receipt without the stamp. The decision of BRODHURST, J., in the case of *Bahadur Singh*, Weekly Notes, 1885, p. 30 is not in point. In that case the acknowledgment was written in the accused's own book and at his request. The present case is really governed by the other cases cited. The conviction and sentence on Mitthu Lal are set aside. The fine to be refunded, if paid.

Conviction quashed.

[8 All. 20]

APPELLATE CIVIL.

The 14th November, 1885.

PRESENT :

**SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND
MR. JUSTICE STRAIGHT.**

Krishna Ram.....Plaintiff

versus

Gobind Prasad and another.....Defendants.*

Dismissal of suit for non-appearance of plaintiff ordered to appear under s. 66, Civil Procedure Code—Rejection of application to set aside dismissal—Appeal—Civil Procedure Code, ss. 66, 103, 107, 540, 588 (8).

A plaintiff who had been ordered, under s. 66 of the Civil Procedure Code, to appear in person in Court upon a day specified, failed to appear, and under s. 107, read with s. 102, his suit was dismissed. He then applied to the Court, under s. 103 for an order to set the dismissal aside, but his application was rejected. He thereupon preferred an appeal from the decree dismissing the suit, under the provisions of s. 540.

Held, that the plaintiff was not entitled to appeal from the decree dismissing the suit, and that his only remedy was by way of an appeal under s. 588 (8) of the Code from the order rejecting the application to set the dismissal aside. *Ial Singh v. Kunjan*, I. L. R., 4 All., 387 referred to.

The facts of this case are sufficiently stated in the judgment of STRAIGHT, J. Munshi *Sukh Ram*, for the Appellant.

* First Appeal No. 42 of 1885, from a decree of G. J. Nicholls, Esq., District Judge of Azamgarh, dated the 4th December 1884.

Mr. C. H. Hill and Mr. G. T. Spankie, for the Respondents.

Straight, J.—The circumstances of this case appear to be these :—The plaintiff instituted a suit in the Court of the Subordinate Judge of Azamgarh, on the 24th June 1884, against the defendants, for establishment of his right to certain property which he alleged he had acquired by purchase in 1880, and for a declaration that such property was not liable to be sold in execution of the decree obtained by the defendant Gobind Prasad on the 29th [21] September 1883, against the vendors of such property to the plaintiff. The suit, which was originally instituted in the Subordinate Judge's Court, was removed to the file of the Judge of Azamgarh for trial; and on the 15th November 1884, after settling the issues, the Judge made an order, professedly under s. 66 of the Code, for the attendance of the plaintiff in person at an adjourned hearing on the 4th December following, with certain documents he considered material for the decision of the subject-matters in dispute between the parties. On this last-mentioned date the case was called on before the Judge, and he proceeded to dispose of it in a manner to which I will presently advert. It appears, however, that prior to this the plaintiff had preferred an appeal to this Court against the order of the Judge of the 15th November 1884, already mentioned, and that appeal was heard by OLDFIELD and MAHMOOD, JJ., who set it aside on the 27th January 1885, (Weekly Notes, 1885, p. 143). The Judge, however, had meanwhile dismissed the suit for want of prosecution, on the ground that the plaintiff had failed to obey his order of the 15th November 1884; and this decision of his professes to have been passed under ss. 107 and 136 of the Procedure Code. Section 136 had nothing really to do with the matter; and this was pointed out by MAHMOOD, J., in his decision above referred to; and I think we must now take it that the suit was dismissed for non-appearance of the plaintiff, under s. 107 of the Code. It is provided in that section that if a plaintiff or defendant, who has been ordered to appear in person under the provisions of s. 66 or s. 436, does not appear in person or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing sections applicable to plaintiffs and defendants, respectively, who do not appear. The order dismissing the suit in this case has, therefore, the same effect as if it had been passed under s. 102 of the Code, and the plaintiff's remedy in such cases is indicated by s. 103 of the Code. The plaintiff was well aware of these provisions, for he did apply to the Judge of Azamgarh, under s. 103 of the Code read with s. 107, for an order to set the dismissal aside. The Judge refused that application, on grounds which are not before us, and with which we are not concerned [22] in this appeal; but it is clear that the plaintiff might have, and ought to have, appealed to us against this last order of the Judge refusing to set aside the dismissal, under s. 588, cl. (8). This he has not done; on the contrary, he has preferred a first appeal as from a decree of the 4th December, which, in my opinion, he was not entitled to do.

It has been held by a Full Bench of this Court in the case of *Lal Singh v. Kunjan*, I. L. R., 4 All., 387, that a defendant against whom a decree has been passed *ex parte* cannot appeal from such decree under the general provisions of s. 540, but must adopt the remedy provided in s. 108 of the Code.

For analogous reasons to those given by the majority of the Full Bench in that case, I hold that the plaintiff is not entitled to appeal from the decree of the 4th December 1884. He very properly applied, under ss. 103-107, to set aside the order of dismissal, and he ought, as I have before observed, to have appealed to us, under s. 588, cl. (8), against the order refusing that application. I may here remark that the propriety of this form of procedure

is well illustrated by this case. Had the plaintiff followed it, all that we should have had to decide in his appeal from the order refusing to reinstate would have been as to the sufficiency or otherwise of the grounds made out by him for having the dismissal set aside. As it is, we are asked under the guise of an appeal from decree to determine not only that question but the merits of the case, which have, in fact, never been investigated or tried at all. The really crucial point is, whether the Judge had any right to do what he did under ss. 103-107 of the Code. Seeing that his order of the 15th November, for default in obedience to which he made his subsequent order of the 4th December, was set aside by this Court, it follows as a necessary consequence that had a proper appeal from his order of refusal to set aside the dismissal of the suit been made to this Court, it must have succeeded, with the result that the case would have then been replaced on his file and tried in the ordinary manner. This is precisely what, in my opinion, the law intended, and not that the matter should come up in the inconvenient form of an appeal from a decree. In [23] this view the appeal must be, and hereby is, dismissed with costs.

Petheram, C.J.—I concur in the order proposed by my brother STRAIGHT.
Appeal dismissed.

[8 All. 23]

The 16th November, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE TYRRELL.

The Himalaya Bank, Limited.....Plaintiff

versus

The Simla Bank, Limited, and another.....Defendants.*

Registered and unregistered documents—Mortgagee under registered deed competing with holder of decree on prior unregistered mortgage deed—

Act III of 1877, (Registration Act), s. 50.

The words in s. 50 of the Registration Act (III of 1877) "not being a decree or order, whether such unregistered document be of the same nature as the registered document or not," mean that, if a decree has been obtained to bring property to sale under a hypothecation bond, or under a money bond, and under that decree the property has been attached, that decree cannot be ousted by a subsequent registered instrument. The section cannot in any way make a decree effect a transfer of more than the interest which the judgment-debtor

Held, that a mortgage-deed registered under Act III of 1877 was entitled to priority over a decree obtained subsequently to the registration of such deed upon a prior unregistered deed of mortgage. *Kanhaiya Lal v. Bansidhar*, Weekly Notes, 1884, p. 136; *Shahi Ram v. Shib Lal*, Weekly Notes, 1885, p. 63, and *Madar v. Subbarayalu*, I. L. R., 6 Mad., 88, referred to.

* First Appeal No. 19 of 1885, from a decree of C. W. P. Watts, Esq., District Judge of Sabaranpur, dated the 2nd December 1884.

THIS was a suit brought by the Himalaya Bank, Mussoorie, to recover a sum of Rs. 3,428-7-3, due on a bond, dated the 17th July 1883, for Rs. 3,000, executed by the defendant No. 1, Mrs. E. McMullen. By this bond, certain land situate in Saharanpur and a dwelling-house thereon of value exceeding Rs. 100 were hypothecated to the plaintiffs. The bond was duly registered on the 10th August 1883. The defendant No. 1 did not appear to answer the suit. The defendants No. 2 were the Simla Bank Corporation, Limited, who held a bond for Rs. 10,000, dated the 30th June 1881, in which the defendant No. 1 had hypothecated to them, among other properties, the same dwelling-house as was subsequently mortgaged to the plaintiffs. This bond was executed by all the parties thereto. On the 25th July 1881, Mrs. McMullen herself took the bond for registration to the office of the Registrar at Mussoorie, [24] and in his presence admitted execution and acknowledged receipt of consideration. Two certificates to this effect were endorsed on the bond and signed by the Registrar, who affixed thereto the office seal. At this point it was discovered that no representative of the Simla Bank was present as required by s. 35 of the Registration Act (III of 1877), and the bond was therefore returned to Mrs. McMullen, without the final certificate required by s. 60 of the Act, and without record in the register-book required by s. 61. The bond was passed on to the Simla Bank, and no further steps towards its registration were ever taken. On the 19th December 1883, the Simla Bank put their bond in suit against Mrs. McMullen and one Moran, who, in execution of a money decree, had attached some of the property hypothecated in the bond. The defendant Mrs. McMullen did not appear, but the claim of the Simla Bank was contested by Moran, who urged that the plaintiffs' bond, being unregistered, was not admissible in evidence. On the 3rd March 1884, the District Judge of Saharanpur decreed the claim, holding that the bond of the 30th June 1881 was duly registered in compliance with the Registration Act.

On the 31st July 1884, the present suit was brought by the Himalaya Bank under their bond, alleging as against the defendant No. 1, Mrs. McMullen, non-payment of the debt secured by that instrument, and as against the Simla Bank that they had taken possession of the mortgaged premises in or about the month of May 1884, and still retained possession; and praying that, in default of payment of the debt due to them, with interest and costs, the said premises might be sold and the proceeds of the sale applied to such payment. The defendants No. 2 appeared and contested the suit, on the ground that under their deed of the 30th June 1881, and the decree thereon of the 3rd March 1884, they held a lien on the property which was entitled to priority over that held by the plaintiffs. In reply to this contention, it was argued on behalf of the plaintiffs that the bond of the 30th June 1881 was not duly registered, and was therefore not admissible in evidence.

The District Judge, re-affirming the grounds of his decision in the case of the *Simla Bank v. McMullen and Moran*, held that the bond of the Simla Bank was duly registered, and therefore admissible in evidence. He was of opinion that the proceedings before the Registrar at Mussoorie on the 25th July 1881, amounted to what he described as "inchoate, though not actually completed, registration," and, in reference to his former judgment, he observed:—"I held then, and I hold still, that the bond was, to all intents and purposes, registered; that publicity had been given to it by Mrs. McMullen, the party most interested, inasmuch as she would have to pay the money, herself coming forward to register it, and I may add here that although it was not finally entered in the register, yet any person coming to search the registers to see if there was any lien on the property, could at once have ascertained from the

clerk what proceedings, short only of actual and final registration, had taken place in the matter." The learned Judge passed a decree in the following terms :—"I decree now for the plaintiff in full against Mrs. McMullen for a sum of Rs. 3,428-7-3 with costs and future interest at 6 per cent. per annum, *ex-parte*, and against the house hypothecated, after the claim of the Simla Bank on its decree shall have been satisfied. The costs of the Simla Bank are payable by the plaintiff Bank to the extent of three-fourths. In all other respects the claim against the Simla Bank is dismissed."

The plaintiffs appealed to the High Court.

Mr. C. H. Hill, for the Appellants, contended that the District Judge was wrong in holding that the bond held by the respondents had been duly registered in conformity with the provisions of the Registration Act. It was obvious that a document must be either registered or unregistered, and there could be no intermediate position, such as the Judge termed "inchoate" or "imperfect" registration. Under the Registration Act, what constituted registration was the entry in the register-book required by s. 60, and, as no such entry had been made in respect of the defendants' bond, it must be taken to be unregistered, and therefore, under s. 49, to be inadmissible in evidence. Under s. 50, the plaintiffs' bond of the 17th July 1883, having been duly registered, was entitled to priority over every unregistered document relating to the same property.

Mr. A. Strachey, for the Respondents, admitted that the finding of the District Judge as to the registration of the bond of the 30th [26] June 1881, could not be sustained. The respondents' title must now, however, be regarded as derived from the decree of the 3rd March 1884, into which their bond had merged, and not from the bond itself. The terms of s. 50 expressly excluded from its scope questions of priority between registered documents and decrees or orders. The decree required no registration, and, not having been set aside by appeal or otherwise, must, so long as it existed, have all the incidents and effects which the law attached to decrees. *Parshadi Lal v. Khushal Rai*, Weekly Notes, 1882, p. 15, was a direct authority; also *Baijnath v. Lachman Das*, I. L. R., 7 All., 888. *Kanhaiya Lal v. Bansidhar*, Weekly Notes, 1884, p. 136, and *Shahi Ram v. Shib Lal*, Weekly Notes, 1885, p. 63, were distinguishable, being cases of competing decrees, and not affecting a question of priority between registered documents and decrees obtained upon unregistered documents.

Mr. C. H. Hill was not called on to reply.

Petheram, C. J.—I am of opinion that this appeal must be allowed, and that judgment must be given in favour of the plaintiff. The real question in the case is, whether the title of the Himalaya Bank or that of the Simla Bank should prevail with respect to the mortgages executed by the defendant, Mrs. E. McMullen. The facts of the case are, that on the 30th June 1881, the defendant, Mrs. McMullen, mortgaged a house in Saharanpur to the Simla Bank, to secure a sum of money. The mortgage deed was never registered, and the amount due upon it was never paid off. On the 17th July 1883, the same mortgagor executed a mortgage-deed in respect of the same house in Saharanpur in favour of the Himalaya Bank, to secure a sum of money, and this deed was duly registered on the 10th August 1883. There is no finding on the subject, but it must be assumed for the purposes of this case that the Himalaya Bank had no knowledge of the mortgage-deed of the 30th June 1881, which at the time of their own deed, was not registered.

The first question is, what was the condition of the titles to the property in suit at the time of the registration of the second mortgage-deed? The titles herein question are titles created by two mortgage-deeds. The matter is

governed by s. 50 of the Regis-[27]tration Act, which is in the following terms:—
 "Every document of the kinds mentioned in clauses (a), (b), (c), and (d) of s. 17, and clauses (a) and (b) of s. 18"—which includes the mortgage-deeds before us—"shall, if duly registered, take effect, as against the property comprised therein, against every unregistered document relating to the same property." It is only necessary to read the section to see what was the condition of the titles possessed by the two Banks at the time when the second mortgage-deed was registered. The registered deed of the Himalaya Bank was, by s. 50, given priority over the unregistered deed of the Simla Bank; so that at that time the Himalaya Bank, by virtue of their registered deed and the terms of the statute, was in the position of a first mortgagee, and the Simla Bank was in the position of a second mortgagee. The only interest, therefore, which Mrs. McMullen or the Simla Bank had in the property was what would remain after the debt of the Himalaya Bank had been satisfied. That was the condition of the titles in August 1883. Upon this state of things, the Simla Bank took proceedings against Mrs. McMullen—to which the Himalaya Bank was not made party—to realise their security, and obtained a decree. Now, at the time when that decree was passed, the interest which Mrs. McMullen had was subject to the Himalaya Bank's mortgage. So that the Himalaya Bank held a first charge on the property, and the Simla Bank held a decree for money against Mrs. McMullen, and against any interest which remained in her after the first charge had been paid off. That was the effect of the decree. Then the present suit was brought by the Himalaya Bank, and the question raised by it is, whether the plaintiffs are entitled to have the property sold to satisfy their mortgage, or whether their mortgage is subject to the decree held by the Simla Bank.

I am of opinion that the decree of the Simla Bank only affected what was left of the property after satisfaction of the mortgage of the Himalaya Bank, and that the Himalaya Bank is therefore entitled to have the property sold.

The authorities on the subject appear to be somewhat at variance with each other. The difficulty arises from the words in s. 50 of the Registration Act immediately following those I have [28] already quoted,—"not being a decree or order, whether such unregistered document be of the same nature as the registered document or not." This, in my opinion, means that if a decree has been obtained to bring property to sale under a hypothecation bond, or under a money bond, and under that decree the property has been attached, that decree cannot be ousted by a subsequent registered instrument. I do not think that the section can in any way make a decree effect a transfer of more than the interest which the judgment-debtor possessed. Such an interpretation would lead to manifest injustice, and would defeat the very object with which the registration law was enacted—namely, that publicly registered documents should have effect as against documents not registered. To give priority to a decree obtained against a mortgagor behind the mortgagee's back would be to defeat this object.

I should have thought it necessary to refer the determination of this case to the Full Bench were it not that my brother TYRRELL concurs in the opinion which I have just expressed. It appears from the judgment in *Kanhaya Lal v. Bansidhar*, Weekly Notes, 1884, p. 136, that my brother STRAIGHT is now of the same opinion. Again, in the case of *Shahi Ram v. Shib Lal*, Weekly Notes, 1885, p. 63, Mr. Justice OLDFIELD and Mr. Justice MAHMOOD expressed the same view in the following words:—"There is no doubt in my mind that the registered bond of the plaintiff takes effect, as regards the property comprised in it, against the defendant's unregistered bond

under s. 50. This gives priority to the incumbrance created by it over the incumbrance created by the defendant's bond; and this priority is not affected by the subsequent decrees obtained on the bonds, which only give effect to the respective rights under the bonds." This precisely expresses the view which I take in the present case; and the same view has been taken by the Madras High Court in *Madar v. Subbarayalu*, I. L. R., 6 Mad., 88.

We therefore have the concurrent opinions of Mr. Justice OLDFIELD, Mr. Justice MAHMOOD, Mr. Justice STRAIGHT, Mr. Justice TYRRELL, the Madras High Court and myself, that this is the correct construction of the terms of s. 50 of the Registration Act; and under these circumstances I have thought it right to deliver judg-[29] ment in the case now. The appeal is allowed with costs, and the plaintiffs declared entitled to judgment, that this mortgage be realised as a first charge against the mortgaged property.

Tyrrell, J.—I am of the same opinion, and, having given careful consideration to the terms of s. 50 of the Registration Act of 1877, I accept the interpretation placed on the words "not being a decree or order" by the learned Chief Justice.

Appeal allowed.

NOTES.

[Under s. 50, Act III of 1877, the decree or order to be unaffected by a registered document, must be prior to the execution and registration of the registered document:—(1890) 13 All., 288; (1894) 20 Bom., 158; (1900) 28 Cal., 139, dissenting from 7 All., 888.

See also the summary of the various decisions on the point in *Banerjee's Registration* (1911) pp. 237, 238.]

[8 All. 29]

The 16th November, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND
MR. JUSTICE TYRRELL.

Nihal Singh and others.....Plaintiffs
versus

Kokale Singh and others.....Defendants.*

Pre-emption—Wajib-ul-arz—Right of pre-emptor to stand in the position of the purchaser.

A co-sharer of a village sold part of his share to a stranger. This sale was subject to a right of pre-emption created by the *wajib-ul-arz* in favour of the partners of the vendor. Only a part of the purchase-money was paid in cash, it being agreed that the balance should remain on credit, and be secured by two deeds in which the property was hypothecated by the purchaser to the vendor.

Held, that it could not be said that the partners of the vendor had not only the right of pre-emption but also the right to be put in the same position with reference to all the peculiar incidents of the payment of the purchase-money as that arranged between the vendor and the purchaser.

THIS was a suit for pre-emption based on the *wajib-ul-arz* of a village named Pachnan. The clause of the *wajib-ul-arz* relating to pre-emption was in the

* First Appeal No. 45 of 1885, from a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Cawnpore, dated the 15th September 1884.

following terms :—" Up to this time, no case of pre-emption has ever occurred. The practice, however, in the neighbourhood has been that when any co-sharer desires to sell his property, he sells first to the nearest partner, after him to the partner in the *thoke*, then to the partner in the village; failing all these, to a stranger. We also accept this practice." The plaintiffs, Nihal Singh and five other persons, alleged that they were co-sharers in the village with the defendant Girind Singh; that, on the 3rd February 1883, Girind Singh sold a five annas share out of his ten annas share in the village to the defendants Kokale Singh and Muhabbat Singh, who were "total strangers and inhabitants of a different mauza," for a sum of Rs. 10,000, of [30] which Rs. 6,000 were paid in cash; and, in respect of the balance, a two annas six pies share of the property was mortgaged to the vendor by the vendees; that the sum of Rs. 15,000 was falsely entered in the sale-deed as the consideration for the sale; and that in order to defraud the plaintiffs, the defendants executed and registered a false and collusive mortgage deed in respect of the remaining two annas six pies share, for Rs. 5,000. The defendants pleaded in reply that the ten annas share of Girind Singh constituted a mahal distinct and separate from that constituted by the plaintiff's share in the village, and that the plaintiffs were therefore not entitled to pre-emption under the terms of the *wajib-ul-arz*; that the plaintiffs had refused to purchase the property in dispute; and that the consideration for the sale was correctly stated in the sale-deed as Rs. 15,000, out of which Rs. 6,000 had been paid in cash and the balance secured by two mortgage-deeds for Rs. 4,000 and Rs. 5,000 respectively.

The Court of First Instance (Subordinate Judge of Cawnpore) decreed the claim for pre-emption, but found that the true consideration for the sale was Rs. 15,000 as stated in the sale-deed, and that the plaintiffs' allegation that the mortgage-deed for Rs. 5,000 was false and collusive had not been substantiated by the evidence. The Court therefore passed the following decree :—" It is ordered that the plaintiffs' claim for possession of the property in dispute be decreed. The plaintiffs should deposit in this Court Rs. 15,000, full sale-consideration, within twenty days from the date this decision becomes final. As the plaintiffs denied the correctness of the sale-consideration, and the defendants denied the plaintiffs' right of pre-emption, each party will bear its own costs. If the plaintiffs fail to pay the sale-consideration within the appointed time, their suit shall stand dismissed, and the costs of the defendants, with interest thereon at eight annas per cent. per mensem, will be charged to them."

From this decree the plaintiffs appealed to the High Court. It was contended on their behalf (i) that the Court of First Instance was wrong in holding that the consideration for the sale was the amount stated in the sale-deed, and (ii) that "the appellants, pre-emptors, are entitled to be placed exactly in the same position [31] as the vendees. The lower Court's decree, directing possession to be given to the appellants on payment of full consideration, is erroneous."

Pandit Nand Lal for the Appellants.

Mr. T. Conlan and Munshi Kashi Prasad, for the Respondents.

Petheram, C.J.—I think that this appeal must be dismissed and the decision of the Court below affirmed. The suit is to enforce a right of pre-emption. The plaintiffs and the vendor are co-sharers. The co-sharers who are defendants in the suit sold to the other defendants, who are strangers, the amount of consideration being Rs. 15,000. They made a bargain with the defendants-vendors that a portion of the purchase-money should remain on credit. The plaintiffs obtained a decree. They are the appellants before the Court,

and they urge that they must have the same credit in respect of payment of the purchase-money as that arranged between the vendors and the vendees-defendants. I do not think that is the meaning of the *wajib-ul-arz*. The stranger and the vendors made some particular bargain regarding the payment of the purchase-money, with which the pre-empting plaintiffs had nothing to do. I do not think it possible to say that the plaintiffs have not only the right of pre-emption, but also the right to be put in the same position, with reference to all the peculiar incidents of the payment of the purchase-money, as that arranged by the vendors and the vendees. The decision of the lower Court is affirmed, and this appeal is dismissed with costs, except that the plaintiffs are to be allowed twenty-one days to deposit the purchase-money, reckoning from the day on which the decree of this Court reaches the lower Court.

Tyrrell, J.—I concur.

Appeal dismissed.

[8 All. 31]

The 26th November, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND
MR JUSTICE OLDFIELD.

Wajid Ali Shah.....Defendant

versus

Dianat-ul-lah Beg.....Plaintiff.*

*Suit for declaration that property is wakf—Act XX of 1863, ss. 14, 15, 18—
Civil Procedure Code, s. 539—Act I of 1887 (Specific Relief Act) s. 42.*

A Muhammadan brought a suit against a person in possession of certain property, for a declaration that the property was *wakf*. He did not allege himself to be interested in the property further or otherwise than as being a Muhammadan. He stated as his cause of action that the defendant had, in a former suit between the same parties, filed a written statement in which he denied that the property now in question was *wakf*.

Held, that, unless it could be shown that the suit was maintainable under some statutory provision, it could not be maintained.

Held, that, inasmuch as no permission had been given to the plaintiff to bring the suit, it was not maintainable under Act XX of 1863, or under s. 539† of the Civil Procedure Code.

* First Appeal No. 48 of 1885, from a decree of Rai Raghu Nath Sahai, Subordinate Judge of Gorakhpur, dated the 13th January 1885.

†[Sec. 539:—In case of any alleged breach of any express or constructive trust created for public, charitable or religious purposes, or whenever the

When suits relating to public charities may be brought.

direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General acting *ex officio*, or two or more persons having a direct interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit in the High Court or the District Court within the local limits of whose civil jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

(a) appointing new trustees under the trust ;

(b) vesting any property in the trustees under the trust ;

Held, that the suit was not maintainable under the provisions of s. 42 of Act I of 1877 (Specific Relief Act).

Held, therefore, that the suit was not maintainable.

Held, further, that, the relief contemplated by s. 42 of the Specific Relief Act being always a matter of the Court's discretion, and inasmuch as the evidence adduced by the plaintiff himself showed that the defendant was using the property for charitable purposes, it would not be proper to make the declaration prayed for by the plaintiff, even if the suit were maintainable.

THE defendant, Wajid Ali Shah, was in possession of certain property situate in the city of Gorakhpur, and consisting of an imambara, a mosque, and an eedgah. In 1880 the plaintiff Dianat-ul-lah Beg, brought a suit against him, upon the allegations that the property did not belong to the defendant, but was an endowed property, of which he had improperly assumed the management, and in respect of which he had improperly obtained mutation of names in his favour from the Revenue Court; and that the defendant had mismanaged and wasted the property and misappropriated its income. The plaintiff accordingly prayed that Wajid Ali Shah might be removed from the management. In reply, the defendant filed a written statement, dated the 26th August 1880, in which he denied that he was in possession of the property as manager only thereof, and also that the property was *wakf*, claimed to hold as proprietor. The suit was dismissed on the 30th September 1880, for deficient payment of court-fee on the plaint. On appeal, the High Court, on the 8th July 1881, dismissed the appeal in the following terms:—"The deficiency not having been made up as ordered, the appeal is struck off."

The present suit was brought by the same plaintiff against the same defendant for a declaration that the property in question was *wakf*. He claimed to be interested in the property as a Muhammadan, and interested in the worship at the mosque and eedgah, [33] and in the good resulting from the imambara; and stated as the cause of action the denial by the defendant, in his written statement in the former suit, that the property was of the character alleged by the plaintiff. In reply, the defendant raised contentions substantially the same as those which were put forward on his behalf in the former suit.

The Court of First Instance (Subordinate Judge of Gorakhpur) decreed the claim. On appeal by the defendant to the High Court, it was contended on his behalf, *inter alia*, that the suit was not maintainable.

Mr. T. Conlan, Munshi Hanuman Prasad and Sheikh Mehdi Hasan, for the Appellant

Lala Lalta Prasad and Maulvi Hashmat-ul-lah, for the Respondent.

Petheram, C. J—I am of opinion that this appeal should be allowed, and the ground upon which I wish to base my judgment, is that the action as brought is not maintainable, whatever the facts may be. I desire to guard myself against expressing any opinion upon the question whether the property in dispute is or is not *wakf*. If it were necessary to consider that point, I think that a new trial would be necessary, in order that evidence might be adduced to determine the true character of the property. The evidence on the record

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- (c) declaring the proportions in which its objects are entitled;
 - (d) authorizing the whole or any part of its property to be let, sold, mortgaged or exchanged;
 - (e) settling a scheme for its management; or granting such further or other relief as the nature of the case may require.

The powers conferred by this section on the Advocate-General may, outside the Presidency-towns, be, with the previous sanction of the Local Government exercised also by the Collector or by such officer as the Local Government may appoint in this behalf. Act No. X of 1840, section 2, is hereby repealed.]

is wholly insufficient for the determination of this question, and I therefore refrain from expressing any opinion in regard to it. I confine myself to saying that, under any set of circumstances which have been suggested in this case, the action is not maintainable.

The action is one of which the character has been formulated by the plaintiff himself in his plaint. He begins by stating that he is a Muhammadan. He then goes on to say that there is certain property situated in the Gorakhpur district, of which he is not a resident, and that this property is *wakf*, and is in the defendant's possession. He proceeds to state that, on the 26th August 1880, the defendant in certain legal proceedings asserted a title to the property, which was inconsistent with its character being *wakf*. He therefore claims a decree, declaring that the property in the defendant's possession is in the defendant, but that it is *wakf*.

[34] I am of opinion that unless it can be shown that the action is maintainable under some statute, it cannot be maintained; and the question therefore is, whether there is any statute which enables such an action to be brought.

Now Act XX of 1863 is an Act which provides for the management of religious endowments, and ss. 14, 15 and 18 provide a machinery by which the rights and powers of trustees in reference to such property may be ascertained. Again, the Civil Procedure Code, s. 539, provides a procedure for ascertaining the rights of trustees of public property. The question then is, whether the present suit can be brought under the provisions of either of these statutes.

When these provisions are considered, it is obvious that the suit is not maintainable under any of them, because under them it is necessary that some permission should be given to the plaintiff to bring the suit. It is admitted that, in the present case, no such permission was obtained. So that the plaintiff in effect admits that this suit was not contemplated by either of the Acts I have mentioned. The only other provisions that could apply to the subject are those of s. 42 of the Specific Relief Act, which gives to persons who are entitled to certain interests the right to bring suits for the declaration of such interests.

As I have already observed, the only right asserted by the plaintiff is his right as a Muhammadan to have the property kept as *wakf* for the general body of persons who believe in the Muhammadan religion. Section 42 of the Specific Relief Act applies to "any person entitled to any legal character or to any right as to any property," and, in certain circumstances, allows such a person to bring a suit for a determination of his title to such character or right. But the scope of the section is confined to the two classes which it specifies. The plaintiff in this case cannot sue as one of the first class, because he has no "legal character" which is denied by any one: he only asserts his character as a Muhammadan, and that has not been questioned. Nor does he for himself assert a right as to any property, and by no act of the defendant has his right to any property been denied.

[35] The suit therefore does not come under the provisions of s. 42, and as it is not contemplated by either of the other statutes to which I have referred, I am of opinion that it is not maintainable. I may add that even if it were possible to hold that the suit was maintainable under s. 42 of the Specific Relief Act, I am of opinion that this is not a case in which this Court, in the exercise of its discretion, would be disposed to grant relief. Under s. 42, such relief is always a matter of the Court's discretion, and inasmuch as the evidence adduced by the plaintiff himself shows that the defendant was using the

property for charitable purposes, I do not think that it would be proper to pass such a decree as the plaintiff asks for, even if he could bring the suit. Under these circumstances the appeal must be decreed with costs.

Oldfield, J.—I am of the same opinion.

Appeal allowed.

NOTES.

[TRUST—SUITS IN RESPECT OF—

- i. Must be by persons beneficially interested :—(1899) 24 Bom., 170 ; (1888) 11 All., 18 F.B.
- ii. Must be by persons capable of being ascertained :—(1892) 20 Cal., 397.
See also (1891) 2 M. L. J., 251 ; (1901) 26 Bom., 174 ; 3 Bom. L. R., 718.]

[8 All. 35]

The 27th November, 1885.

PRESENT :

**SIR W. COMER PETHERAM, KT, CHIEF JUSTICE,
AND MR. JUSTICE OLDFIELD.**

Afzal-un-nissa Begam.....Plaintiff
versus
Al Ali.....Defendant.*

Civil Procedure Code, Chapter XV, s. 191—Hearing of suit—Power of Judge to deal with evidence taken down by his predecessor.

A Subordinate Judge having taken all the evidence in a suit before him, adjourned the case to a future date for disposal. Upon the date fixed, a further adjournment was made. The Subordinate Judge, at this stage of the proceedings, was removed, and a new Subordinate Judge was appointed.

Held, that the trial, so far as it had gone before the first Subordinate Judge, was abortive, and, as a trial, became a nullity.

Held, also that the duty of the second Subordinate Judge, when the case was called on before him, was to fix a date for the entire hearing and trial of the case before himself ; that he might, at the request of the pleaders, have fixed the same day upon which the case was called on, and proceeded to try it at once ; and that the trial should then have proceeded in the ordinary way, except that the parties would be allowed, under s. 191 of the Civil Procedure Code, to prove their allegations in a different manner.

Jagram Das v. Narain Lal, I. L. R., 7 All., 857, referred to.

THE facts of this case are sufficiently stated for the purposes of this report, in the judgment of PETHERAM, C. J.

[36] Munshi *Hanuman Prasad* and Mir *Zahur Husain* for the Appellant.
Pandits *Ajudhia Nath* and *Sundar Lal*, for the Respondent.

Petheram, C. J.—I am of opinion that this case must go back to be tried by the Subordinate Judge of Moradabad, on the ground that nothing that can be called a judgment by a Judge trying the case has ever been given. The observations which I made in *Jagram Das v. Narain Lal*, I. L. R., 7 All., 857, are applicable to the present case, and the considerations which then weighed with me, affect my mind now in the same manner. I should not have thought it necessary to add anything to the observations which I made on that occasion,

* First Appeal No. 29 of 1885, from a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Moradabad, dated the 23rd December 1884.

if I had not been informed that my judgment had led to some confusion as to the mode in which cases of this kind should be dealt with. The only addition I propose to make to my former observations is by pointing out what appears to me to be the course which should have been adopted in the present case, which is a fair illustration of what commonly happens.

The suit was instituted on the 25th May 1883, in the Court of the Subordinate Judge of Moradabad, an office which was then filled by Maulvi Nasir Ali Khan. It went through the ordinary course of the proceedings necessary for fixing issues and ascertaining the matters to be tried. Maulvi Nasir Ali Khan fixed a date for proceeding with the evidence, and accordingly on various occasions he sat for the purpose of taking evidence, and on the 17th April 1884, the taking of evidence was concluded before him. He then heard everything that was brought before him, and he directed that an account should be prepared in the office. After this, various adjournments took place for various reasons which it is not necessary to mention, until the 20th September 1884, which was a date fixed by him for the disposal of the suit before himself, the evidence being then complete. Upon the 20th September there was a proceeding to the effect that there was no time for disposing of the case on that day, and making a further adjournment to the 9th December. That proceeding seems to be of the kind which is generally adopted when an adjournment is necessary. When the 9th December arrived, the case would be taken up as adjourned from the 20th September 1884, which was [37] itself the date of an adjournment from the date originally fixed by the Subordinate Judge for the hearing of the case. That original date would be the date of the hearing, and all subsequent dates would be those of adjournments. What took place on the 9th December, therefore, would be a proceeding held by adjournment in the trial heard on the original date.

Now, when the 9th December arrived, Maulvi Nasir Ali Khan had left Moradabad, and was succeeded in the office of the Subordinate Judge by Maulvi Zainulabdin. When the case was called on, it was his duty to try it. The Judge who had originally heard it had gone, and therefore the trial, so far as it had gone before him, was abortive, and, as a trial, became a nullity, because the person conducting it had ceased to be a Judge, and could not give judgment in a trial held before him.

The question then arises—What was the duty of Maulvi Zainulabdin? I think that when the case was called on before him on the 9th December, he ought to have fixed a date for the hearing, that is to say, for the entire hearing and trial of the case before himself. He might, at the request of the pleaders, have fixed the same day, the 9th December, and proceeded to try the case at once. But by the act of fixing a date, he would have avoided the danger of making it appear possible that he was deciding a case which he himself had not heard. Then, when the time fixed—either the same day, by such an arrangement as I have suggested, or a future date—arrived, the trial would proceed in the ordinary way, as if the day were the first on which the case had ever come on for hearing, except that the parties would be allowed, by s. 191 of the Civil Procedure Code, to prove their allegations in a different manner. The Code has provided a mode of avoiding the inconvenience which might arise if the witnesses had to be called twice over, if neither the parties nor the Judge consider such a course to be necessary. But no Court can, in my opinion, extend the operation of the statute so as to enable a new Judge to take up a trial which has been partly heard by his predecessor, and to proceed with it as if it had been commenced before himself.

For these reasons, I am of opinion that the trial of this case is a nullity, and that the case must be remitted for trial by the [38] Subordinate Judge of Moradabad. The costs will be costs in the cause.

Oldfield, J.—I am of the same opinion.

Cause remanded.

NOTES.

[See notes to 8 All., 576 F.B. *infra*.]

[8 All. 38]

CRIMINAL REVISIONAL.

The 2nd December, 1885.

PRESENT :

MR. JUSTICE BRODHURST.

Queen-Empress

versus

Ganga Ram and another.

Act XLV of 1860 (Penal Code) s. 211—Prosecution for making a false charge— Opportunity to accused to prove the truth of charge.

A complaint of offences under ss. 323 and 379 of the Penal Code, was referred to the police for inquiry. The police reported that the charge was a false one, and thereupon the Magistrate of the District passed an order, under s. 195 of the Criminal Procedure Code, directing the prosecution of the complainants for making a false charge, under s. 211* of the Penal Code.

Held, that the order under s. 195 of the Criminal Procedure Code should not have been passed until the complainants had been afforded an opportunity of proving their case, which had been thrown out merely on the report of the police. *The Government v. Karimdad*, I.L.R., 6 Cal., 496, referred to.

IN this case the petitioners, Ganga Ram and Durga, prosecuted two persons, named Chidda and Chandan, for theft, under s. 379, and assault, under s. 323 of the Penal Code. The complaint was referred to the police for inquiry. The police reported that the charge was a false one, and thereupon the Joint Magistrate of Aligarh dismissed it, ordered the prosecution of the petitioners under s. 211 of the Penal Code for making a false charge, and sent the case to the Magistrate of the District, who, on the 25th July 1885, passed an order under s. 195 of the Criminal Procedure Code, referring the case to the Deputy Magistrate for disposal. An application for revision of this order was made to the District

* [Sec. 211 :—Whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or

False charge of offence falsely charges any person with having committed an offence, made with intent to injure, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both ; and if such criminal proceeding be instituted on a false charge of an offence punishable with death, transportation for life, or imprisonment for seven years or upwards, shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.]

Judge of Aligarh, upon grounds which it is not necessary to set forth. The Judge dismissed the application by an order dated the 29th August 1885. The petitioner applied to the High Court to revise this order on the following grounds :—

"The sanction for the prosecution should not have been given without giving the complainants an opportunity of proving the truth of their case, which was merely thrown out on the report of the police.

[39] "It was for the Magistrate alone to ascertain whether the statements of the complainants were credible or not."

Babu Ram Das Chakarbaty, for the Petitioners.

The Junior Government Pleader (Babu Dwarka Nath Banarji), for the Crown.

Brodhurst, J.—One of the grounds for revision is, that sanction under s. 195 of the Criminal Procedure Code should not have been given until the complainants had been afforded an opportunity of proving their case, which had been thrown out merely on the report of the police.

This objection is, I think, valid, and it is supported by the judgment of GARTH, C.J., and FIELD, J., in *The Government v. Karimdad*, I. L. R., 6 Cal., 496. Under the circumstances above referred to, I set aside the Magistrate's order of the 25th July 1885.

NOTES.

[The following are decisions to the same effect :—(1897) 14 Cal., 707 F.B.; (1907) 29 All., 587; (1907) 30 All., 52; (1896) 22 Bom., 596, (where the facts were a little different). See also (1905) 33 Cal., 31; (1912) 22 M. L. J., 419; 14 I. C., 305.]

[8 All. 39]

PRIVY COUNCIL.

The 23rd and 24th June, 1885.

PRESENT :

SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, AND SIR A. HOBHOUSE

Muhammad Abdul Majid.....:Defendant

versus

. Fatima Bibi.....Plaintiff.

[On appeal from the High Court for the North-Western Provinces.]

Muhammadian law—Will—Disposition of estate among sharers—Words of duration of estate not denoting more than interest for life—Construction—Restriction on alienation.

Words such as "always" and "for ever," used in an instrument disposing of property do not in themselves denote an extension of interest beyond the life of the person named as taking, their meaning being satisfied by the interest being for life.

An instrument in the nature of a will, made by a Muhammadian, gave shares in his property to his surviving widow, son, and grand-children, and devoted a share to charitable purposes. It directed that his son "should continue in possession and occupancy of the full sixteen annas of all the estates All the matters of management in connection

with this estate should necessarily and obligatorily rest 'always' and 'for ever' in his hands." It also, with the express object of keeping the property in the family, attempted to restrict alienation by the sharers. There were other provisions to the same effect, in regard to the management by his son, who retained it till his death. The defendant, who was a son of that son, having claimed to retain possession of the property, in order to carry out the provisions of the will : held that, on its true construction, the plaintiff, a sharer under it, was entitled to the full [40] proprietary right in, and to the possession of, her share, notwithstanding the above expressions in the will, and the attempt to control alienation by the sharers.

APPEAL from a decree (6th January 1882) of the High Court affirming a decree (18th June 1880), of the Subordinate Judge of Jaunpur. The question now arising was as to the right construction of the words in an instrument which, although all its dispositions were not altogether testamentary, was termed a will throughout the case.

On its construction depended the question whether or not the plaintiff had rightly obtained a decree in her suit for possession of her share under the instrument, which was executed under the following circumstances :—Muhammad Imam Bakhsh, a Sunni Muhammadan of Jaunpur, being about to go on a pilgrimage to Mecca, where he afterwards went, and where he died, executed the instrument, "by way of a will," as he stated in it, on the 19th August 1860, and caused it to be registered. He died about a year afterwards. His family then consisted of one surviving wife, Hingan Bibi, and her daughter, the respondent, Fatima Bibi; also of a grandson and grand-daughter, both minors, and of Muhammad Haidar Hussain, his son by a wife who died before him, this son being the father of Muhammad Abdul Majid, the present appellant.

By the first clause in his will, as it was called, Imam Bakhsh, after stating who were his legal heirs as well as who were the other members of his family, dedicated a fourth part of his property, excluding certain immoveables, to the maintenance of a college and a mosque, and to other similar objects. The remaining three-fourths of his estate, as also all the immoveables excluded from the above dedication, he directed to be divided into four shares, or "sehams;" and of these he gave two to the respondent, Fatima Bibi, and of the other two shares he gave one to his son Muhammad Haidar Hussain, and one to his grandson and grand-daughter above mentioned.

The will then stated the assent of Fatima Bibi and the other sharers to the dispositions made, and provided for the management of the four annas share directed as above mentioned, of which share it directed that the management should be retained by Muhammad Haidar Hussain, and by some capable descendant [41] after him. Of all the testator's estate also the management was given to Haidar Hussain, who, as to the lands, was to obtain *dakhil-kharij* in his name. This son was to continue in possession of the full sixteen annas of the estate, of which the management was to rest with him "always" and "for ever" (*hamesha wa dawami ke liye*). There were also prohibitions of alienation to strangers.

The dispositions of the will were accepted by Hingan Bibi, by Muhammad Haidar Hussain, and by the respondent; this assent being necessary on account of the testator's having made the shares materially different from those which the law would have given, which latter would have been one-eighth to the widow, with a division of the residue between the son and daughter, the former taking two-thirds and the latter one-third. Muhammad Haidar Hussain entered upon the management and continued to pay their due proportion of the profits to the parties entitled until he died on the 20th July 1875. On his death the present appellant, his eldest son, applied for mutation of names in the settlement record, the respondent filing her objections to the proposed

entry, the dispute resulting in the present suit, which was brought on the 5th May 1879.

The judgment of the Subordinate Judge of Jaunpur, Kashinath Biswas, was to the following effect :— He held that the important issue was whether the plaintiff was entitled to receive possession of the *corpus* of her share in the estate. The first question, therefore, was whether Haji Imam Bakhsh, the testator, intended to deprive the plaintiff or her children and heirs of possession of the share secured to her by the so-called will for all time to come, or only during the life time of Haidar Husain, the manager. Examining the clauses of the will, the Subordinate Judge held it to be clear that an absolute right of ownership was given to her. This had been qualified in favour of Haidar Husain during his life in virtue of the formal acceptance of the provisions of the will, he taking the right of management. The real question was whether that right was to go beyond the person and beyond the life of Haidar Husain or was limited to him for life.

The judgment continued thus :—“ Throughout the clauses 5 and 6, in fact throughout the whole of the document, Haidar Husain [42] in relation to the management of the estate, was mentioned in his individual person. Nowhere his heirs-at-law are mentioned as representing him, after his death, in the management of the estate, at least divided between the heirs of the testator or those whom he wished to benefit by his inheritance. At one place only, in clause 6, the words ‘*qaim maqam*’ have been used as respects Haidar Husain, or where the testator says, that an auction purchaser of the rights and interests of a sharer in the estate will not have the right of disturbing the possession and superintendence of Maulvi Muhammad Haidar Husain or of his ‘*qaim maqam*.’ Here the words are clearly used in the sense of a personal representative, or as one standing in the place of Haidar Husain in his absence or by delegation. The will throughout is altogether silent as to the management, after the death of Haidar Husain, of by far the larger portion of the estate which was declared to belong to, and was divided into shares between, the legal heirs of the testator and the children of a deceased daughter. The omission or the silence on the point is the more striking when it is remembered that the testator specially provided, in clause 3, for the management, after the death of Haidar Husain, of the smaller portion of the estate which was assigned or set apart for charitable purposes. It is noticeable, besides, that in explaining, in clause 6, his object for the restriction as regards possession, the testator says: ‘My, the declarant’s, real object is, that all the properties belonging to me, the declarant, should, as specified above, remain for ever in possession of my children (*hamare aulad*).’ This clearly shows that the testator did not mean that, after the death of Haidar Husain, his son or sons should take the management, to the exclusion of one begotten by the testator, as the plaintiff certainly is. But it is said that in giving the powers of management to Haidar Husain, the testator used the words ‘*ahamesha wa dawami keliye*’ (‘for ever and in perpetuity’). The word ‘*hamesha*’ may as well mean ‘always,’ and ‘*abad*’ in Persian is another word for ‘*dawami*,’ both meaning ‘for ever’ or ‘in perpetuity.’ These words, when applied to a person individually, as they are certainly here used, mean no more than the lifetime of that person. In this sense the word ‘*abad*’ is used in the Hedaya on the subject of usufructuary wills, in chapter VI, [43] of Baillie’s Digest of Muhammadan Law, pp. 652-55 *. The testator himself appears to have been fully aware of the real meaning of the words ‘*ahamesha*,’ ‘*dawami*,’ and ‘*abad*’ as in clause 6, in making it obligatory on his

* Hamilton’s Hedaya, Book LII, Chapter V, of usufructuary wills,

children (*aulad*) to give a right of pre-emption to co-sharers ; he uses the words '*naslan bad naslan*' ('generation after generation') with the word '*dawami*' ('in perpetuity'). Reading the whole of the will, it appears to me that Haidar Husain, because of the confidence his father had in him, and of the high ability he possessed, was appointed an executor in his own person, and such a power is not certainly inheritable by his son or heir-at-law in the absence of a provision to that effect in the will."

An appeal from the above was dismissed. The material part of the judgment of the High Court (STUART, C.J., and STRAIGHT, J.) was the following:

"The case for the appellant was ably and exhaustively argued by Mr. Hill ; but it is unnecessary, in the view we take of the matter, to detail at length the points taken by him. It seems to us, that whether the instrument of the 19th of August 1860 be considered as of a testamentary character in the nature of a will, or a deed of gift, or partly one and partly the other, is a mere question of terms, that is of no very great importance. The Subordinate Judge has regarded it in the light of a will, and under the circumstances in which he and we are called upon to consider it, the designation is perhaps not an unreasonable one. Be this as it may, it is certain that all the parties to whom it has reference, among them the father of the (defendant) appellant, and the (plaintiff) respondent, by the pen of her husband, gave their assent to its provisions by subscribing their names, and no point is raised upon either side as to the validity of the document itself, or the mode in which it was executed—the sole question in difference being the interpretation to which it is open. It is also obvious that, whether Haidar Husain was or was not legitimate, an issue, by the way, which I am glad to think it is unnecessary for us to decide, his father Imam Bakhsh had the very greatest confidence in him, and intended to hand over to him the entire administration of his affairs so long as he lived. To this [44] arrangement, the (plaintiff) respondent, having herself assented, was of course unable to raise any objection, nor indeed does it appear that she ever desired to do so ; on the contrary, she recognized the powers of Haidar Husain, to the fullest extent, down to the time of his death in July 1875, as is evidenced by the *ikrar nama* (agreement) of the 26th September 1867. While it may well be that Imam Bakhsh, being bent upon a long and distant journey, from which he might naturally feel he was not likely to return, was desirous of making provision for the management of his estates, immediately upon his departure, as also for settling their distribution in the event of his death, it is far from probable that he ever intended to prevent his heirs for all time from acquiring the fee-simple of the properties, the rents and profits whereof they were to receive in stipulated proportions from Haidar Husain so long as he lived. Mr. Hill contended, that by the language of the document of the 19th of August 1860, an estate in fee of the whole four seahms was conveyed to Haidar Husain, but we find nothing in any of its clauses, in our judgment, either directly or indirectly, to justify any such construction ; on the contrary, we concur with the Subordinate Judge where he points out the obvious contrast between the language of clause 3 in contradistinction to that to be found in clauses 5 and 6. We know of nothing, either in Muhammadan or any other law, forbidding the creation of an interest of the kind now claimed by the (plaintiff) respondent, namely, limited during the existence of one life, and absolute on such life falling in. It certainly seems to us much more reasonable to infer that this was the intention of Imam Bakhsh, than to hold that he meant to perpetuate, for all time, to Haidar Husain and his heirs the possession and management of his estates, so as to exclude his other

children or their issue from ever obtaining the *corpus* of the share allotted to them. Under any circumstances, the latter alternative should not, in our judgment, be adopted, unless the words of the instrument were so strong and clear as to leave no other construction possible. We do not feel called upon to discuss the case at any greater length, approving as we do generally of the remarks made by the Subordinate Judge and the conclusions arrived at by him. In our opinion, the plaintiff has made out her case to the two shares claimed by her, and the appeal should be dismissed, with costs, in this and the lower [45] Court, the amount to be regulated according to the value of the relief decreed, less that refused."

On this appeal,

Messrs. *T. H. Cowie*, Q.C., and *Mr. R. V. Doyne*, for the Appellant, argued that on the due construction of the instrument of 19th August 1860, the appellant, as representing his father, was, on the death of the latter, entitled to succeed to the office of manager of his grandfather's estate, subject to the right of the respondent to receive her share of the profits. The present suit tended directly to break up the estate of Muhammad Imam Bakhsh and to defeat the general intention of his so-called will. Sufficient effect had not been given to the intention apparent in the fifth clause, nor to the words in the clause relating to alienations to strangers, to the effect that the right of possession and management, given to Haidar Husain, was not to be disturbed, concluding, as they did, with the expression "or whoever may be his representative." These words indicated an intention on the part of the testator that his estate should at all times remain under the management of a representative of Haidar Husain. The respondent, while taking benefits under the will in excess of what she would have received by law as one of the heirs, ought not to be allowed to set aside the restriction subject to which her interest in the testator's property was conferred.

Mr. Graham, Q.C., and *Mr. J. D. Mayne*, for the Respondent, were not called upon

Their Lordships' judgment was delivered by

Sir R. Couch.—The question in this appeal arises out of a disposition of his property made by one Imam Bakhsh. The disposition, which was not strictly a will, because it was made in his lifetime and he reserved to himself some benefit under it, was made on the 19th August 1860, and he died about a year afterwards. At the time he made it the state of the family was this: He had two wives. By the first he had a daughter, Musammat Fatima Bibi, who had had a son, Hafiz Syed-ud-din, then dead. He had had another daughter, Musammat Makki Bibi, who had died, leaving two children, Muhammad Ibrahim and Mariam Bibi. By the second wife he had a son, Maulvi Muhammad Haidar Husain, who died in [46] July 1875, leaving his eldest son, the present appellant and the defendant in the suit, and other children. The contention between the appellant and respondent arose after his death. It was this, as stated in the plaint of the respondent which was filed on the 5th of May 1879. In that she states the disposition of the property by her father, Imam Bakhsh, and that the management of the whole property was intrusted to Haidar Husain, and after the death of Imam Bakhsh, she, the plaintiff, confirmed him as manager, and that she has not disputed any of the rights of Haidar Husain. Then, after stating that he was in possession of the property and acted as manager, and stating his death, she says that, after his death, the defendant, without the consent and permission of the plaintiff, improperly took possession of the property constituting her share, and asked the Revenue Court to enter his name in the place of that of Haidar Husain, and that she gave

notice to the Revenue Court of her dissent from that. She then goes on to say, "that the defendant, notwithstanding his want of right, not only arbitrarily declares himself to be the manager of the whole property, but considers and represents himself to be the permanent owner of the whole property, and by his own authority, and with the view of injuring the plaintiff, has committed and omitted to do acts calculated to cause great loss to her; and she prays that a decree may be passed in her favour declaring her right, permanent proprietary title and possession to her share in the property detailed below," and "that complete possession of her share may be awarded to her: that the defendant's possession and management may be removed."

The defendant, in his written statement, sets up this claim: "From the death of Maulvi Muhammad Haidar Husain the whole property mentioned in the will and the agreement legally devolved upon and came into the possession of the defendant under the express conditions and directions of the said documents, and with reference to inferences drawn from them. According to the terms of the will, the rules of the Muhammadan law, and the principles of justice, the defendant alone is entitled and competent to retain possession (subject to the conditions of the will), in order to carry out its provisions, which are to be carried out in perpetuity and for ever, and not for a limited period." It may here be noticed that the defendant is not the only heir of Muhammad Haidar [47] Husain, there are other persons who are also his heirs. The contention is that although the defendant is only one of the heirs, he alone is entitled and competent to retain possession.

This being the contention of the parties, the provisions in the document may now be looked at, to see how far the defendant's contention is supported by its provisions, and how far the right of the plaintiff to recover in this suit is established. Imam Bakhsh begins by saying: "I had two wives married according to the Muhammadan law: one, Musammat Hingan Bibi, who is at present alive, and by whom I had two daughters, one, Musammat Fatima Bibi, who is alive, and her son, Hafiz Syed-ud-din Muhammad Syed Bakht, now deceased, was adopted by me as my son, and the other, Musammat Makki Bibi, who died, leaving one son, Muhammad Ibrahim, and a daughter, Mariam Bibi, minors. My second married wife died, and Maulvi Muhammad Haidar Husain, a son by her, is alive. Therefore, according to the Muhammadan law, Musammat Fatima Bibi, my daughter, and Maulvi Muhammad Haidar Husain, the children of my loins, are my legal heirs." He then goes on to provide that the whole income of a four annas share of his villages and estates shall be devoted to charity and works of beneficence, and the remaining twelve annas of the villages and estates and the whole of his other property shall be divided into four 'sehams' (shares), and gives one share to Hafiz Syed-ud-din Muhammad Syed Bakht, one to Fatima Bibi, one to Maulvi Muhammad Haidar Husain, and one to Muhammad Ibrahim and Mariam Bibi, and says:—"During my, the declarant's, lifetime they shall continue to receive the profits of those 'sehams' (shares): the one 'seham' of Hafiz Syed-ud-din Muhammad Syed Bakht will be received by his mother, Fatima Bibi. She will be the owner of her own one 'seham' and of one 'seham' of Hafiz Syed-ud-din Muhammad Syed Bakht, in all of two 'sehams.' She is at liberty to give them to anyone she may like among her own children. It will be necessary and incumbent on all the said heirs to perform all the necessary and obligatory terms of this document, which they have of their own will consented to observe, and they will not have the power to dissent from it on any plea of law or Muhammadan law." The assent which is here stated is shown by their putting their names [48] to the document after the signature of Imam Bakhsh. Then in the third

clause he provides for what is to be done with the four annas share which was devoted to charity. He says:—"He, Maulvi Muhammad Haidar Husain, shall always be the manager of this four anna share; none of the heirs shall have the right to interfere in any way in the aforesaid four anna share. It shall be incumbent on Maulvi Muhammad Haidar Husain to keep the entire management in his own hands." A little lower down he says, "after Maulvi Muhammad Haidar Husain, whoever from the descendants is just, virtuous, and capable of performing this duty shall be the superintendent and manager of that four anna share. In short my, the declarant's, object is this—that the managership and superintendentship should always continue with Maulvi Muhammad Haidar Husain, and after him, as specified above, whoever among the descendants is capable of performing this work." The word "descendants" there means among his own descendants—not limited to the descendants of Muhammad Haidar Husain; and as far as this provision goes it would seem to point to some selection being made from amongst his descendants in order to have a person who should have the management of the charity property. Then we come, under the fifth clause, to the provision which makes with regard to the remainder of his property. In the fourth clause he had said what there seems to be no doubt was his wish:—"The aforesaid heirs should continue in harmony and eat and reside together, so that being united, the estate may continue to improve and the name always be preserved." In the fifth he says: "Maulvi Muhammad Haidar Husain shall continue in possession and occupancy of the full sixteen annas of all the estates, villages, lands lying at different places, and moveable and immoveable property (collections from the villages). All the matters of management in connection with this estate should necessarily and obligatorily rest always and for ever in the hands of Maulvi Muhammad Haidar Husain." Here we have the words "always and for ever." But these words, according to several decisions of this Board, do not *per se* extend the interest beyond the life of the person who is named. *Per se* they are satisfied by limiting the interest which is there given to the life of Muhammad Haidar Husain. The Subordinate Judge has made observations upon the meaning of these words which are quite supported by the authorities. So far, then, there is nothing [49] in the words used by the testator to indicate an intention that the possession and management were to go to any one of his descendants after the death of Muhammad Haidar Husain. He then gives directions as to the recording of the name and goes on to say:—"No heir and no stranger shall at any time or period have, on any ground, or in any way, power to object to or oppose any of the matters above mentioned, or, to take possession or to make any arrangements of his own regarding the estates. In all these matters all persons shall be entirely powerless;" showing there an intention to keep the property in the hands of his family if possible, and that no strangers should at any time come in and have any part of it. This is still further shown by the sixth paragraph. But before that he directs that Haidar Husain is to make collections of the profits, and says that he is to pay the profits of two out of the four shares to Fatima Bibi, "and the profits of one 'seham' he may take himself, and the profit of one share, that of Muhammad Ibrahim and Mariam Bibi, after deducting the expenses, he is to keep in deposit with himself," according to the provisions of a subsequent clause. This part clearly shows that what he intended was that during the life of Haidar Husain he was to give to the parties their shares of the profits. But there is no direction that this should be done by any other person after the death of Haidar Husain. The direction is applicable to Haidar Husain only, who is directed himself to pay the profits. Then he says:—"My, the declarant's, real object is that all my estates may always remain in possession of my descendants as specified

above"—repeating the intention previously shown—"and no interference of any stranger on any account may be permitted therein, and my property should not be allowed to pass into the hands of any stranger. Hence I enjoin on Musammat Fatima Bibi, Maulvi Muhammad Haidar Husain, Muhammad Ibrahim, Mariam Bibi, and also their descendants, generation after generation in perpetuity, that when any of them is disposed to transfer his share by sale, mortgage, or lease, etc., then he must first offer to transfer to all of his sharers in property; and so long as the sharers are willing to take it, he must by no means transfer to others." There, it may be observed, he does not speak of profits. He had spoken previously of the shares and profits; but here he seems to be speaking of shares in the property, and the shares of the different persons, [50] amongst others of Fatima Bibi, and he directs that they shall not transfer their shares of the property to strangers. Certainly that does not indicate an intention that the property should not be vested after the death of Haidar Husain in the persons to whom he had given the shares. Then he says:—"The stranger will not have any power to take any possession or occupancy of the transferred property beyond receiving the profits which will be handed to him," and "the purchaser also, beyond receiving the profits, shall have no power or right of possession or occupancy over the property sold; nor by the auction shall the right of possession and management be disturbed of Maulvi Muhammad Haidar Husain, or whoever may be his representative." Mr. Cowie rightly admitted that by "representative" here is meant, not a successor of Haidar Husain in the right of Haidar Husain in any way, but a person who might, during Haidar Husain's life, be his agent, thus again indicating that he was making a provision rather for what was to be done during the life of Haidar Husain than for what was to be done afterwards.

These are the provisions of the will, and it is difficult to see in them any provision by the settlor which would confer upon the present defendant the right which he now claims to have. There is nothing to show that the heirs of Haidar Husain were to take his place in the succession and management, and, even if there were, there would be this difficulty, that, if it went by right of succession to the heirs of Haidar Husain, they would all, and not the present defendant alone, come in. Thus expressions clearly denoting that the management is to be in a single hand would, by a strained application of them to a period beyond the life of Haidar Husain, be used to vest the management in a number of hands.

It has been contended by Mr. Doyne that there ought to be, and that there might be, a selection, by some sort of family council, of one of the heirs of Haidar Husain, who should succeed him in the management, and, in default of any appointment by a kind of family council, that it might be made by the Court. We find in this document no provision of the kind, nothing to indicate that it was the intention of the settlor that there should be any selection; and it seems to their Lordships, whatever might [51] have been the wish of the settlor to keep the property in the family, impossible to say that he has so framed this instrument as to carry out such an intention or to effectuate such a wish beyond the life of Haidar Husain. The right of Fatima Bibi to her shares in the property is clear upon the terms of this instrument, unless the defendant could show that there were provisions in it which would control that part of it, and limit her for ever (for that seems to be the contention) simply to an enjoyment of the profits, and not to have any other interest in the property. There are words which indicate an intention that she should take an interest in the property with an attempt, no doubt, to control her in the disposition of it, and to prevent her parting with it to strangers.

It is unnecessary to allude to what is said in the judgments of the subordinate Court and the High Court. Their Lordships are of opinion that the conclusion they came to was a correct conclusion, and they will humbly advise Her Majesty to affirm the decree of the High Court and to dismiss this appeal. The costs of it will be paid by the appellant.

Solicitor for the Appellant : Mr. T. L. Wilson.

Solicitors for the Respondent : Messrs. Barrow and Rogers.

NOTES.

[This case has subsequently been referred to in the two Privy Council decisions (1900) 23 All., 194 P.C. ; (1901) 23 All., 324 P.C.]

[8 All. 51]

CRIMINAL REVISIONAL.

The 7th December, 1885.

PRESENT :

MR. JUSTICE STRAIGHT.

Queen-Empress

versus

Bandhu.

Animal " nullius proprietas "—Bull set at large in accordance with Hindu religious usage—Appropriation of bull—Act XLV of 1860 (Penal Code), ss. 403, 410, 411.

A person was convicted and sentenced under s. 411 of the Indian Penal Code for dishonestly receiving a bull, knowing the same to have been criminally misappropriated. It was found that, at the time of the alleged misappropriation, the bull had been set at large by some Hindu, in accordance with Hindu religious usage, at the time of performing funeral ceremonies.

Held that the bull was not, at the time of the alleged misappropriation, " property " within the meaning of the Indian Penal Code, inasmuch as not only was it not the subject of ownership by any person, but the original owner had surrendered all his rights as its proprietor ; that it was therefore *nullius proprietas*, and incapable of larceny being committed in respect of it ; and that the conviction must be set aside.

[52] THIS was a case reported for orders, under s. 438 of the Criminal Procedure Code, by Mr. C. Donovan, Sessions Judge of Benares. One Bandhu was, on the 21st September 1885, convicted by Raja Jai Kishen Das, C.S.I., a Magistrate of the first class, under s. 411 of the Indian Penal Code, for dishonestly receiving a bull, knowing the same to have been criminally misappropriated, and sentenced to six months' rigorous imprisonment. The evidence showed that about midnight, on the 1st September the accused was found going along a road in Mauza Sheonathpur, driving a bull before him. Upon being questioned by a chaukidar, he said he was an Ahir, but immediately corrected himself, saying :—" I am a Chamar and live at Ramnagar, and the bull belongs to the Maharaja. I am taking it to Ramnagar." He also stated :—" My house is at Goghra. The bull has been sent for by Madar and Samer, butchers. They have promised to pay me eight annas." The accused was then taken into custody. The bull was found to be blind, and to bear a brand

indicating that it had been set at large by some Hindu at the time of performing funeral ceremonies in accordance with Hindu religious usage. Before the Magistrate the accused stated :—"I do not know who is the owner of this bull. Madar and Samer brought it from some place and gave it to me. I do not know where they drove it. The said two persons told me to take the bull secretly to their house, and promised to pay me eight annas. It was given to me at Goghra, on the western road leading to Chigya ; they made me stay near Bari Bagh from now till evening, and then told me to drive it. I acknowledge my fault that I took the stolen property with me at their instigation. Being hungry, I was tempted by the offer of eight annas."

The Magistrate, in convicting the accused, observed :—"Although no one has been found to be the owner, custodian, or keeper of this bull, yet it may be gathered from the statement of the accused himself that the butchers had come by it by illegal means. The bull is not stolen property, but there is no doubt that it was brought by means of misappropriation, and that the accused knowingly retained it for taking it away. Hence the accused is guilty under s. 411, according to the definition given in s. 410 of the Penal Code."

[53] The accused appealed to the Sessions Judge, who, in dismissing the appeal, made the following observations :—"It was certainly not the intention of the persons who set the bull at large that any human right of property should be attached to it by any one, and the intentions of such persons are respected by general public feeling ; and the bulls so let loose are looked upon as not liable to be converted to use in any way that would interfere with their liberty. I may be straining a point, but I think it may be held that the Hindu public have such an interest in these '*Sands*' remaining unmolested and at liberty, as to make them the subject of a sort of public right, and so bring them within the meaning of 'property.' I find that the bull was, for the purposes of s. 403, 'property,' and that it was dishonestly misappropriated, and had therefore become stolen property (s. 410, Penal Code) ; and I affirm the conviction and sentence of the lower Court dismissing this appeal. As the question I have discussed, and upon which the case turns, is novel, but nevertheless may turn up again, and as my finding that the bull was 'property' was not arrived at without some hesitation, I think it well to submit the proceedings for the information of the High Court."

Munshi *Kashu Prasad* appeared for the Prisoner, Bandhu.

The *Junior Government Pleader* (*Babu Dwarka Nath Banarji*), for the Crown.

Straight, J.—I am much indebted to Munshi *Kashu Prasad* for taking so much pains to put the case for the accused man before the Court. I entirely agree with what fell from the *Junior Government Pleader*, that an animal of the kind to which this case has reference was not "property" at the time of the alleged misappropriation, within the meaning of the Indian Penal Code, for it was not only not the subject of ownership by any person, but the original owner had surrendered all his rights as its proprietor, and had given the beast its freedom to go whithersoever it chose. It was therefore "*nullius proprietarius*," and as incapable of larceny being committed in respect of it as if it had been "*feræ naturæ*." I am not now concerned to determine whether cases may not occur in which the killing of such an animal would be an offence ; but I have simply to decide whether the conviction of Bandhu, under s. 411, can be upheld. I do not think that it can be ; and, setting [54] aside the orders of the Magistrate and the District Judge, he will stand acquitted. If he has

not found bail and is in custody he will be at once released; if he has, no further order will be necessary.

Conviction set aside.

NOTES.

[RES NULLIUS.

As to what circumstances would constitute continuance of ownership in a thing apparently abandoned, see, (1890) 17 Cal., 852, where (1887) 11 Mad., 145 was commented on

The main case was adopted in (1887) 9 All., 348; (1893) 18 Bom., 212 (case of lost gold mohur).]

[8 All. 55]

APPELLATE CIVIL.

The 7th December, 1885.

PRESENT:

MR. JUSTICE STRAIGHT AND MR. JUSTICE TYRRELL.

Udit Singh.....Plaintiff

versus.

Padarath Singh and another.....Defendants.*

Pre-emption—Mortgage by conditional sale—Act XV of 1877 (Limitation Act), sch. ii, No. 120—Time from which period of limitation begins to run.

A mortgagee under a deed of mortgage by conditional sale obtained a final order for foreclosure under Regulation XVII of 1806 in December 1875. He then sued to have the conditional sale declared absolute and for possession of the mortgaged property, obtaining a decree for the relief sought in April 1881.

In a suit for pre-emption in respect of the mortgage,—*held*, with reference to art. 120, sch. ii, of the Limitation Act, which was applicable to the case, that the pre-emptor's full right to impeach the sale had not accrued until the mortgagee had obtained the decree of April 1881, declaring the conditional sale absolute and giving him possession. *Rasik Lal v. Gajraj Singh*, I. L. R., 4 All., 414, and *Prag Chaudhary v. Bhajan Chaudhary*, I. L. R., 4 All., 291, referred to.

THE plaintiff in this suit claimed to enforce the right of pre-emption in respect of a mortgage by conditional sale, dated the 23rd March 1868, made by the defendant Chatarpal Singh to the defendant Padarath Singh. The mortgagee had applied under Regulation XVII of 1806 for foreclosure of the mortgage, on the 21st April 1873, and the year of grace allowed by that Regulation had expired on the 24th May 1874, and a proceeding by the District Court foreclosing the mortgage had been drawn up on the 8th December 1875. He had subsequently sued to have the conditional sale declared absolute and for possession of the mortgaged property, and had obtained a decree on the 28th April 1881, for the relief claimed. On the 30th November 1883, he had obtained possession of the mortgaged property in execution of that decree. This suit was instituted on the 27th March 1884. [55] The defendant Padarath Singh, the mortgagee, set up as a defence that the suit was barred by limitation.

* Second Appeal No. 112 of 1885, from a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 31st July 1884, affirming a decree of Munshi Shiva Sahai, Munsif of Basti, dated the 5th May 1884.

The Court of First Instance (Munsif of Basti) held that the suit was barred by No. 120, sch. ii of the Limitation Act, computing the period of limitation from the 8th December 1875. It observed as follows: "It has been ruled in the following decisions that in cases of conditional sales the term of limitation for a pre-emptive suit should be calculated from the date of foreclosure—*Nath Prasad v. Ram Paitan Ram*, I. L. R., 4 All., 218, and *Ashik Ali v. Mathura Kandu*, I. L. R., 5 All., 187. The case last cited is similar to the present. I therefore, without disposing of the other issues, dismiss the plaintiff's claim with costs."

On appeal the Lower Appellate Court (Subordinate Judge of Gorakhpur) concurred with the Munsif that the suit was barred by limitation under art. 120, but computed the period of limitation from the 24th May 1874, the date of the expiration of the year of grace.

The plaintiff appealed to the High Court, contending that the period of limitation should be computed from the date the mortgagee had obtained possession in execution of his decree.

Lala Lalta Prasad, for the Appellant.

Mr. Carapiet, for the Respondent.

Straight, J.—The article of the Limitation Law admittedly applicable to this case is art. 120, and the only question is, from what point are the six years to be held to commence. Now, although the final order for the foreclosure was made in December 1875, Padarath Singh, the vendee, was compelled to bring a suit for declaration of his title and possession, and it was not until the 28th April 1881, that he obtained a decree, under which possession was subsequently given him on the 30th November 1883. For the reasons given by me in *Rasik Lal v. Gajraj Singh*, I. L. R., 4 All., 414, I think that the pre-emptor is entitled to contend that his full right to impeach the sale had not accrued until the validity of the sale, as between the vendor and vendee, had been established by a Court, for *non constat*, but that it might have been found invalid, in which [56] case his cause of action would have disappeared. It is not necessary for me to discuss here whether I am prepared to adopt the view expressed by my brothers OLDFIELD and BRODHURST in the case of *Prag Chaubey v. Bhajan Chaudhri*, I. L. R., 4 All., 291; as taking the decree of the 28th April 1881, as the starting-point, the present suit, which was started on the 27th March 1884, is abundantly within time. In my opinion this appeal must be decreed, and the decrees of the lower Courts being reversed on the preliminary point on which they threw out the suit, the case will be remanded to the Munsif, under s. 562 of the Civil Procedure Code, for disposal on the merits. The costs hitherto incurred will be costs in the cause.

Tyrrell, J.—I agree in the views stated and the order made by my learned brother.

Appeal allowed.

NOTES.

[This case was overruled in (1892) 14 All., 405.]

[8 All. 56]

The 7th December, 1885.

PRESENT :

MR. JUSTICE BRODHURST and MR. JUSTICE TYRRELL.

Thakur Das.....Decree-holder

versus

Shadilal.....Judgment-debtor.*

Execution of decree—Decree prohibiting execution till the expiration of a certain period—Limitation—Act XV of 1877 (Limitation Act), sch. ii, Nos. 178, 179.

A decree, which was passed on the 8th December 1881, in a suit on a simple mortgage-bond, contained the following provision :—" If the judgment-debt is not paid within four months, the decree-holder shall have the power to recover it by a sale of the mortgaged property." On the 17th February 1885, the decree-holder applied for execution of the decree.

Held, that, inasmuch as the decree provided expressly that the decree-holder might not apply for its execution till after the expiry of four months from its date, the limitation of art. 178, sch. ii of the Limitation Act, and not of art. 179, should be applied to the case and the application for execution having been made within three years from the 8th April 1882, when the right to ask for execution accrued, was not barred by limitation.

THE decree of which execution was sought in this case, bearing date the 8th December 1881, was made in a suit on a simple mortgage-bond. It contained the following provision :—" If the judgment-debt is not paid within four months, the decree-holder shall have the power to recover it by sale of the mortgaged property." The decree-holder applied for execution of the decree on the 17th February 1885. The Court of First Instance (Munsif [57] of Farukhabad) rejected the application on the ground that it was barred by limitation. The Court was of opinion that the decree-holder should have applied for execution within three years from the date of the decree, as provided by art. 179, sch. ii of the Limitation Act, inasmuch as the decree could have been executed against the judgment-debtor personally from its date, although it could not have been executed against the mortgaged property till the expiration of four months from its date, and no such application having been made, the present application was barred.

On appeal by the decree-holder the Lower Appellate Court (District Judge of Farukhabad) affirmed the order of the Court of First Instance.

The decree-holder appealed to the High Court, contending that the application was not barred by limitation.

Munshi Kashi Prasad, for the Appellant.

The Respondent was not represented.

Brodhurst and Tyrrell, JJ.—The Courts below were wrong in applying the provisions of art. 179, sch. ii of the Limitation Act to this case. The decree made on the 8th December 1881, provided expressly that the decree-holder might not apply for its execution till after expiry of four months from that date, that is to say, till after the 8th of April 1882. Therefore the limitation of art. 178 applies to the case before us. The decree-holder has three years

* Second Appeal No. 72 of 1885, from an order of C. J. Daniell, Esq., District Judge of Farukhabad, dated the 23rd June 1885, affirming an order of Sayyid Zakir Husain, Munsif of Farukhabad, dated the 9th March 1885.

from the date when the right to ask for execution accrued to him. His application of the 17th February 1885, being within three years from the 8th April, 1882, is not barred. The appeal is decreed with costs.

Appeal allowed.

NOTES.

[LIMITATION—EXECUTION OF DECREE.

As to when Art. 178 or 179 is applicable, see the exhaustive judgment of BHASHYAM AYYANGER, J. in (1903) 26 Mad., 780; 13 M.L.J., 412.

In (1894) 16 All., 237, where the decree was contingent upon default in payment by the judgment-debtor, Art. 178 was held applicable.

In (1894) 17 All., 39, where the decree was incapable of execution as it was passed, Art. 178 was applied and application for execution within three years from the amendment of the same but beyond 12 years from the original decree, was held not barred.]

[8 All. 37]

The 11th December, 1885.

PRESENT :

MR. JUSTICE BRODHURST AND MR. JUSTICE TYRRELL.

Tahal.....Plaintiff

versus

Bisheshar and another.....Defendants.*

Agreement to refer to arbitration—Refusal to refer—Suit in respect of matter agreed to be referred—Pleadings—Act I of 1877 (Specific Relief Act), s. 21.

One of the parties to a contract to refer a controversy to arbitration brought a suit for part of the subject-matter referred. The defendants pleaded the bar of [58] s. 21 † of the Specific Relief Act, but did not allege in their answer to the plaint that the plaintiff refused to perform his contract.

Held, that the mere act of filing the suit on the part of the plaintiff was not tantamount to a refusal to perform his contract, in the sense of s. 21 of the Specific Relief Act.

* Second Appeal No. 149 of 1885, from a decree of M. S. Howell, Esq., District Judge of Mirzapur, dated the 9th January 1885, reversing a decree of Shaikh Maula Bakhsh, Munsif of Mirzapur, dated the 23rd August 1884.

Contracts not specifically enforceable. † [Sec. 21 :—The following contracts cannot be specifically enforced :—

- (a) a contract for the non-performance of which compensation in money is an adequate relief ;
- (b) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms ;
- (c) a contract the terms of which the Court cannot find with reasonable certainty ;
- (d) a contract which is in its nature revocable ;
- (e) a contract made by trustees either in excess of their powers, or in breach of their trust ;
- (f) a contract made by or on behalf of a corporation or public company created for special purposes, or by the promoters of such company, which is in excess of its powers ;
- (g) a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date ;
- (h) a contract of which a material part of the subject-matter, supposed by both parties to exist, has, before it has been made, ceased to exist.

And save as provided by the Code of Civil Procedure, no contract to refer a controversy to arbitration shall be specifically enforced ; but if any person who has made such a contract and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.]

The contract, the existence of which would bar a suit under the circumstances contemplated by s. 21 of the Specific Relief Act, must be an operative contract, and not a contract broken up by the conduct of all the parties to it.

THE plaintiff in this suit claimed possession of a house. He alleged that many years ago he and his brother, the father of the first defendant, Bisheshar, and grand-father of the second defendant, Khannu, had made a division of their ancestral property; that the house in question, which was a part of such property, fell to the plaintiff's share; and that he had been wrongfully dispossessed of it by the defendants. The defendants pleaded—(i) that there had been an agreement between the plaintiff and themselves to refer the matter to arbitration, and that the suit was barred by the last paragraph of s. 21 of the Specific Relief Act; and (ii) that there had been no such division of property as alleged by the plaintiff; and that, assuming that such division had been made, the plaintiff was entitled to one-half of the house only.

Upon the first of these contentions, the Court of First Instance (Munsif of Mirzapur) observed as follows :—" I have very carefully considered the objection founded on the concluding paragraph of s. 21 of the Specific Relief Act, and the conclusion to which I have come is adverse to the defendants. To succeed in that plea, the defendant must, in my opinion, prove that the plaintiff has refused to perform the contract to refer to arbitration. This has not been done—not even alleged nor suggested—by the defendants: on the contrary, one of their witnesses, Debi Prasad, gives as a reason why there was no award, that which I think to be equally the fault of the defendants. He says :—' No award has been delivered; since the agreement the parties have quarrelled, and the present suit has been instituted; therefore no award was made.' I understand him to mean that neither party abided by the contract, and therefore there was no award. This appears to me to be the law itself. As an authority, if needed, I refer to *Koomud Chunder Dass v. Chunder Kant Mookerjee*, I. L. R., 5 Cal., 498. The plaintiff's own [59] explanation why he would not conform to the aforesaid agreement is, that the arbitrators had refused to decide, and that some of them have died since the institution of the suit. The first portion of this statement is disputed, as the pleader for the defendants contends that the arbitrators did not refuse; but whether they did or did not refuse is, I think, immaterial, since it is now admitted that some of them are dead; and, this being so, I hold that the agreement has ceased to be operative between the parties (*Russell On Arbitration*, p. 156). It has been also urged that as the arbitrators, who are stated to be now dead, were alive, and all were willing to adjudicate, at the time the suit was brought, the question of the liability of the plaintiff under the agreement should be determined as it then stood: that, looking at it in that aspect, I should hold the present suit to be barred by s. 21 of the Specific Relief Act, and relegate the plaintiff to a fresh suit. This seems to me a too inequitable view of the matter, and I cannot adopt it. I therefore hold that nothing has been shown to bar the present suit." On the merits of the suit the Court found that there had been a division of the ancestral estate, and that the house in question had fallen to the plaintiff's share, and had been held by him for forty years. The Court accordingly decreed the suit.

The defendants appealed to the District Judge of Mirzapur. Upon the question whether the suit was barred by s. 21 of the Specific Relief Act, the Judge observed :—" The Munsif seems to have drawn the conclusion that both parties agreed to revoke the reference to arbitration; for he says, ' I understand him (Debi Prasad) to mean that neither party abided by the contract, and therefore there was no award.' But I do not think that more can be deduced

from the witness's words than that the parties quarrelled in the course of the arbitration, and thereupon the plaintiff rushed into Court. Now this, I think, amounted to a refusal to perform his share of the contract. He had contracted to await and abide by the award of the arbitrators. Instead of doing this, he rushed into Court before the arbitrators had had time to complete the inquiry upon which they had entered. This case, then, is clearly distinguishable from *Koomud Chunder Dass v. Chunder Kant Mookerjee*, I. L. R., 5 Cal., 498, cited by the Munsif, where the reference to arbitration had been [60] contingent, but when the contingency arose, the defendants omitted to call upon the plaintiff to carry out his contract to refer the dispute to arbitration, and, in consequence of this omission and of the plaintiff's omission to bring the case before the arbitrator, the case never came before the arbitrator at all. That precedent merely shows that from the mere omission of the plaintiff to bring the case before the arbitrator, it cannot be inferred that he has refused to allow it to go before the arbitrator, and the same rule is laid down in *Atma Rai v. Sheobaran Rai*, Weekly Notes, 1882, p. 58. But here the case was actually before the arbitrators, and the plaintiff tried to withdraw it from their cognizance by filing this suit. Under these circumstances, I think the suit is barred. The cause of action is said to have accrued on the 17th January 1882, and the house in suit was admittedly one of the two houses specified in the agreement of the 18th May 1883; and it is clear, therefore, that the subject of the present suit is one of the subjects that the plaintiff had contracted to refer. The Munsif assigns another reason for holding that the suit is not barred, namely, that some of the arbitrators being admittedly now dead, the agreement had ceased to be operative. But I think that 'the existence of such contract' in s. 21, means 'the existence of such contract at the time of institution of the suit,' as clearly appears from the context. Whether or not the plaintiff may be entitled to institute a suit after the death of some or all of the persons named as arbitrators, he was not entitled to institute the present suit at a time when all those persons were alive. I reverse the Munsif's decree, and dismiss the suit with costs in both Courts."

The plaintiff appealed to the High Court, contending that the suit was not barred by s. 21 of the Specific Relief Act.

Munshi Kashi Prasad, for the Appellant.

Babu Ram Das Chakrabati, for the Respondents.

Brodhurst and Tyrrell, JJ.—It is admitted in this case that the parties agreed to an arbitration on the 18th May 1883. One of them has brought this suit for part of the subject-matter referred to the arbitrators more than a year after that date. The defendants plead the bar of s. 21 of the Specific Relief Act, but they do not allege in their answer to the plaint that the plaintiff [61] refused to perform his contract to submit to arbitration. And one of the arbitrators, a witness in this case, has sworn that the arbitrators did not decide the case because "the parties were contentious among themselves." The Judge, in appeal, held that the mere act of filing this suit on the part of the plaintiff is tantamount to a refusal to perform his contract in the sense of s. 21 of the Specific Relief Act. We cannot take this view; and we hold that the contract, the existence of which would bar a suit under the circumstances contemplated by this section, must be an operative contract and not a contract broken up by the conduct of all the parties to it. We allow the appeal, and setting aside the decree of the Lower Appellate Court, remit the appeal for determination on the merits, under s. 562 of the Civil Procedure Code. Costs will be costs in the cause.

Appeal allowed.

NOTES.

[See the principle of this case followed in (1910) 33 All., 315 : 9 I. C., 80, where an agreement to refer to arbitration not acted upon and become, by lapse of time unenforceable, was held not to be a bar to a suit in respect of matters contained in it. (1896) 11 Bom., 199 was referred to for the same purpose. See also 29 All., 13.]

[3 All. 61]

The 12th December, 1885.

PRESENT :

MR. JUSTICE BRODHURST AND MR. JUSTICE TYRRELL.

Dhanak Singh and others.....Defendants

versus

Chain Sukh.....Plaintiff.*

*Lambardar and co-sharer—Suit by co-sharer for profits—Burden of proof—
Act XII of 1881 (N.-W. P. Rent Act), s. 209.*

When a co-sharer claims a dividend on the full rental of the mahal, and the lambardar pleads in reply that the actual collection fell short of that rental, the burden of proof lies on the co-sharer to show that the deficient collection was attributable to the conduct of the lambardar, in the sense of s. 209 of the N.-W. P. Rent Act (XII of 1881), before he can succeed in getting a decree for a sum in excess of the actual collections.

THE plaintiff in this suit, a recorded co-sharer in a mahal, sued the defendant, the lambardar, for his share of the profits, claiming in respect of the full rental of the mahal. The Assistant Collector trying the suit gave the plaintiff a decree for profits calculated on what the defendant and the patwari said had been collected, on the ground that it was for the plaintiff to prove that more was collected, or that the defendant was able to collect more, which he had not done. On appeal to the District Court the plaintiff contended that he was entitled to a share of profits calculated on the full rental of the mahal, and that if the lambardar asserted that he had collected less than the full rental, the burden of proving that fact rested [62] on him, and also of showing that he was unable to collect the full rental owing to circumstances which would relieve him of the responsibility of accounting to the shareholders for the full rental. The District Judge allowed this contention; and, as the defendant had not proved that he had not collected the full rental, and had not shown that he was unavoidably prevented from collecting, he gave the plaintiff a decree for the amount he claimed.

The heirs of the lambardar appealed to the High Court.

Mr Carapiet, for the Appellants.

Munshi Hanuman Prasad and Munshi Madho Prasad, for the Respondent.

Brodhurst and Tyrrell, JJ.—The burden of proof has been wrongly laid by the Appellate Court on the lambardar in this case. When a co-sharer claims a dividend on the full rental, and the lambardar pleads in reply that the actual collection fell short of that rental, it is incumbent on the co-sharer to show that the deficient collection was attributable to the conduct of the lambardar in the sense of s. 209 of the Rent Act, before he can succeed in getting a decree for a sum in excess of the actual collections. The Court

* Second Appeal No. 160 of 1885, from a decree of C. J. Daniell, Esq., District Judge of Farukhabad, dated the 12th November 1884, modifying a decree of Pandit Maharaj Narain, Assistant Collector of the first class, Farukhabad, dated the 29th March 1884

below has ruled erroneously to the contrary effect; and we must modify his decree to this extent.

The appeal is allowed, with costs in proportion to the amount by which the decree will be thus reduced.

Appeal allowed.

NOTES.

[See the Full Bench case in (1899) 12 All., 301, where this case is considered.]

[8 All. 62]

The 12th December, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE OLDFIELD.

Chhiddu.....Defendant

versus

Narpat and others.....Plaintiffs.*

Jurisdiction—Civil and Revenue Courts—Suit by lessee of occupancy-tenant for recovery of possession—Act XII of 1881 (N.-W. P. Rent Act), s. 95 (n).

Section 95 (n) of the N.-W.P. Rent Act (XII of 1881) is applicable to a suit by the lessee of an occupancy-tenant to recover possession of the land under the lease, from which the lessor has ejected him; and such a suit is exclusively cognizable by the Revenue Courts. *Muhammad Zaki v. Hasrat Khan*, Weekly Notes, 1882, p. 61, and *Ribban v. Partab Singh*, I.L.R., 6 All., 81, distinguished.

[68] THE plaintiffs in this suit, claiming to be the sub-tenants of the defendant, a tenant with a right of occupancy, under a lease in writing, and alleging that the defendant had illegally ejected them, sued for possession of the land leased to them. The suit was instituted in the Court of the Munsif of Etah. The defendants set up as a defence to the suit, amongst other things, that the suit was one cognizable in the Revenue and not in the Civil Courts. Upon the issue framed on this contention the Munsif held, that, the dispute being between two cultivators, the suit was cognizable in the Civil Courts, and, deciding the other issues in favour of the defendant, dismissed the suit. On appeal by the plaintiffs, the Lower Appellate Court (Subordinate Judge of Mainpuri) gave them a decree, holding also, for the same reason as the Munsif, that the suit was one of which the Civil Courts could take cognizance.

The defendant appealed to the High Court.

Mr. Simeon, for the Appellant.

Babu Ram Das Chakarbaty, for the Respondents.

Oldfield, J.—In this case it is admitted that the defendant has the rights of an occupancy cultivator in this land, and the plaintiff is a lessee from him. The suit is a suit to recover possession of the land under the lease from which the defendant has ejected the plaintiff. The only question before us is, whether the Civil Court has jurisdiction to entertain this suit. In my opinion the

* Second Appeal No. 189 of 1885, from a decree of Maulvi Muhammad Abdul Basit, Subordinate Judge of Mainpuri, dated the 17th September 1884, reversing a decree of Maulvi Sakhawati Ali, Munsif of Etah, dated the 27th June 1884.

finding of the lower Court on this question is wrong. The suit is exclusively cognizable by the Revenue Courts. The lower Court is wrong in holding that when both the parties are cultivators the suit is cognizable by the Civil Courts, because there is no relation in that case of landholder and tenant, as contemplated by the Rent Act. This is not so, the matter in suit is a matter on which an application of the nature mentioned in s 95 (n)—“application for recovery of the occupancy of any land of which a tenant has been wrongfully dispossessed”—might be made. The rulings cited by the learned pleader for the respondent—*Muhammad Zaki v Hasrat Khan*, Weekly Notes, 1882, p. 61, and *Rabban v. Partab Singh*, I. L. R., 6 All., 81,—are distinguishable. In those cases the suit was brought against the [64] defendant as a trespasser for a declaration of right. The decree of the Court below is reversed, and the suit is dismissed with costs in all Courts

Petheram, C.J—I concur.

Appeal allowed.

[8 All 64]

The 14th December, 1885.

PRESENT

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND
MR JUSTICE OLDFIELD

Muhammad Abid and anotherPlaintiffs

versus

Muhammad Asghar.....Defendant.*

Arbitration—Agreement to refer not providing for disagreement of arbitrators—Appointment of umpire by Court—Award by umpire and one arbitrator—Decree in accordance with award—Appeal—Civil Procedure Code, ss. 508, 509, 511, 523—Application to set aside award—Act XV of 1877 (Limitation Act), sch. II, No. 158

In an agreement to refer certain matters to arbitration, which was filed in Court under s. 523 of the Civil Procedure Code, and on which an order of reference was made by the Court, no provision was made for difference of opinion between the arbitrators, by appointing an umpire, or otherwise. The arbitrators being unable to agree upon the matters referred, the Court, on the application of one of them, appointed an umpire, and directed that the award should be submitted on a particular date. An award was made by the umpire and one arbitrator, without the concurrence of the other arbitrator, and submitted to the Court, which passed a decree in accordance with its terms. On appeal by the defendant in the case, the District Judge reversed the decree.

* Second Appeal No 191 of 1885, from a decree of E. B. Thornhill, Esq., District Judge of Jaunpur, dated the 21st November 1884, reversing a decree of Maulvi Nasr-ul-lah Khan, Subordinate Judge of Jaunpur, dated the 31st March 1884.

Held, that an appeal would lie to the Judge from the decree of the first Court, where there had been no legal award, such as the law contemplated. *Lachman Das v. Brivpal*, I. L. R., 6 All., 174, referred to.

Held, that, in the present case, there had been no legal award such as the law contemplated, inasmuch as the agreement to refer gave the Court no power to appoint an umpire, and required that the award should be made by the arbitrators named by the parties.

Held, that s. 509* and the other sections preceding s. 523† of the Civil Procedure Code relating to the power of the Court to provide for difference of opinion among the arbitrators, were only made applicable to cases coming under s. 523, so far as their provisions were consistent with the agreement filed under that section.

Held, also, that the defendant was not precluded from appealing to the Judge from the first Court's decree because he had not applied to set aside the award within the ten days allowed by art. 158, sch. II of the Limitation Act, inasmuch as that article applied to applications referred to in s. 522 of the Civil Procedure [65] Code, i.e., applications to set aside an award on any of the grounds mentioned in s. 521, and the defendant did not contest the award on any of those grounds.

THE facts of this case are stated in the judgment of the Court.

Mr. C. H. Hill and Shah Asad Ali, for the Appellants.

Mr. T. Conlan and Pandit Ajudhia Nath, for the Respondent.

Petheram, C.J., and Oldfield, J.—This is a case coming under s. 523 of the Civil Procedure Code.

The plaintiff applied in writing to the Court of the Judge of Jaunpur to file an agreement entered into by him and the defendant to refer certain matters to arbitration. The agreement is dated the 27th August 1879, and the application was presented on the 17th August 1883.

This application was numbered and registered as a suit, as required by the section; and notice was given to the parties to show cause why the agreement should not be filed. The defendant filed some objections, which were disallowed;

When reference is to two or more, order to provide for difference of opinion.

* [Sec 509. —If the reference be to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators,

- (a) by the appointment of an umpire, or
- (b) by declaring that the decision shall be with the majority, if the major part of the arbitrators agree, or
- (c) by empowering the arbitrators to appoint an umpire, or
- (d) otherwise, as may be agreed between the parties, or, if they cannot agree as the Court determines

If an umpire is appointed, the Court shall fix such time as it thinks reasonable for the delivery of his award in case he is required to act.]

Agreement to refer to arbitration may be filed in Court.

† [Sec 523 —When any persons agree in writing that any difference between them shall be referred to the arbitration of any person named in the agreement or to be appointed by any Court having jurisdiction in the matter to which the agreement relates, the parties thereto, or any of them, may apply that the agreement be filed in Court.

The application shall be in writing and shall be numbered and registered as a suit

Application to be numbered and registered

applicant as plaintiff and the other parties as defendants.

On such application being made, the Court shall direct notice thereof to be given to all the parties to the agreement other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

If no sufficient cause be shown, the Court may cause the agreement to be filed, and shall make an order of reference thereon, and may also nominate the arbitrator, when he is not named therein and the parties cannot agree as to the nomination.]

and the Court made an order of reference, as required by the section, to the two arbitrators named in the agreement.

By this agreement only two arbitrators were named, and no provision was made for difference of opinion, by appointing an umpire, or otherwise. It appears that one of the arbitrators applied to the Court to appoint an umpire, as the arbitrators could not agree, and the Court did appoint an umpire, and directed that the award should be submitted on the 17th March 1884.

The defendant, on the 14th March 1884, objected to the umpire appointed by the Court; and no notice would appear to have been taken of the objection; and an award was made by the umpire and one arbitrator, without the concurrence of the other arbitrator, and submitted to the Court on the 15th March 1884.

Some objections were filed to it by the defendant, on the 27th March, which were disallowed, and the Court passed a decree in conformity with the award. The defendant then appealed to the Judge, who reversed the decree, on the ground that the award was illegal, inasmuch as it was not consistent with the agreement for the Court to appoint an umpire, or for the award to be made by the umpire and one only of the arbitrators named.

[66] In appeal by the plaintiff, it has been urged that no appeal lay to the Judge, and that the defendant was precluded from appealing, inasmuch as he had not applied to set aside the award within the ten days allowed by art. 158 of the Limitation Act, and that it was within the power of the Court to appoint an umpire, and for the umpire and one arbitrator to make the award.

We think the appeal must fail. An appeal will lie to the Judge from the decree of the first Court with reference to the Full Bench ruling of this Court to which the Judge refers *Lachman Das v. Brijpal*, I. L. R., 6 All., 174, where there has been no legal award such as the law contemplates; and this is the case here, as it seems to us that the agreement gave the Court no power to appoint an umpire, and required that the award should be made by the two arbitrators named by the parties.

It has been contended that s. 509 of the Civil Procedure Code gives the Court a power to provide in the way it did for difference of opinion among the arbitrators; and we were also referred to s. 508.

But s. 509 and the other sections preceding s. 523 are only made applicable to cases coming under s. 523 (like the one we are dealing with) so far as their provisions are consistent with the agreement filed under s. 523.

The terms and intentions of the agreement itself must therefore be looked to, to see if s. 509 or s. 511 could be properly applied in this case; and we think they could not, as no implied power to appoint an umpire can be gathered from the agreement of the parties, which appears to have been that the two arbitrators named by them should alone and in consultation arbitrate between the parties, by coming to some unanimous decision upon the matters referred. There will be therefore no legal award in this case.

We do not think that there is any force in the plea that the defendant-respondent is precluded from contesting by way of appeal the decree of the first Court, because he did not apply to the Court to set aside the award within the time allowed by art. 158 of the Limitation Act.

This article applies to applications under the Civil Procedure Code to set aside an award, that is, to applications referred to [67] in s. 522, which are those to set aside an award on any of the grounds mentioned in s. 521.

The defendant, in appeal, however, does not contest the award on any of those grounds.

His objection is that the persons who made the award had no power at all to make it; and there was, in consequence, no legal award; and he questions the legality of the procedure. Whether or not the defendant would be precluded in appeal from making objections on any of the grounds mentioned in s. 521, because he had not applied to set aside the award on those grounds within the time allowed by the Limitation Act for making the application, is a question we need not determine, as it does not arise here; but there is nothing with reference to the Limitation Act to prevent him from raising the question he now does.

A long argument was addressed to us by Pandit *Ajudhya Nath* on behalf of the defendant, that the plaintiff-appellant's application to file the agreement was itself barred by limitation under art. 178 of the Limitation Act; but taking the view here taken, that the appeal fails, it is unnecessary to discuss it.

The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[This is no longer law after the Privy Council ruling in 29 Cal., 167; 29 I. A., 51. See in this connection 18 I. A., 45; 4 Bom. L. R., 161; 6 C. W. N., 226; 25 P. R., 1902; 17 I. C., 7 (Cal.).]

[8 All. 67]

The 14th December, 1885.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE BRODHURST.

Gopal Dai.....Plaintiff

versus

Chunni Lal.....Defendant.*

Execution of decree—Attachment of property—Payment into Court of money due under decree—Civil Procedure Code, s. 295—Assets realized by sale or otherwise.

G and *C* held decrees against *B*, and took out execution of them and the judgment-debtor's property was attached, but no sale took place. The judgment-debtor paid into Court the sum of Rs. 1,200 on account of *G*'s decree.

Held, that *G* was entitled to the sum of Rs. 1,200 paid into Court by the judgment-debtor, and it could not be regarded as assets realized by sale or otherwise in execution of a decree, so as to be rateably divisible between the decree-holders under s. 295 † of the Civil

* Second Appeal No. 1663 of 1884, from a decree of Babu Pramoda Charan, Judge of the Small Cause Court, Agra, exercising the powers of a Subordinate Judge, dated the 26th August 1884, affirming a decree of Lala Baij Nath, Muasif of Agra, dated the 9th May 1884.

† [Sec. 295 :—Whenever assets are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of the realization, shall be divided rateably among all such persons :

Proceeds of execution-sale to be divided rateably among decree-holders.

Provided as follows :—

Proviso where property is sold subject to mortgage.

(a) When any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not as such be entitled to share in any surplus arising from such sale :

(b) when any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the assent of the mortgagee or incumbrancer, order

Procedure Code, inasmuch as it could not be said that there was a realization from the property of the judgment-debtor.

Purshotamdass Tribhovandass v. Mahanant Surajbharthi Haribharthi, I. L. R., 6 Bom., 588, approved.

[68] THE plaintiff in this suit, Gopal Dai, a Hindu widow, obtained a decree against her husband's father and brother for a maintenance allowance of Rs. 120 per mensem. In February 1883, she applied for execution of this decree, praying to recover Rs. 1,200, arrears of the allowance, by the attachment and sale of a village belonging to the judgment-debtors. The village was attached, and then the judgment-debtors paid into Court the amount of the arrears. By the order of the Court executing the decree the amount was rateably divided between the plaintiff and other persons who held decrees against the plaintiff's judgment-debtors, and had applied for execution thereof. One of these decree-holders was the defendant in this suit, Chunni Lal, to whom Rs. 844-3-9 were paid. The plaintiff sued to recover this amount from him. Both the lower Courts held that the defendant was entitled to the amount under the provisions of s. 295 of the Civil Procedure Code.

In second appeal by the plaintiff it was contended on her behalf that the provisions of s. 295 were not applicable under the circumstances.

Pandit *Ajudhia Nath* and Babu *Jogindro Nath Chaudhri*, for the Appellant.
Mr. *W. M. Colvin*, for the Respondent.

Oldfield and Brodhurst, JJ.—We are of opinion that s. 295 of the Civil Procedure Code does not apply to this case.

The plaintiff and defendant held decrees against Babu Bishambhar Nath, and took out execution of them, and the judgment-debtor's estate, mauza Barara, was attached, but no sale took place. The judgment-debtor paid into Court the sum of Rs. 1,200 on account of the plaintiff's decree, and the question is whether the plaintiff is entitled to this sum, or it was rateably divisible among the decree-holders.

We think that this sum cannot be held to be assets realized by sale, or otherwise, in execution of a decree, so as to be rateably divisible under s. 295. It cannot be said that there was a realization from the property of the judgment-debtor, and so the payment does not come within the meaning of s. 295. The payment would not release the property from attachment, or stop sale in execution of the defendant's decree.

[69] We concur in the view of the law taken by the Bombay High Court in *Purshotamdass Tribhovandass v. Mahanant Surajbharthi*, I.L.R., 6 Bom., 588, which supports the view we take here.

that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same right against the proceeds of the sale as he had against the property sold.

- (c) when immovable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—

Proviso

first, in defraying the expenses of the sale,
secondly, in discharging the interest and principal-money due on the incumbrance;
thirdly, in discharging the interest and principal-moneys due on subsequent incumbrances (if any), and fourthly, rateably among the holders of decrees for money against the judgment-debtor, who have, prior to the sale of the said property applied to the Court which made the decree ordering such sale for execution of such decrees and have not obtained satisfaction thereof.

If all or any of such assets be paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

Nothing in this section affects any right of the Government.]

THE LAND MORTGAGE BANK OF INDIA v. MOTI &c. [1885] I.L.R. 8 All. 70

The plaintiff is therefore entitled to a decree, and we reverse the decree of the lower Court, and decree the claim with all costs.

Appeal allowed.

NOTES.

[This case was referred to and approved in (1905) 28 Mad., 880 : 15 M. L. J., 202. The other cases following this are :—16 Bom., 91 ; 28 Bom., 264.

See also (1899) 26 Cal., 772.]

[8 All. 69]

The 15th December, 1885.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE BRODHURST.

The Land Mortgage Bank of India.....Plaintiff

versus

Moti and others.....Defendants.*

License, revocation of—Works of permanent character executed by licensee—

wa

Act V of 1882 (Easements Act), ss 60, 61.

In a suit by a zamindar to have his right declared to build a house on some waste land in the mauza, the defendants, who were tenants in the mauza, resisted the claim on the ground that they had built wells and water-courses on the land, and had a right also to use it as a threshing-floor and for stacking cow-dung.

Held, that the defendants having acquired no right adverse to the plaintiff as owners, by prescription or otherwise, in the land, their right of use could only be as licensees of the plaintiff ; and although he could not interfere with their right to the wells, which were works of a permanent character, and on which the defendants had incurred expenses, he could revoke the license as to the other use claimed of the land, and his claim to build the house should therefore be decreed.

THE facts of this case are stated in the judgment of the Court.

Babu Jogindro Nath Chaudhri, for the Appellant.

The Respondents were not represented.

Oldfield and Brodhurst, JJ.—The claim is by a zamindar to have his right declared to build a house on some waste land in the mauza. Defendants are tenants in the mauza, and assert that they have built wells and water-courses on this land, and have a right also to use it as a threshing-floor and for stacking cow-dung. On these grounds they resist the claim.

The Court below admits that the defendants have no proprietary right in this land, but has dismissed the claim on the ground that they have acquired a right to use it for the purposes claimed.

[70] But if they have acquired no right adverse to the plaintiff as owners, by prescription, or otherwise, in the land, their right of use can only be as licensees of the plaintiff ; and, on the facts found in this case, it can be revoked by the plaintiff, except in respect of the wells, which are works of a permanent character, and on which the defendants have incurred expenses.

* Second Appeal No. 61 of 1885, from a decree of Rai Cheda Lal, Subordinate Judge of Farukhabad, dated the 10th December 1884, modifying a decree of Maulvi Muhammad Anwar Husain, Munsif of Kaimganj, dated the 13th June 1884.

The principle of ss. 60* and 61† of the Easements Act is quite applicable to this case, although that Act is not in force here.

In this case, their right to the wells which they have made cannot be interfered with; but the zamindar can revoke the license as to the other use claimed of the land.

The decree of the Court of First Instance, which, while decreeing the claim to build the house, preserves the rights as to the wells and taking water from them, and also provides, by consent of the plaintiff, facilities for a threshing-floor, &c., is fit to be affirmed.

We set aside the decree of the Lower Appellate Court, and restore that of the first Court with costs.

Appeal allowed.

[8 All. 70]

The 9th December, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND
MR. JUSTICE OLDFIELD.

Bholai and another.....Plaintiffs

versus

Kali and another.....Defendants. †

Hindu widow—Mortgage by Hindu widow in possession of property in lieu of maintenance—Declaratory decree—Act I of 1877 (Specific Relief Act), s. 42.

The name of the widow of a member of a joint Hindu family was allowed by the other members to be recorded in her husband's place in respect of his rights and interests in the family property by way of compliment to her, and they consented that, in lieu of maintenance, she should receive the profits of the property during her lifetime. The widow executed a deed of mortgage of the property, which did not specifically state the amount of the estate mortgaged, and also a bond, upon which the obligee obtained a decree, in execution whereof he attached part of the property recorded in the name of the obligor. The members of the family brought a suit in which they prayed for a declaration that the mortgage executed by the widow was invalid, and that the property was not liable for the amount due thereunder, or to attachment in execution of the decree obtained upon the bond.

License when revocable. * [Sec. 60:—A license may be revoked by the grantor, unless

(a) it is coupled with a transfer of property and such transfer is in force :

(b) the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution.]

Revocation express or implied. † [Sec. 61:—The revocation of a license may be express or implied.]

‡ First Appeal No. 18 of 1885, from a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 3rd December 1884.

Held, that if the widow's possession were only a possession by the plaintiffs' consent entitling her merely to receive the profits for her maintenance, the plaintiffs [71] might eject her from the property, and that before they could obtain a declaration under s. 42 * of the Specific Relief Act, they must seek their relief by ejectment, that being the substantial and real relief appropriate to the cause of action. On the other hand, if the widow had an estate in possession, given to her in exchange for her maintenance, she had an interest which she was competent to alienate.

Held, also that inasmuch as the deed of mortgage contained no description of the amount of the estate mortgaged by the widow, and, upon its face, mortgaged her share of the property only, it could have no operation beyond her share, and the Court would not be justified in granting a declaration under s. 42 of the Specific Relief Act, merely because the plaintiffs apprehended some possible future claim based upon the allegation that the transfer comprised the entire estate.

THE plaintiffs in this suit alleged in their plaint that they and one Doman Pandey were members of a joint and undivided Hindu family; that Doman Pandey died leaving him surviving a minor son called Nihor; his other son, Behari, having died during his father's lifetime leaving a widow, the defendant Musammat Kali; that Nihor died a few days after his father and before his name was entered in the revenue records in respect of the rights and interests of his father; and that, owing to the circumstances mentioned above, "the name of Musammat Kali, daughter-in-law of Doman Pandey, was caused to be entered in respect of the rights and interests of Doman Pandey, merely by way of consolation and courtesy to the said Musammat, who had in fact no right to the property in question, and her name had hitherto continued to be recorded." The plaintiffs then went on to allege that, "notwithstanding her want of right in every way," Musammat Kali had, on the 21st May 1877, executed a bond for Rs. 778 in favour of the defendant Raghubans Pandey, in which she made a simple mortgage of a one anna and one pie share in mauza Sihonda, a part of the property recorded in her name; that Musammat Kali was not competent to make the mortgage, nor was there any necessity for the loan, nor was the bond in question in any way valid and enforceable as regards the plaintiffs, nor had Musammat Kali any right in the property "other than her possession as a trustee in lieu of her alimony;" that in addition to the bond mentioned above Musammat Kali had given another bond to Raghubans Pandey, on which the latter had, on the 6th February 1884, obtained a decree, in execution of which he had caused a part of the property recorded in the name of Musammat Kali to be attached; and that the property was not liable for this debt and had [72] been wrongfully attached, Musammat Kali having no right therein, and the debt not having been contracted for necessary purposes. On these allegations the plaintiffs claimed the following reliefs:—

"That by establishment of the plaintiffs' right and invalidation of the bond, dated the 21st May 1877, and of the attachment proceedings, it may be

* [Sec 42 :—Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Discretion of Court as to declarations of status or right.

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Bar to such declaration.

Explanation.—A trustee of property is a 'person interested to deny' a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.]

declared that the under-mentioned property, recorded in the name of the female defendant, can in no way be liable for the amount due under the bond dated the 21st May 1877, and for the amount of the decree dated the 6th February 1884."

In the mortgage-bond, in respect of which relief was claimed, Musammatt Kali, after stating that she had borrowed Rs. 778 from Raghubans Pandey at the rate of Re. 1-8-0 per cent. per mensem, and promising to repay that amount within one year, and after stating the purposes for which the money had been borrowed stated as follows:—"I hypothecate a one anna and one pie share of mauza Sihonda.....for the sum, and I will not mortgage or transfer it in any way until the said sum with interest is repaid."

The suit was defended by both defendants upon the ground, amongst others, that Doman Pandey had in his lifetime separated from the family to which he and the plaintiffs belonged; that Behari, the deceased husband of Musammatt Kali, had not predeceased his father Doman and his brother Nihor, but, on the contrary, Nihor had died first and then Doman, and Behari had succeeded to the property recorded in his father's name, and had in turn been succeeded by Musammatt Kali as his heir; and that the debts which the lady had contracted she had power to contract, and the plaintiffs were not competent to maintain the suit, inasmuch as they were not the next reversioners, Behari's daughter and daughter's son being alive.

The defendants succeeded in this defence and their other defences in the Court of First Instance (Subordinate Judge of Gorakhpur), which dismissed the suit. The plaintiffs appealed.

Messrs. *T. Conlan* and *G. T. Spankie*, for the Appellants.

Mr. C. H. Hill, *Babu Jogindro Nath Chaudhri* and *Lala Jokhu Lal*, for the Respondents.

[73] *Mr. G. T. Spankie*, for the Appellants.—The evidence on the record shows that Behari, husband of the defendant Musammatt Kali, predeceased his father Doman and his brother Nihor. The family was joint, and Kali enjoyed the profits of the estate, by permission of the plaintiffs, in lieu of her maintenance only, and not by reason of any interest possessed by her in the property. This being so, her possession was necessarily restricted to her own personal enjoyment, and could not be alienated by her. The mortgage executed by her in favour of the defendant No. 2 was therefore an illegal transaction, and the plaintiffs are entitled to a declaration to that effect.

[*PETHERAM, C.J.*—If the defendant's possession depends wholly on the plaintiffs' permission, she is their tenant-at-will, and they can eject her at any moment. In that case, however, they must seek their relief by ejectment, and cannot, with reference to the proviso to s. 42 of the Specific Relief Act, sue for a mere declaration of their title. The Legislature intended by that section that the Court might grant to a plaintiff the relief granted by the Court of Chancery in cases where no relief at common law was available. Where a proprietor's title was in danger, and he could not bring an action at common law to try the question of title, the Court of Chancery would give him this indirect form of relief, the more direct kind not being open to him. A mere declaration was never granted except on this condition. On the other hand, if the plaintiffs in this case cannot eject the widow at their will, she has at all events a right to possession, and that is surely a transferable interest?]

What the plaintiffs desire is not the ejectment of the widow, but the invalidation of the mortgage of the estate by her. All that the proviso to s. 42 of the Specific Relief Act forbids is a suit for a pure declaration, without

further relief: it does not compel a plaintiff to sue for all the relief which could possibly be granted, or debar him from obtaining a relief which he wants unless at the same time he asks for a relief which he does not want. The plaintiffs here ask for consequential relief, in addition to a declaration, for they seek to set aside the alienation and the attachment proceedings. Secondly, assuming that the plaintiffs [74] cannot eject the widow, it does not follow that she has a transferable interest in the property. Her interest was by its very nature confined to her personal enjoyment, and incapable of transfer, resembling in this particular the interest of an occupancy-tenant under Act XII of 1881 (N.-W. P. Rent Act), whose alienations though invalid do not entitle the landlord to eject him from his holding. The analogy of English estates is misleading when applied to the possession and transfer of property under the Hindu law.

[PETHERAM, C.J.—You say that the family being joint, the widow of Behari took no interest in the estate, but a mere right of maintenance, but that, by a family arrangement, the reversioners allowed her a life estate in lieu of her maintenance. What evidence is there to show that this life estate was confined to her personal enjoyment, and that she was not competent to transfer it?]

That is the necessary legal consequence of the facts that the family was joint, and that the widow's possession was in lieu of maintenance. She was not in the position of the widow of a separated Hindu.—*Hurdyal Singh v. Shewdyal Singh*, N.-W. P. S. D. A. Rep., 1864, vol. ii, p. 104.

[OLDFIELD, J.—Surely the power of the widow to transfer an interest of this kind is a matter of evidence in each case.

PETHERAM, C.J.—If the widow had the limited interest you have described, nothing beyond that interest can be affected by her alienations. If the mortgage-deed does not specifically refer to the whole estate, it must be assumed to relate to such interest only as the mortgagor could legally deal with, and you cannot sue upon the assumption that she meant to deal with more. How then is the title of the reversioners endangered?]

Such a transfer is injurious to the reversioners, because the transferee may be put in possession, and they may be compelled to sue him for ejectment, possibly long after the evidence regarding this transaction has ceased to exist. The bond purports, upon its face, to mortgage the whole one anna and one pie share: it contains nothing which confines its operation to the widow's interest, and [75] the *onus* of proving such restriction would lie upon any person asserting it.

[PETHERAM, C.J.—Ought not the plaintiffs to have objected in the execution proceedings to the attachment of the property in execution by the defendant Raghubans Pandey?]

They were not obliged to do so: s. 283 of the Civil Procedure Code does not establish any new form of suit. The form of suit is an old one, and the object of the section is to save it, and to prevent any possible impression that the order refusing to release the property from attachment is conclusive.

Mr. C. H. Hill, for the Respondents, was not called on to reply.

Petheram, C. J.—I am of opinion that this suit is not maintainable. The facts, as alleged by the plaintiffs-appellants themselves, are, that the female defendant is the widow of a Hindu who was a member of an undivided Hindu family, and that they (the plaintiffs) represent the other members of that family. They allege that, after the death of their brother, they allowed the widow's name to be recorded in his place, in respect of his rights and interests in the property in dispute, out of compliment to her, and that subsequently, although she was

not entitled to any interest in the property itself, but only to receive maintenance from them, she was allowed to receive the profits in lieu of the maintenance. They further state that, under this arrangement, she obtained and still continues in possession, and that she executed a deed mortgaging the property to the other defendant. They bring this suit to obtain a declaration that the mortgage was an illegal transaction. It is a suit which must be brought under s. 42 of the Specific Relief Act, or it cannot be brought at all.

Upon this state of facts, the widow's possession—which the plaintiffs themselves allege to be an actual possession—must have one of two characters. Either it is a possession by the plaintiffs' consent, entitling her merely to receive the profits for her maintenance, or it is a possession for her life, given to her in exchange for the annuity which, under the arrangement I have referred to, she has released to the plaintiffs. In either case, I am of opinion that the suit is not maintainable. If her possession is merely [76] permissive, and extends no further than the collection of the profits, then the plaintiffs may eject her from the property, if they are at any time dissatisfied with her mode of dealing with it. Then, before they can claim the relief provided by s. 42 of the Specific Relief Act, they must claim the other relief to which they are entitled—that is to say, the relief of ejectment, that being the substantial and real relief appropriate to such a cause of action. On the other hand, if the widow had an estate in possession, given to her in exchange for the annuity which she had released to the plaintiffs, then she possessed an interest which, so far as I can see, she had a right to dispose of. The mortgage-deed in question contains no description of the amount of the estate mortgaged by her. It is expressed with extreme vagueness, and, upon its face, mortgages her share of the property only. It could therefore have no operation beyond her share; and, in my opinion, no Court would be justified in interfering, and in making such a declaration as the plaintiffs ask for, merely because the deed is so vague that they apprehend that some imaginary claim may possibly be made by somebody at some time or other. Under these circumstances, I am of opinion that the suit and the appeal must be dismissed. Each of the respondents will be allowed his own costs separately.

Oldfield, J.—I agree in the opinion that this is not a case in which the declaration sought for should be granted. I may add that we have heard the appeal on its merits, and I see no reason to interfere with the decision of the Court of First Instance. The appeal is dismissed with two sets of costs.

Appeal dismissed.

[8 All. 76]

The 12th December, 1885.

PRESENT :

MR. JUSTICE BRODHURST AND MR. JUSTICE TYRRELL.

Raghunath Prasad.....Defendant

versus

Gobind Prasad.....Plaintiff.*

Hindu Law—Joint family—Power of the father to alienate ancestral property for pious purposes.

According to the Hindu law, the power of a father to make alienations of joint ancestral estate without his son's consent extends to provision of a permanent shrine for a family idol. *Gopal Chand Pande v. Babu Kunwar Singh*, S. D. A., L. P., 1843, vol. 5, p. 24, referred to.

[77] In a suit brought by a son to set aside an alienation of ancestral estate by the father for the purpose above mentioned, the son having contended that the real motive for the gift was not piety to the gods, but malice against him, the Court remitted an issue to the Lower Appellate Court for the purpose of ascertaining whether the endowment had been made *bona fide* for the satisfaction of the idol and the benefit of the donor's soul, or from motives of spite against the plaintiff.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Pandit Nand Lal, for the Appellant.

Mr. Shivanath Sinha and Lala Lalla Prasad, for the Respondent.

Brodhurst and Tyrrell, JJ.—This is a suit brought by an adult son against his father and the trustee of an idol, on whom the father conferred a house and some moveable effects by a deed executed on the 6th May 1881.

It is conceded that the father and the son are joint owners of a considerable ancestral estate. It is also unquestionable that the shares of the parties in case of a partition between them would be half and half each. On the 8th April 1884, the son brought this suit to cancel the deed of transfer, on the single ground that, under the Hindu law, his father was incompetent to make any disposal whatever of the ancestral estate without his, the son's, consent.

The first Court tried this issue and decided it in favour of the father, dismissing the claim of the plaintiff. The latter pleaded in appeal before the District Judge the absolute inability of his father to deal with the property as he had done, the absence of any legitimate necessity for the alienation in question, and, finally, that the motive of the endowment was not piety to the gods, but malice against the son, who had interfered with a previous disposition of a portion of the property in favour of Musammatt Gumti, a sister of the plaintiff. The Judge found that the father's powers to make an alienation of ancestral estate against the will of his son would not extend to provision of a permanent shrine of a family idol; and that, even if it did, the alienation should be restricted to "a small portion" of the estate. The Judge, holding that the alienated property represented a value of Rs. 693 out of an entire estate worth Rs. 4,000, decided that the gift was exclusive, and decreed the appeal and the suit. This decision is challenged in second [78] appeal; and an examination of the authorities is sufficient to show that a father is

* Second Appeal No. 168 of 1885, from a decree of A. Sells, Esq., District Judge of Cawnpore, dated the 6th January 1885, reversing a decree of Babu Khetar Mohan Ghose, Offg. Munsif of Cawnpore, dated the 22nd July 1884.

competent to deal with ancestral property, not only for the especial exigencies mentioned by the Judge, but also to make "pious and reverential gifts to Brahmans, as Brahmutra Krishnarpana," also "gifts from affection towards Vishnu and other divinities"—*Gopal Chand Pande v. Babu Kunwar Singh*, S. D. A. L. P., 1843, vol. 5, p. 24. The finding of the Judge on this point therefore cannot stand; and we are not informed on what materials he based his finding that the value of the estate is Rs. 4,000 only. The Judge has also omitted to decide the important plea as to the real motive underlying the gift—that is to say, the question of the good faith of the donor.

We have not materials on the record to enable us to dispose of these questions. We therefore refer the following issues for trial under s. 566 of the Civil Procedure Code:—

1. What is the value of the entire ancestral property of the parties to the suit?

Has the endowment been made *bond fide* for the satisfaction of the idol and the benefit of the donor's soul, or from motives of spite against the plaintiff-respondent, as pleaded by him in his fifth plea before the Judge?

On receipt of the findings, ten days will be allowed for objections.

Issues remitted.

NOTES.

[In (1900) 24 Bom., 547, a small gift of affection in favour of a widowed daughter-in-law, comprising a fraction of moveable property acquired by the donor while living in union with the son and the grandson was upheld.

In (1901) 11 M. L. J., 310, gift of a small portion of family property to a temple by a Hindu father, held not valid. This case was distinguished on the ground that the gift here being in favour of a family idol, was valid under Hindu Law.]

[8 All. 78]

The 18th December, 1885.

PRESENT :

MR. JUSTICE STRAIGHT AND MR. JUSTICE TYRRELL.

Paigi and another.....Defendants

versus

Sheonarain.....Plaintiff.*

Husband and wife—Hindu law—Restitution of conjugal rights—Suit by Hindu husband out of caste at time of suit—Decree for restitution conditional on plaintiff's obtaining restoration to caste.

In a suit by a Hindu, a *sunar* by caste, against his wife for restitution of conjugal rights, it was found that the plaintiff, in consequence of having left his wife and cohabited with a Mubammadan woman (whom, however, he had left at the time of suit), had been turned out of caste, but that the misconduct of which he had been guilty was not of such a character as to render him liable to perpetual [79] excommunication, and, upon making certain amends, he could obtain restoration to his caste.

Held, that, while the plaintiff was entitled to come into Court for the relief prayed, unless, in the circumstances above stated, the marriage had, under the Hindu law, been dissolved, the Court was bound, when asked to employ coercive process to compel a wife to return to her husband, not to disregard any reasonable objection she might raise to such process

* Second Appeal No. 256 of 1885, from a decree of W. R. Barry, Esq., Judge of the Court of Small Causes at Allahabad, exercising the powers of a Subordinate Judge, dated the 13th January 1886, affirming a decree of Pandit Indar Narain, Munsif of Allahabad, dated the 17th April 1884.

being granted, either on the ground that she had been subjected before to personal injury or cruelty at the hands of her husband, or that she went in fear of one or the other, or that the husband was actually living in adultery with another woman, or that, if she resumed cohabitation or association with him, he being outcasted, she would herself incur the risk of being put out of caste.

Held, therefore, that in decreeing a claim of this description, a Court was entitled, if it saw good reason to do so, while recognizing the civil rights of a husband to his wife, to put such conditions upon the enforcement of his rights by legal process as the circumstances of the case might fairly demand; and that, applying this principle to the present case, the defendant might reasonably ask the Court, before compelling her return to her husband, to make it a condition that he should first obtain his restoration to caste.

Held, also, that, under the Hindu law, the fact that a husband had had adulterous intercourse with another woman, which had ceased at the time of suit, was not an answer to a claim by him for restitution of conjugal rights.

The facts of this case are stated in the judgment of STRAIGHT, J.

Babu Baroda Prasad Ghose, for the Appellants.

Mr. Abdul Majid, for the Respondent.

Straight, J.—This is a suit brought by the plaintiff, Sheonarain, a *sunar* by caste, against Musammat Paigi, his wife, and Musammat Sarasuti, his mother-in-law, for restitution of conjugal rights.

His allegations are, that he was married to the defendant Musammat Paigi eight years ago; that she now refuses to cohabit with him, and that she is kept from doing so by the second defendant, her mother.

The defendants pleaded two matters in reply. In the first place, it was pleaded that, under an agreement of the 1st June 1876, the plaintiff had, prior to his marriage to the defendant No. 1, undertaken to live in the house of his mother-in-law, defendant No. 2, with his wife after marriage; that defendant No. 1 was married to him on that condition; that he has left the house and refuses to live in it, and is therefore not entitled to enforce [80] his marital rights, and that the defendant No. 1 can consequently withdraw herself from him. In the second place, it was pleaded that the plaintiff, having taken a Muhammadan woman as his mistress, and having lived and eaten food with her, has been put out of caste; and that, under these circumstances, defendant No. 1 cannot be called upon to go back to him, as, if she did, she would be excluded from caste herself. As to the first of these defences, I need scarcely say it is absurd, and of course could not be seriously entertained in a Court of law, and need not be noticed further.

Both the Courts below have given the plaintiff a decree, and the defendants are appellants before us from the decision of the Subordinate Judge.

The pleas in appeal are in substance as follows:—

1. That as the plaintiff is still out of caste, the defendant, his wife, is not bound to return to him.

2. That until he has been restored to caste no cause of action can accrue to him.

Now it has been found by both the Courts that the plaintiff did leave his wife and cohabit with another woman, whom now, however, he has given up, and was consequently turned out of caste; but that the impropriety and breach of caste rules and regulations of which he was guilty was of such a character and description as did not render him liable to perpetual excommunication; but that, upon his making certain amends, by feeding his caste-fellows, he can obtain restoration to his caste that of a *sunar*. This is now admitted to be so on both sides.

Now I need scarcely say that unless we can hold that by being excluded from caste under the circumstances I have mentioned, the plaintiff had extinguished his ordinary civil rights as a husband to require his wife to live with him, or that, in other words, the marriage had, under the Hindu law, thereby been dissolved, he is entitled to come into court to seek the relief he asks, if he is not otherwise disqualified from obtaining it. But while entertaining this view, we are, I think, bound, when asked to employ coercive process to compel a wife to return to her husband, not to disregard any reasonable objection she may raise to [81] such process being granted, either on the ground that she has been subjected before to personal injury or cruelty at the hands of her husband, or that she goes in fear of one or the other, or that the husband is actually living in adultery with another woman, or that, if she resume cohabitation or association with him, he being outcasted, she will herself incur the risk of being put out of caste.

I therefore think that, in decreeing a claim of this description, a Court is entitled, if it sees good reason to do so, while recognizing the civil rights of a husband to his wife, to put such conditions upon the enforcement of his rights by legal process as the circumstances of the case fairly demand.

Applying this principle to the present case, it seems to me that the defendant Musammat Paigi may reasonably ask us, before compelling her to return to her husband, to make it a condition that he shall first obtain his restoration to caste, and to this extent I think her appeal should succeed. Having looked into the authorities on the subject, I am not prepared to hold, until corrected by a higher tribunal, that, under the Hindu law, the fact that a husband has had adulterous intercourse with another woman, which has ceased at the time of suit, is an answer to a claim by him for restitution of conjugal rights.

Before stating what the decree here should be in terms, I have to observe, with reference to Musammat Sarasuti, that no case whatever has been made out by the plaintiff for making her a party to the proceedings, and the suit as against her must be dismissed. It only remains for me to direct that the decree be framed in the following terms:—

It is ordered and decreed that this appeal be decreed; that the suit in respect of Musammat Sarasuti do stand dismissed; and that it be declared that the plaintiff is entitled to his conjugal rights as to Musammat Paigi; and that, upon his obtaining his restoration to his caste, the defendant Musammat Paigi, his lawful wife, do and is hereby ordered to return to his protection within one month of such restoration to caste and of request by him to her to return thereto.

In the event of the plaintiff satisfying the condition of this decree, and the defendant Musammat Paigi wilfully failing to obey [82] its directions, her obedience will be enforced in manner provided by s. 260 of the Civil Procedure Code.

The costs of this appeal will be paid by the respondent, who will also pay the costs of Musammat Sarasuti throughout the litigation.

The defendant No. 1 will pay her own costs in the Court below.

Tyrrell, J.—I concur.

Appeal allowed.

NOTES.

[RESTITUTION OF CONJUGAL RIGHTS.]

I. Valid Defences.

(a) *Cruelty*:—(1905) 34 Cal., 971; (1911) 13 I. C. 609; 12 A. L. J. 995.

(b) *Grave matrimonial offences.*

Compelling wife and son to live with a low caste woman as member of family was considered to be a grave matrimonial offence disentitling the husband for restitution of conjugal rights with his wife:—(1905) 34 Cal., 971; 1 C. L. J. 283; 9 C. W. N. 510.

II. Invalid Defences.

(a) *Insanity of the husband*:—

(1890) 13 All., 126

(b) *Minority* :—(1900) 28 Cal., 37, where the wife was of sufficient age to live with her husband though she was yet a minor.

(c) *Loss of caste* :—(1904) 27 All., 96, where admission into caste was not recognized to be a condition precedent for decreeing restitution ; (1907) 31 Bom., 366 (ex-communication).

(d) *Ante-Nuptial agreement* :—

An agreement before marriage that the husband should never remove his wife was held invalid as being opposed to Hindu Law :— (1901) 28 Cal., 751. Nor is an agreement for future separation valid :—(1912) 14 Bom. L. R., 1178.]

[8 All. 82]

The 18th December, 1885.

PRESENT:

MR. JUSTICE STRAIGHT AND MR. JUSTICE TYRRELL.

Ganga Ram and another.....Defendants
versus
Data Ram and another.....Plaintiffs.*

*Appellate Court, powers of—Withdrawal of suit—"Decree"—Appeal—
Civil Procedure Code, ss. 373, 582.*

Where, on appeal from a decree dismissing a suit, the Appellate Court, being of opinion that the plaint was informally drawn and its allegations regarding the cause of action not sufficiently specific, gave the plaintiff permission, under s. 373† of the Civil Procedure Code, to withdraw the suit, with leave to institute a fresh one—*held*, that the order of the appellate Court was a "decree" within the meaning of the Civil Procedure Code, and afforded a proper ground of second appeal to the High Court.

Per STRAIGHT, J., that, with reference to the terms of s. 582‡ of the Civil Procedure Code, the appellate Court had power to avail itself of the provisions of s. 373, and therefore had a discretion to make the order allowing the plaintiff to withdraw the suit and institute a fresh one. *Gregory v. Dooley Chand Kandary Mull*, 14 W. R. O. J., 17, and *Khatoon Koonwar v. Hurdoot Narain Singh*, 20 W. R., 163, referred to.

Also *Per* STRAIGHT, J., that it could not be said that the appellate Court in this case had exercised its discretion so unreasonably or erroneously as to compel the interference of the High Court with it in appeal.

* Second Appeal No. 206 of 1885, from a decree of H. A. Harrison, Esq., District Judge of Meerut, dated the 11th December 1884, affirming a decree of Maulvi Munim-ud-din Ahmad, Munsif of Ghaziabad, dated the 11th September 1884.

† [Sec. 373 :—If, at any time after the institution of the suit, the Court is satisfied on the

Power to allow plaintiff to withdraw with liberty to bring fresh suit.

application of the plaintiff (a) that the suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for permitting him to withdraw from the suit or to abandon part of his claim with liberty to bring a fresh suit for the subject-matter of the suit or in respect of the part so abandoned, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit.

If the plaintiff withdraw from the suit, or abandon part of his claim, without such permission, he shall be liable for such costs as the Court may award, and shall be precluded from bringing a fresh suit for the same matter or in respect of the same part.

Nothing in this section shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others.]

‡ [Sec. 582 :—The appellate Court shall have, in appeals under this chapter, the same powers, and shall perform as nearly as may be the same duties,

Appellate Court to have same powers as Courts of original jurisdiction.

as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted under Chapter V ; and, in Chapter XXI, so far as may be, the words "plaintiff," "defendant" and "suit" shall be held to include an appellant, a respondent and an appeal, respectively, in proceedings arising out of the death, marriage or insolvency of parties to an appeal.

The provisions hereinbefore contained shall apply to appeals under this chapter so far as such provisions are applicable.]

Per TYRRELL, J., that it might be taken that the appellate Court, though not so stating in express terms, meant to set aside, and did set aside, the decree of the Court of First Instance, regarding it as a decree which could not have been rightly made and must be set aside, by reason of the radical defect in the plaint, the basis of the suit and the decree; and that, in this view, there was no legal objection to the exercise by the appellate Court of the discretionary power of Chapter XXII of the Code.

THE plaintiffs sued the defendants for the following reliefs:—(a) that a wall which they represented had been built on their land by [83] the defendants might be ordered to be demolished; (b) that they might be put in possession of 7 bighas and 13 biswas of land of which they alleged they had been dispossessed by the defendants. The defendants, in their written statement, objected to the plaint as not being sufficiently specific, both in regard to the situation of the wall sought to be removed and also to the boundaries of the land sought to be recovered.

The Munsif of Ghaziabad, who tried the suit, was of opinion that he was not entitled to reject the plaint upon this ground, and proceeded to dispose of the suit on the merits, and in the result dismissed it. On appeal by the plaintiffs the District Judge of Meerut was of opinion that the plaint was informally drawn; that it did not state of how much land the plaintiffs had been dispossessed, or in what way the erection of the wall had deprived them of the land; and he expressed an opinion to the effect that the Munsif ought to have returned it for amendment before the first hearing. He added that, under the Full Bench ruling in *Damodar Das v. Gokal Chand*, I. L. R., 7 All., 79, no return for amendment could now be made, and in the result he gave the plaintiffs permission to withdraw the suit with leave to institute a fresh suit. He ordered the plaintiffs to pay all the defendants' costs up to that point.

From this decision the defendants appealed to the High Court on the following grounds:—

1. That the Judge, as a Court of appeal, had no power to make the order he did.
2. If he had the power to do so, he exercised his power improperly and irregularly.

A preliminary objection was taken to the hearing of the appeal by the pleader for the respondents, upon the ground that the order of the Judge did not come within the definition of "decree" as used in the Civil Procedure Code, and it therefore could not be made the subject of second appeal.

Babu Jogindro Nath Chaudhri, for the Appellants.

Munshi Kashi Prasad, for the Respondents.

[84] **Straight, J.** (after stating the facts continued):—I must deal with this preliminary objection first, and upon it I have only this much to say, that it seems to me that the order with which the Judge closes his judgment must be treated and regarded as one disposing of the suit and the appeal before him. It must, I think, be held to have put an end to the decree which had been passed in the defendants' favour by the Munsif, and it was therefore such an adjudication as must be regarded in the light of a *decree*. In this view of the matter, it affords a proper ground for a second appeal to this Court.

The next question to consider is the first point taken by the appellant. Had the Judge, sitting as a Court of appeal, power to make the order he did, with reference to the provisions of s. 373 of the Civil Procedure Code? Now, by s. 582 of the Civil Procedure Code, it is provided that a Court of appeal shall have in appeals the same powers, and shall perform, as nearly as may be, the same duties, as are conferred and imposed by this Code on Courts of

original jurisdiction in respect of suits, and the provisions contained in the previous portion of the Civil Procedure Code shall be applicable to appeals, so far as such provisions are applicable. It therefore comes to this, that, in so far as they may be applicable, a Court of appeal has power to avail itself of the provisions of s. 373. In this connection I may refer to a ruling of Sir BARNES PEACOCK—*Gregory v. Dooley Chand Kandary Mull*, 14 W.R.O J., 17—which, though delivered in reference to the provisions of the old Civil Procedure Code (Act VIII of 1859), read in conjunction with s. 37 of Act XXIII of 1861, may nevertheless be regarded as an authority in regard to the present Code. There it was held that a Court of appeal had the power to allow a plaintiff to withdraw a suit and institute a fresh one. In other words, it was there decided that a Court of appeal is, in this respect, placed in the same position as a Court of original jurisdiction; and if such Court of original jurisdiction has not done what it ought to do, then the Court of appeal may itself do what that Court ought to have done. I may observe that there is another ruling to the like effect—*Khatoon Koonwar v. Hurdoot Narain Singh*, 20 W. R., 163. Agreeing in the views expressed in those cases, I think, with [85] regard to the first contention of the appellants, that the Judge had power, as a Court of appeal, to make the order he did.

The only other point for consideration is, whether the Judge was right in making his order, or was the exercise of his discretion so unreasonable that we ought to set his order aside.

Now by s. 373 of the Civil Procedure Code, read with s. 582, the Judge had, as I have already ruled, a discretion to permit the plaintiffs to withdraw the suit with leave to sue again. That discretion the Judge has exercised; and, without expressing any opinion as to whether, had I been in his place, I should have taken the course he did, I think it enough to remark that I cannot say that he exercised his discretion so unreasonably or erroneously as to compel our interference with it in appeal.

Looking to all the circumstances of the case, I dismiss the appeal; but as the defendants might well have accepted the Judge's order which gave them all their costs, I think this appeal was a very unnecessary proceeding, and that they ought not to have any costs. Consequently each party will pay his own costs on the appeal.

Tyrrell, J.—The difficulty I felt in dealing with the procedure adopted by the Lower Appellate Court was, that a plaintiff could not, in my judgment, conceivably be allowed to withdraw, in the proper sense of that term, from a suit that had reached its termination in a decree. To allow a plaintiff to withdraw from a decreed suit is tantamount to allowing him to withdraw from the operation of the decree in that suit, which would stand, however, as a valid operative decree, such withdrawal notwithstanding, in favour of the defendant. In other words, it seemed to me that the District Judge, who had not in any way considered the decree in appeal before him, had not pronounced any decision on its legality or propriety, had left it in all respects undisturbed, could not allow the plaintiffs-appellants before him to withdraw from the suit under s. 373 of the Code, so as to enable them to bring a fresh suit. If there were no other obvious difficulties in the way, the subsisting decree of the Court of First Instance would bar any second action in the same matter.

[86] But, on consideration, I think that we may take it that the Court below—though this was not done in express terms—meant to set aside, and did set aside, the decree of the Court of First Instance, regarding it as a decree which could not have been rightly made and must be set aside, by reason of

the radical defect discerned by the Court of appeal in the plaint, the basis of the suit, and the decree.

Taking this view of the meaning and effect of the decree before us, I see no legal objection to the exercise by the appellate Court of the discretionary power of Chapter XXII of the Code; and in this view of the case I readily concur in the order proposed by my brother STRAIGHT.

Appeal dismissed.

NOTES.

[This case was *dissented* from and not followed in (1893) 16 All., 19; (1895) 17 All., 97; (1891) 18 All., 322. The earlier case of 6 All., 211, was approved and followed in all the above cases.]

[8 All. 86]

The 21st December, 1885.

PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE BRODHURST.

Durga Prasad.....Defendant

versus

Shambhu Nath and others.....Plaintiffs.*

Mortgage—Suit by mortgagee for possession of the mortgaged property—Sale of mortgaged property by mortgagor—Pre-emption—Purchaser for value without notice—Adverse possession—Act XV of 1877 (Limitation Act), sch. ii, No. 144.

Under a registered deed of mortgage dated in May 1869, the mortgagee had a right to immediate possession; but by arrangement between the parties, the mortgagors remained in possession, the right of the mortgagee to obtain possession as against them being, however, kept alive. In October 1869, the mortgagors sold the property, and thereupon one *R* brought a suit to enforce the right of pre-emption in respect of the sale and obtained a decree, and got the property and sold it in 1871 to *D*. In 1883, the mortgagee brought a suit against *D* to obtain possession under his mortgage.

Held, with reference to a plea of adverse possession for more than twelve years set up by the defendant, that the position of a person who purchased property by asserting a right of pre-emption was not analogous to that of an auction-purchaser in execution of a decree, but that such person merely took the place of the original purchaser and entered into the same contract of sale with the vendor that the purchaser was making. There was privity between him and the vendor, and he came in under the vendor, and his holding must be taken to be in acknowledgment of all obligations created by his vendor. *Anundoo Moyee Dossee v. Dhonendro Chunder Mookerjee*, 14 Moo., I. A., 101: 8 B.L.R., 122, distinguished.

Held, also, that although it would be material to show that the defendant had in any way by fraud been kept out of knowledge of the mortgage, his not having [87] notice of it would not otherwise affect his liability, inasmuch as the principle on which Courts of Equity in England refuse to interfere against *bona fide* purchasers for a valuable consideration, without notice, when clothed with the legal title, had no applicability in the Courts of British India.

Held, under these circumstances, that there was no equitable ground why the plaintiff's right under the mortgage, which had priority, should be defeated by the defendant's purchase. ON the 20th May 1869, Kunj Behari Lal, a defendant in this suit, on his own behalf, and as the *sarbarakar* or manager of Musammat Tejo, also a

* Second Appeal No. 156 of 1885, from a decree of G. E. Knox, Esq., District Judge of Agra, dated the 4th November 1884, affirming a decree of Babu Abinash Chandar Banarji, Subordinate Judge of Agra, dated the 5th March 1884.

defendant in this suit, executed a deed of mortgage in favour of one Bakhtawar Mal in respect of a share in a village called Baroli and of other shares in other villages. The deed provided that the mortgagor should deliver possession of the mortgaged property to the mortgagees; that the latter should pay the Government revenue out of the profits, and also pay himself Rs. 270 yearly as interest, and pay the balance to the mortgagors; and that if what remained after the payment of the Government revenue did not amount to Rs. 270, the mortgagors should make good the deficiency, and as long as they did so, the mortgagors should not sue for the principal till the end of the year 1280 fasli, corresponding with the 7th September 1873.

The mortgagees did not deliver possession of the property, and on the 13th September 1870, the mortgagors sued them for Rs. 270, the interest for the first year, and obtained a decree against Kunj Behari Lal alone, Tejo being exempted. The mortgagors then came to an arrangement with the mortgagee. On the 18th March 1871, they gave one Sham Lal, a servant of the mortgagee, a general power-of-attorney, which authorized him to take possession of all their property, including the mortgaged property, and to realize the profits and, after paying them a certain sum by way of maintenance, to pay the balance to the mortgagee on account of his debt. This power also authorized Sham Lal to collect the debts due to the mortgagors and pay them to the mortgagee on the same account. This power was apparently not acted on. On the 28th September 1871, the mortgagors gave the mortgagee a bond for Rs. 1,000, out of which sum they were only paid Rs. 226, the balance being deducted as follows:—Rs. 375 were deducted as due under the decree mentioned above; Rs. 349 were deducted as the interest due on the mortgage-deed from the date of that decree to [88] the date of the bond, and Rs. 60 were deducted on account of moneys advanced subsequently to the date of the mortgage-deed.

On the 19th June 1874, Tejo executed a deed of sale of certain property in favour of the mortgagee in part satisfaction of the principal and interest due on the mortgage-deed, and Kunj Behari Lal also executed deeds of sale of certain properties in favour of the mortgagee in part satisfaction of the moneys due on the mortgage-deed and the bond. On 21st September 1874, the latter made another payment of Rs. 325, in part satisfaction of the money due on the mortgage-deed and the bond, by executing a deed of sale for that amount of certain property in favour of the mortgagee. In this deed the several sums which had been paid to the mortgagee on account of the mortgage and bond were set out, and it was stated that a balance of Rs. 3,105 was due to him.

In the meantime, on the 7th October 1869, Kunj Behari Lal sold to one Bansidhar the share in the village Baroli, part of the property mortgaged by the deed of the 20th May 1869, to Bakhtawar Mal. One Raghobar claimed the share by right of pre-emption and obtained a decree for it on the 2nd August 1870. On the 20th April 1871, Raghobar sold the property to Durga Prasad. Bansidhar and Raghobar had been in possession of the share, and Durga Prasad obtained possession of it on the date of the sale to him.

The present suit was brought in March 1883, by the next friend of Shambhu Nath, the heir of Bakhtawar Mal, for possession of the property mortgaged to him by the deed of the 20th May 1869. Durga Prasad and certain other persons to whom other portions of the mortgaged property had been transferred were made defendants jointly with the mortgagors.

The plaintiff alleged in his plaint that, having regard to the acknowledgments and part-payments by the mortgagors, the suit was within time, and that his cause of action arose in January 1883, when the defendants refused to give him possession.

All the defendants defended the suit on the ground that it was barred by limitation, more than twelve years having elapsed from the date of the mortgage; and the defendant Durga Prasad further defended it on the ground that he and his vendor [89] had been in adverse possession of the share in the village of Baroli for more than twelve years, and the suit as regards that share was barred by limitation.

The Court of First Instance (Subordinate Judge of Agra) held on the first point that, inasmuch as the mortgagors had down to the year 1874 repeatedly acknowledged the title of the mortgagee in several documents executed by them, and had not only paid him down to the 21st September 1874, interest on the mortgage-deed, but had also paid him a portion of the principal, the suit was not barred by limitation simply because it had not been brought within twelve years from the date of the mortgage, but the plaintiff was entitled to the benefit of ss. 19 and 20 of the Limitation Act. The Subordinate Judge referred to *Mankee Koer v. Sheikh Mannoo*, 14 B. L. R., 315.

On the second point it was contended for the defendant Durga Prasad that the principle laid down by the Privy Council in *Brijonath Koondoo Chowdry v. Khelut Chunder Ghose*, 14 Moo., I. A., 144 : 8 B. L. R., 104, and *Anundoo Moyee Dossee v. Dhonendro Chunder Mookerjee*, 14 Moo., I. A., 101 : 8 B. L. R., 122, applied to him, there being no difference between his position and that of a purchaser at an execution-sale. On this point the Subordinate Judge held that the defendant Durga Prasad was not in the position of a purchaser at an execution-sale, but was a person claiming under a voluntary alienation from the mortgagor. The Subordinate Judge further observed as follows:—"As a private alienee of the mortgagor a slight inquiry at the registration office would have disclosed to him the mortgage in favour of Bakhtawar Mal. If he did not make such inquiry, it was his fault, and he cannot be considered to be a *bona-fide* purchaser without notice. There is nothing to show that Bakhtawar Mal wilfully concealed his mortgage from him. Durga Prasad must therefore be held to have purchased the property subject to the plaintiff's mortgage."

The Subordinate Judge in the result gave the plaintiff a decree for possession of the mortgaged property, which, on appeal by the defendant Durga Prasad, the Lower Appellate Court (District Judge of Agra) affirmed.

[90] The defendant Durga Prasad again contended in second appeal that the suit was barred by limitation so far as it affected him.

Babu Dwarka Nath Banarji, for the Appellant.

Mr. T. Conlan, for the Respondents.

Oldfield and Brodhurst, JJ.—Kunj Behari and Musammat Tejo mortgaged the property in suit by a registered deed, dated 29th May 1869, to the plaintiff. Under the deed the plaintiff had a right to immediate possession: by arrangement, however, between the mortgagors and mortgagee, the former remained in possession. The right, however, of the plaintiff to obtain possession as against the mortgagors was kept alive. The mortgagors, however, on the 7th October 1869, sold the mortgaged property in suit to one Bansidhar. One Raghobar brought a suit in respect of the sale to enforce pre-emption and obtained a decree in his favour and got the property; and he made a sale of it on the 20th April 1871, to the defendant in this suit.

The plaintiff-mortgagee has now brought this suit against the defendant to obtain possession under his mortgage. The suit was instituted on the 17th March 1883. His claim has been decreed, and the material question in appeal is, whether the defendant can successfully plead limitation against the plaintiff.

It has been contended that Raghobar, who obtained the property by asserting a right of pre-emption by suit, is in a better position than an ordinary purchaser by a private sale, and has a position analogous to that of a purchaser

at an execution-sale; and that his possession was not as mortgagor and in acknowledgment of the continuance of the title of the mortgagee, but as absolute owner: and his possession and subsequent possession of defendant will be adverse to the right of the mortgagee, and the suit barred by limitation; and we are referred to the case of *Anundoo Moyee Dossee v. Dhonendro Chunder Mookerjee*, 14 Moo., I.A., 101 : 8 B.L.R., 122. The position however, of a person who purchases property by asserting a right of pre-emption is not, in our opinion, analogous to that of an auction-purchaser in execution of a decree. He merely takes the place of the original purchaser and enters into the same contract of sale with the vendor that the purchaser was making. There is privity [91] between him and the vendor, and he comes in under the vendor, and his holding must be taken to be in acknowledgment of all obligations created by his vendor. The case of *Anundoo Moyee Dossee*, 14 Moo. I. A., 101 : 8 B. L. R., 122, is therefore not applicable. Moreover, that case was not governed or decided under the present Limitation Act. Article 144, Act XV of 1877, is the law which governs this case; and the time from which the period begins to run is when the possession of the defendant becomes adverse to the plaintiff. There is nothing to show—and it is not pretended—that until recently, when the present dispute arose, there were any conflicting claims in respect of the mortgage from which the assertion of an adverse title on the defendant's part against the plaintiff can be gathered, so as to make his possession adverse. The lower Courts have further held that the defendant-appellant had constructive notice of the mortgage by reason of the instrument being registered. This is a question which need not be discussed. It would be material to show that the defendant had in any way by fraud been kept out of knowledge of the mortgage; but his not having notice of it otherwise will not affect his liability.

The principle on which Courts of Equity in England refuse to interfere against *bona fide* purchasers for a valuable consideration, without notice, when clothed with the legal title, has no applicability in our Courts.

There is no equitable ground why the plaintiff's right under the mortgage should be defeated by the defendant's purchase. It has priority; and if the defendant had no notice, it will not affect the plaintiff, who was not responsible for that.

The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[This was distinguished in (1890) 13 All., 28.]

[3 All. 91]

The 24th December, 1885.

PRESENT :

MR. JUSTICE STRAIGHT AND MR. JUSTICE TYRRELL.

Bhagwant Singh and another.....Plaintiffs

versus

Tej Kuar and others.....Defendants.*

Civil Procedure Code, s. 13—Res judicata.

Two-thirds of a village were sold by T, P, and B. B was the widow of S, her name being recorded in respect of the property formerly recorded in his [92] name, and what she

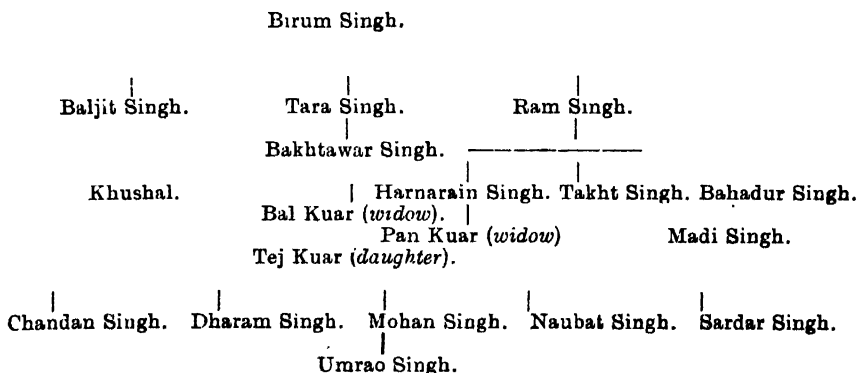
* Second Appeal No. 72 of 1885, from a decree of A. F. Millett, Esq., District Judge of Shahjahanpur, dated the 12th November 1884, affirming a decree of Maulvi Muhammad Ismail, Munsif of Bisauli, dated the 30th June 1884.

sold was his one-third share in the village, the other one-third being sold by *T* and *P*. The vendors having refused to give possession of the property, the purchasers sued them for possession of it and joined as defendants to the suit *C*, *D*, and *M*, to whom belonged the remaining one-third share in the village. These latter persons contended, *inter alia*, that the family was a joint one, and that *B* was not competent to alienate her deceased husband's share in the village. The Court decided that the family was joint. After *B*'s death, her daughter *K*, whose name had been recorded in place of her mother's, made a usufructuary mortgage of another village in which her deceased father had formerly owned a share. A suit was brought by certain persons who had purchased the right in the same village of the representatives in interest of *C*, *D*, and *M*, against *K*, her mortgagee, and their vendors, to set aside the mortgage and recover the interests which they had purchased. They contended that the family was joint, and that the question whether it was joint or divided was *res judicata* by reason of the decision in the former litigation.

Held, that the question whether the family was joint or divided had not, in the former suit, been determined among the defendants *inter se*, but simply as against the plaintiff, and could only be *res judicata* against him or parties claiming under the same title; and the decree in that suit was therefore not binding against *K* in the hands of the present plaintiffs, who were not the assignees of the plaintiff in the former suit, but of persons who were arrayed in it as defendants along with *B*, *K*'s mother, and on the same side.

Shadal Khan v. Amin-ullah Khan, I. L. R., 4 All., 92, referred to by STRAIGHT, J., and distinguished by TYRELL, J. *Narain Kuar v. Durjan Kuar*, I. L. R., 2 All., 738, referred to by STRAIGHT, J.

THE following genealogical table is material to the question raised by this appeal:—



Birum Singh died possessed of a number of villages, which, on his death, devolved on his three sons, Baljit Singh, Tara Singh, and Ram Singh, in equal one-third shares.

Bakhtawar Singh, son of Tara Singh, died in 1858, leaving a widow, Bal Kuar, whose name was recorded in respect of the [93] property recorded in her husband's name at the time of his death. On the 1st September 1862, Takht Singh, one of the sons of Ram Singh, Madi Singh, one of his grandsons, Bal Kuar, and Pan Kuar, widow of Harnarain Singh, son of Ram Singh, sold to one Ram Prasad and certain other persons two-thirds of one of the villages mentioned above, called Bisauli. The vendors having refused to give possession of the property, the purchasers sued them for possession of it. Chandan Singh, Dharam Singh, and Mohan Singh were made defendants to the suit after its institution. They contended, amongst other things, that Bal Kuar was not competent to alienate her deceased husband's one-third share in Bisauli, as the family was a joint one. Bal Kuar contended that the three

defendants named above were illegitimate, and therefore not competent to challenge the sale. Takht Singh and Madi Singh contended that they were the heirs to Bakhtawar's share. The question whether the family was joint was decided by the Court of First Instance in the affirmative, and this decision became final in 1868.

In 1880 Bal Kuar died, and on her death Tej Kuar's name was recorded in respect of the property which had been recorded in Bakhtawar Singh's name, and, after his death, in Bal Kuar's name. On the 2nd May 1881, Tej Kuar gave a usufructuary mortgage of one of the villages above mentioned to one Makund Ram. In August 1883, Umrao Singh, Naubat Singh, and Sardar Singh sold their interests in the same village. The purchasers brought the present suit against Tej Kuar, the heirs of the mortgagee, and their vendors, to set aside the mortgage by Tej Kuar and recover the interests which they had purchased. They alleged, *inter alia*, that at the death of Bakhtawar Singh, the family was joint and his rights and interests had passed on his death to the surviving male members of the family, and contended that the question whether the family was joint or not was *res judicata* with reference to the decision in the former litigation.

Both the lower Courts disallowed this contention.

In second appeal by the plaintiffs they raised the same contention.

Mr. T. Conlan and Pandit Ajudhia Nath, for the Appellant.

[94] Babu Dwarka Nath Banarji, Pandit Bishambar Nath, and Munshi Hanuman Prasad, for the Respondents.

Straight, J.—I am clearly of opinion that this appeal fails. The only plea pressed upon us by the learned counsel is the first, which invites us to disagree with the view of the learned Judge upon the point of *res judicata*. Assuming, though without conceding it, that Musammatt Tej Kuar would be bound by a decree formerly obtained against her mother, Bal Kuar, in respect of the subject-matter of the present suit, such decree would only be binding in the hands of the person who obtained it, or of persons claiming under a title acquired from him. The plaintiffs-appellants before us are not the assignees of Ram Prasad, the plaintiff in the suit of 1868, who, it may be remarked, was unsuccessful in that litigation, but of Chandan and others, who were arrayed in it as defendants along with Bal Kuar and on the same side. In that proceeding the question whether the family was joint or divided was not determined among the defendants *inter se*, but simply as against the plaintiff; and it could only be *res judicata* against him or parties claiming under the same title. My attention has been called to *Shadal Khan v. Amin-ullah Khan*, I.L.R., 4 All., 92. I can only say that if it was intended to lay down in that case that a decree in a suit makes all material questions raised therein *res judicata* as between the defendants to it, I must most respectfully but firmly express my dissent, which is only in accordance with the views expressed by me as far back as 1880, in the case of *Narain Kuar v. Durjan Kuar*, I. L. R., 2 All., 738.

This is the only point before us in second appeal, and such being my opinion with regard to it, the appeal must be dismissed, and is dismissed, with costs.

Tyrrell, J.—I concur in dismissing this appeal with costs, and will only add that in the case of *Shadal Khan v. Amin-ullah Khan*, it was especially noted that the parties to the former suit were in appearance only, and not in

fact, on the same side or in the same array, but were, in fact, on opposite sides and controversially maintaining opposite propositions on the issues under trial.

Appeal dismissed.

NOTES.

[Co-defendants in a suit will not be affected by the judgment therein unless there is a conflict of interest between them there or the disputes between them have been decided therein —(1900) 25 Bom , 74]

[95] *The 2nd January, 1886*

PRESENT

MR JUSTICE STRAIGHT AND MR JUSTICE TYRRELL

Raghubar Dayal and another . . . Plaintiffs

versus

Budhu Lal . . . Defendant *

Mortgage—Redemption—Suit to redeem brought before expiration of term of mortgage.

A mortgage-deed, dated the 15th March 1883, stipulated that the mortgagor would " pay the interest every year and the principal in ten years," that " the principal shall be paid at the promised time, and the interest every year," and that upon failure by the mortgagor to pay the principal and interest " at the stipulated period," the mortgagee should be at liberty to realize the debt from the mortgaged property and from the other property and against the person of the mortgagor. The mortgagor instituted a suit for redemption on the 16th July 1884.

Held, upon a construction of the mortgage deed, that the advance by the mortgagee to the mortgagor was for a period of ten years, certain that the case was essentially one in which, looking to the merits of the matter between the parties, their obligations were mutual and reciprocal and there was nothing in the terms of the deed to take it out of the ordinary rules applicable to documents of the kind, and that while on the one hand the mortgagee could not enforce his rights during the period of ten years, on the other hand the mortgagor was not entitled, before that period had expired to redeem the property *Vadju v. Vadju*, I L.R., 5 Bom , 22, referred to

THE plaintiffs in this suit, the purchasers of one of two houses mortgaged by one Janki Prasad, sued to redeem the mortgage. The defendant set up as a defence that the term of the mortgage had not expired, and therefore the mortgage was not redeemable.

The material portion of the deed of mortgage, which was dated the 15th March 1883, was as follows —

" I, Janki Prasad, do hereby declare that I have borrowed Rs. 200 of the Empress of India's coin, half of which is Rs 100, with interest at the rate of Rs 2 per cent per mensem, from Budhu Lal, in order to pay two instalments of mortgage-money due to Gopi Lal, and also to carry on my own business, and mortgage the two pucca built houses situate in Etawah, which are already hypothecated to Gopi Lal, promising to pay the interest every year, and the principal in ten years. The money has been received in this

* Second Appeal No. 338 of 1885, from a decree of Maulvi Muhammad Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 16th December 1884, reversing a decree of Lala Mata Prasad. Munsif of Etawah dated the 31st July 1884.

way:—Rs. 100 have been left with the creditor to pay the instalments due to Gopi Lal, and the remaining Rs. 100 have been [96] received in cash. The agreement is that the principal shall be paid at the promised time, and the interest every year. In any year in which the interest is not paid up, it shall be calculated and added as principal, and interest shall be charged thereon at the above rate till the date of payment; and in this way every item of interest shall be calculated as principal, and interest shall be charged on the aggregate amount. If the principal, interest, and compound interest is not paid up at the stipulated period, then the creditor is at liberty to realize his money from the houses mortgaged and from my other moveable and immoveable property and my person by bringing a suit. I will not transfer the property mortgaged until the payment of the debt. If I do, the transfer shall be null and void."

The suit was instituted on the 16th July 1884.

The Court of First Instance (Munsif of Etawah) held as follows on the question whether the mortgage was redeemable within the term of ten years:—"It is true that the term fixed for the repayment of the mortgage-money is ten years, but there is not a word in the mortgage-deed prohibiting or precluding the mortgagor from getting the property redeemed before that period. In the absence of a contract to the contrary, I see no reason why the mortgagor or the plaintiffs should not be allowed to repay the debt and protect themselves from the future burden of the interest to be accumulated."

On appeal by the defendant the Lower Appellate Court (Subordinate Judge of Mainpuri) held that the mortgage was not redeemable within the term, observing as follows:—

"I think that the claim brought within the stipulated period of ten years is improper for the following reasons:—

In the first place, the mortgage-deed has the words 'on a promise to pay the principal amount in ten years.' It does not provide that the money shall be paid within ten years, but provides that it shall be paid in full ten years. Secondly, s. 60, Act IV of 1882, provides that on the principal mortgage-money becoming payable, a mortgagor is at liberty to tender its payment at any time he likes and demand that the mortgage-deed should be returned to him if the mortgage is without possession, or that he [97] should be put in possession if the mortgage is accompanied by possession. Hence this section provides that payment shall be made after the money has become payable—that is, after the expiration of the term of the bond and not within it. Thirdly, in the precedent *Vadju v. Vadju*, I. L. R., 5 Bom., 22, the suit brought within the stipulated period was held to be unmaintainable. Although that mortgage was accompanied by possession, yet the principles laid down in the precedent are not inapplicable to this case. There are times fixed for redemption and foreclosure of mortgage. In this case also a redemption can be made and the mortgagee can obtain a decree and bring the property to auction sale at proper times. Fourthly, the suit is untenable also according to justice, because the creditor has lent his money for profit, *i. e.*, to take interest for the stipulated period. His money is secure, and he will take compound interest. If his money be paid within the stipulated time, he will be deprived of the profit. Had it been the intention of the contracting parties that the money should be paid within the stipulated time, it would have been distinctly provided in the mortgage-deed that if the mortgagor should pay the money within that time, it shall be taken. But the mortgage-deed contains no condition to this effect, nor do the words 'within the stipulated period' occur in it. Hence I find that the suit brought within the stipulated time is unmaintainable."

The plaintiffs appealed to the High Court.

Munshi *Hanuman Prasad* and Pandit *Nand Lal*, for the Appellants:
 Pandit *Sundar Lal*, for the Respondent.

Straight, J.—In this case the plaintiffs-appellants are the assignees of certain mortgagors under a mortgage-deed, dated the 15th March 1883, of a house charged as security for the mortgage-debt, and the plaintiffs in this case sue for redemption of the mortgage and bring the money into court for that purpose. The plea of the defendant-respondent is, in effect and substance, that the suit is premature; that the term of the mortgage was ten years, and that neither the plaintiffs nor their assignor was in a position, [98] under the terms of the instrument, to redeem the property before the ten years had expired. The Lower Appellate Court has adopted this view, and it is this decision of the Court which is impeached by the appeal before us.

The primary question is, under the term of the instrument of the 15th March 1883, what was the time at which the principal money advanced on the mortgage was payable by the mortgagor to the mortgagee? In other words, after what date would the mortgagee be able to enforce his rights under the mortgage-deed?

I have no doubt that the Lower Appellate Court was right in the construction placed by it on the instrument of the 15th March 1883, that the advance of Rs. 200 by the mortgagee to the mortgagor was for a period of ten years certain, and that while, on the one hand, the mortgagee could not enforce his rights during that period, on the other hand the mortgagor was not entitled before that period had expired to redeem the property. It is essentially a case in which, looking to the merits of the matter between the parties, their obligations were mutual and reciprocal; and there is nothing in the terms of the deed to take it out of the ordinary rules applicable to documents of this nature. Moreover, in the deed itself it is provided that the principal money is to be paid "at the promised time," and that, in default of such payment, certain contingencies shall arise. Reading this expression with the rest of the language of the instrument, it is obvious that by "promised time" was meant a specific point of time, and that was the period of ten years for which the mortgage was made. I may add that I entirely concur with the views of the learned Judges of the Bombay High Court expressed in *Vadju v. Vadju*, I. L. R., 5 Bom., 22, with regard to the principles which should be applied to such matters, and to which expression had been given in ss. 60 and 61 of the Transfer of Property Act.

The appeal must be dismissed with costs.

Tyrrell, J.—I am of the same opinion.

Appeal dismissed.

NOTES.

[The general principle that, in the absence of contract to the contrary, the right to redeem is co-extensive with the right to fore-close, has been embodied in the Transfer of Property Act.

So the earlier cases which held that the mortgagor may pay up the mortgage whenever he liked, are no longer Law.

But see the following cases for the circumstances under which the mortgagor may be entitled to pay before the expiry of the time mentioned:—(1912) 39 Cal., 828; 15 Ind. Cas., 287; (1907) 29 All., 471.

See also *Ghose on Mortgages*, IVth Ed. Vol. I, p. 230.]

[99] CRIMINAL REVISION.

The 15th January, 1886.

PRESENT :

MR. JUSTICE OLDFIELD.

Queen-Empress
versus
Jokhu and another.

Public nuisance, repeating or continuing—Injunction by public servant not to repeat or continue nuisance—Act XLV of 1860 (Penal Code), s. 291—Criminal Procedure Code, ss. 134, 143, 144, sch. v, Form 20.

To support a conviction under s. 291* of the Penal Code, there must be proof of an injunction to the accused individually against repeating or continuing the same particular public nuisance. It must be shown that the person convicted had on some previous occasion committed the particular nuisance, had been enjoined not to repeat or continue it, and had repeated or continued it.

The authority under which a Magistrate can order or enjoin a person against repeating or continuing a public nuisance is s. 113† of the Criminal Procedure Code. It is the infringement of this order that is punishable under s. 291 of the Penal Code. What is contemplated is an order addressed to a particular person.

A Magistrate's powers to deal with public nuisances are contained in Chapters X and XI of the Criminal Procedure Code. Chapter XI is only properly applicable to temporary orders in urgent cases. It is only in such cases that an order may be made *ex parte*, and any exception is allowed to the general rule that it shall be directed to a particular individual. In such emergent cases an order may, under s. 144‡ of the Code, be directed to the public

* [Sec. 291 :—Whoever repeats or continues a public nuisance, having been enjoined by any public servant who has lawful authority to issue such injunction not to repeat to continue such nuisance, shall be punished with simple imprisonment for a term which may extend to six months, or with fine, or with both.]

† [Sec. 143 :—A District Magistrate or Sub-divisional Magistrate, or any other Magistrate empowered by the Local Government or the District Magistrate in this behalf, may order any person not to repeat or continue a public nuisance, as defined in the Indian Penal Code or any special or local law.]

‡ [Sec. 144 :—In cases where, in the opinion of a District Magistrate, a Sub-divisional Magistrate or of any other Magistrate specially empowered by the Local Government or the District Magistrate to act under this section, immediate prevention or speedy remedy is desirable,

such Magistrate may, by a written order stating the material facts of the case and served in manner provided by section 134, direct any person to abstain from a certain act or to take certain order with certain property in his possession, or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any persons lawfully employed, or danger to human life, health or safety, or a riot or an affray.

An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed *ex parte*.

An order under this section may be directed to a particular individual, or to the public generally when frequenting or visiting a particular place.

Any Magistrate may rescind or alter any order made under this section by himself or any Magistrate subordinate to him or by his predecessor in office.

No order under this section shall remain in force for more than two months from the making thereof ; unless, in cases of danger to human life, health or safety, or a likelihood of a riot or an affray, the Local Government, by notification in the official Gazette, otherwise directs.]

generally, when frequenting or visiting a particular place, to abstain from a certain act; but this provision does not apply to a proclamation directed not to the public generally frequenting or visiting a particular place, but to a portion of the community.

THIS was an application to the High Court for revision of an order of Mr. P. Gray, Joint Magistrate of Allahabad, dated the 22nd October 1885, convicting the petitioners, Jokhu and Cheti, of an offence under s. 291 of the Indian Penal Code.

The first ground of the application was that "the petitioners were not, within the meaning of s. 291 of the Penal Code, enjoined by any public servant to discontinue the public nuisance complained of."

The facts of the case are stated in the judgment of the Court.

Mr. A. Strachey, for the Petitioners.

The Public Prosecutor (Mr. C. H. Hill), for the Crown.

Oldfield, J.—It appears that the Magistrate received a petition on the 16th September 1885, complaining of a nuisance caused by cultivators of fields in the petitioners' neighbourhood spreading nightsoil as manure on their fields. No one was named [100] in this petition; and upon it the Magistrate issued a proclamation forbidding, in general terms, any person spreading nightsoil on his fields so as to cause disease or annoyance.

The proclamation was issued on the 19th September. On the 10th October, one Ali Jan charged Jokhu, the petitioner, and another person who is not before this Court, with offences under ss. 278, 290 and 291, with reference to spreading nightsoil on their fields.

The Police were directed to send up the accused. They sent up Jokhu and Cheti, the petitioners now before this Court (the latter not being one of those whom Ali Jan had charged); and the Magistrate instituted a prosecution against them under s. 291, and convicted them of an offence under that section, and sentenced them to a fine of Rs. 25 each, or simple imprisonment for one month. A petition has been presented for revision, on the ground that no offence under s. 291 has been committed; and in my opinion this is the case. Section 291 is as follows:—"Whoever repeats or continues a public nuisance, having been enjoined by any public servant who has lawful authority to issue such injunction not to repeat or continue such nuisance, shall be punished with simple imprisonment for a term which may extend to one month, or with fine, or with both."

To support a conviction, there must be proof of an injunction to the petitioners individually against repeating or continuing the same particular public nuisance. It must be shown that the person convicted had on some previous occasion committed the particular nuisance, had been enjoined not to repeat or continue it, and had repeated or continued it.

The authority under which a Magistrate can order or enjoin a person against repeating or continuing a public nuisance is s. 143 of the Criminal Procedure Code; and it is the infringement of this order or injunction that is punishable under s. 291 of the Indian Penal Code; and it is clear that what is contemplated is an order addressed to a particular person (see sch. V, Form 20).

In the case before me, these requirements have not been fulfilled. The only order of the Magistrate is contained in the proclamation addressed generally to the public at large. It sets out that some [101] persons not named, have committed a nuisance by spreading nightsoil on their fields; and all cultivators are ordered to refrain from spreading nightsoil so as to cause disease or

annoyance. It is difficult to see how any cultivator could take this order as necessarily applicable to himself. The act of using nightsoil as manure is not in itself a public nuisance; and each cultivator might suppose in his individual case that the nightsoil he used would not cause disease or annoyance so as to be an infringement of the order. Section 291 contemplates a wilful breach of an order against repeating or continuing a public nuisance; and the order must be brought home to the individual charged before he can be convicted under that section.

I may add that the Magistrate had no authority for the procedure he adopted in issuing the proclamation. His powers to deal with public nuisances are contained in Chapters X and XI of the Criminal Procedure Code.

The provisions of Chapter X contemplate orders to be directed to, and served on persons individually, and that opportunity shall be given to show cause against the order; and service of the order is to be made on the person against whom the order is made, if practicable, in the manner provided for service of summons; and it is only if such order cannot be so served, that it may be notified by proclamation published in such manner as the Local Government may by rule direct (s. 134).

It is only in emergent cases, to which Chapter XI applies, that an order may be made *ex parte*, and any exception is allowed to the general rule that it shall be directed to a particular individual.

In such emergent cases the order, which is to be served in the manner provided by s. 134, may be directed to "the public generally when frequenting or visiting a particular place" (s. 144). That is to say, an order may, under s. 144, be directed to the public generally, when frequenting or visiting a particular place, to abstain from a certain act; but this provision has no applicability to an order of the nature contained in the Magistrate's proclamation, which was directed to a portion of the community, and had no concern with the public generally, frequenting or visiting a particular place.

[102] I notice this point as the Public Prosecutor referred to Chapter XI, and particularly this part of s. 144, to support the action of the Magistrate in issuing the proclamation. I may add that Chapter XI is only properly applicable to temporary orders in urgent cases, and the order here was not of a temporary character; nor is there anything to show that the Magistrate considered immediate action necessary under this Chapter.

I have been asked by the Public Prosecutor to alter the conviction to one of an offence under s. 290,—committing a public nuisance—or other which the evidence may prove to have been committed. But this is not a case in which such action on the part of a Court of Revision is desirable, assuming it to have the power. The petitioners were only put on their defence in respect of the charge under s. 291, and the case was tried summarily; and there is no evidence on the record to which this Court can refer, so as to say that any offence has been committed; and it is, moreover, undesirable to take up now a charge in respect of a public nuisance, which, if it was committed, is a thing of the past.

The convictions and sentences are set aside, and the fines will be refunded.

Convictions set aside.

[8 AIL. 102]
FULL BENCH.

The 20th January, 1886. •

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE STRAIGHT,
MR. JUSTICE OLDFIELD, MR. JUSTICE BRODHURST
AND MR. JUSTICE TYRRELL.

Karim Bakhsh Khan and others.....Defendants

versus

Phula Bibi.....Plaintiff.*

Pre-emption—Wajib-ul-arz—Vendor and purchaser—Clause fixing price in case of sale to a co-sharer—Sale to a stranger for higher price—Agreement running with land—Pre-emptor entitled to take property on payment of price fixed in wajib-ul-arz—Purchaser entitled to recover purchase-money.

The *wajib-ul-arz* of a village contained a provision that any co-sharer desiring to sell his share should offer it to the other co-sharers before selling it to a stranger, and further, that, in case of sale to a co-sharer, the price to be paid [103] should be calculated in proportion to the price for which a particular share had been sold in 1860. One of the co-sharers, without first offering his share to the other co-sharers, sold it to a stranger, for a price higher than that which would be payable according to the above-mentioned provision. A suit for pre-emption was brought by a co-sharer against the vendor and the purchaser; and the plaintiff claimed the benefit of the sale upon payment of a sum calculated according to the condition of the *wajib-ul-arz* relating to sales between co-sharers.

Held, by the Full Bench, that the condition of the *wajib-ul-arz* regarding the price to be paid for the share was still binding on the land, notwithstanding the sale; that a co-sharer was entitled to purchase the share at the price agreed before it could be sold to anyone else, and, in case of sale to a stranger, could call on the vendor and the purchaser to hand it over on payment of such price; and that, if the stranger vendee had paid more than was payable according to the *wajib-ul-arz*, he was entitled to recover it from the vendor.

Akbar Singh v. Juala Singh, Weekly Notes, 1885, p. 216, distinguished by TYRRELL, J.

THE plaintiff in this suit claimed to enforce the right of pre-emption in respect of the sale of a two annas share of a village called Baranpur. This share had been sold by the defendant, Zahur Khan, a co-sharer, to the other defendants, strangers, the sale-deed being dated the 9th April 1883, and the price stated therein being Rs. 750. The suit was based on the *wajib-ul-arz*. That document provided that a co-sharer, before selling his share to a stranger, should offer it to his co-sharers; and further, that the price to be paid, in case of sale to a co-sharer, should be calculated with reference to the price for which the share of one Karam Khan had been sold in 1860, which was Rs. 198. The plaintiff claimed the benefit of the sale upon payment of Rs. 148-8-0, the amount proportionate to the price of the share mentioned in the *wajib-ul-arz* as the standard of price in sales between the co-sharers of the village. The defendants-vendees pleaded (*inter alia*) that they were entitled to payment by the pre-emptor of the price mentioned in the sale-deed, the same having been

* Second Appeal No. 1344 of 1884, from a decree of G. J. Nicholls, Esq., Offg. District Judge of Azamgarh, dated the 15th August 1884, affirming a decree of Rai Soti Behari Lal, Subordinate Judge of Azamgarh, dated the 20th June 1884.

actually paid by them to the vendor, and that the conditions of the *wajib-ul-arz* above referred to were not binding on them.

Both the Court of First Instance (Subordinate Judge of Azamgarh) and the Lower Appellate Court (District Judge of Azamgarh) decreed the plaintiff's claim, conditionally on payment by her of Rs. 148 8-0, that being the amount of consideration payable according to the provisions of the *wajib-ul-arz* relating to sales between the co-sharers.

[104] The defendants appealed to the High Court. The appeal came on for hearing before PETHERAM, C. J. and STRAIGHT, J., who made the following order of reference to the Full Bench :—

"The only plea pressed on us in this appeal is the third plea, which raises the following question, namely --Whether a condition of the *wajib-ul-arz*, such as is found in the present case relating to price, is binding upon the stranger-vendee without notice. According as this question is decided in the affirmative or the negative by the Full Bench, this appeal will be decided."

The question referred was altered by the Full Bench to read as follows :—

"Whether a condition of the *wajib-ul-arz*, such as is found in the present case relating to price, is still binding on the land, notwithstanding the sale to the vendees."

Lala Juala Prasad, for the Appellants.

Munshi Kashi Prasad, for the Respondent.

Petheram, C.J.—I am of opinion that the answer to this reference, as altered, should be in the affirmative. The facts of the case are, that by the *wajib-ul-arz* of the village concerned it was agreed by the co-sharers that, if any of them desired to sell his share, he should offer it to the others before selling it to a stranger; and also that the price of the property, if sold to any of themselves, should be so much a share. One of the co-sharers sold his share to strangers for a greater price than that mentioned in the *wajib-ul-arz*. A suit is brought by another of the co-sharers against the vendor and against the purchasers, in whose possession the share is, and the question arises whether, under the circumstances, the plaintiff is entitled to possession of the share on payment of the price agreed upon under the *wajib-ul-arz*. I am of opinion that he is. It has always been considered—and this view has been acted upon—that agreements of this nature run with the land to this extent, that a co-sharer wishing to purchase, and to whom the property has not been offered, can follow it in the hands of the vendee, and get possession of it himself. If this is so, the agreement so far runs with the land, and if it does so to any extent, it must, in my opinion, do so to the full extent of the agreement,—that is to say, a co-sharer is entitled to purchase at the [105] price agreed, before the property can be sold to any one else. As soon, therefore, as a co-sharer finds that another co-sharer has sold his share, he can call on the vendor and the purchaser to hand it over, upon payment of the price which he agreed to pay to those who were parties to the agreement. If the purchaser has paid more than was stipulated for in the agreement, he may get it back from the vendor. The pre-emptor can get the land under the original contract, that is to say, upon payment to his co-sharer of the price mentioned in the *wajib-ul-arz*; and the purchaser can recover the price which he paid, whatever it was, because the consideration has failed, and he has not got the land. For these reasons, I am of opinion that the answer to the reference, as altered, must be in the affirmative, and that the appeal must consequently be dismissed with costs.

Straight, J.—I am of the same opinion.

Oldfield, J.—I am of the same opinion.

Brodhurst, J.—I am of the same opinion.

Tyrrell, J.—I am of the same opinion. The ruling in *Akbar Singh v. Juala Singh*, Weekly Notes 1885, p. 216, is distinguishable. The standard in this case is fixed and inflexible; in that case it was only a practicable alternative price to be adopted in the event of the selling and purchasing co-sharers being unable to agree together what the fair price should be.

NOTES.

[See also (1889) 12 All., 234 F. B. ; (1888) 11 All., 257 ; (1904) 27 All., 12 ; 3 A. L. J., 830,]

[8 All. 105]

The 22nd January, 1886.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE STRAIGHT,
MR. JUSTICE OLDFIELD, MR. JUSTICE BRODHURST AND
MR. JUSTICE TYRRELL.

Raghunath Prasad.....plaintiff
versus

Jurawan Rai and another.....Defendants.*

Mortgage—First and second mortgages—Payment by purchaser of mortgaged property of first mortgage—Right of second mortgagee to bring to sale mortgaged property subject to the first mortgage.

In 1874 a plot of land, No. 111, which, in 1866, had been mortgaged to *L*, was with other property mortgaged to *R*. In 1878 the equity of redemption in plot No. 111 was purchased by *J*, who paid off the mortgage of 1866. *R* brought a suit against *J*, to bring to sale the whole of the property included in the mortgage of 1874. The Court of First Instance decreed the claim in part, exempting from the decree plot No. 111, on the ground that the defendant, by reason of having purchased the equity of redemption in that plot and having paid off the mortgage [106] of 1866, stood in the position of a first mortgagee of that plot and his mortgage had priority over the plaintiff's mortgage of 1874.

The Full Bench modified the decree of the Court of First Instance by inserting after the words "land No. 111 be exempted from the hypothecation lien" the words "in that property the interest of the plaintiff as second mortgagee only to be sold."

Per OLDFIELD, J., that the second mortgagee could not bring the land to sale so as to oust the first mortgagee, whose mortgage was usufructuary, and get rid of the first mortgage without satisfying it; but that he had a right to sell such interest as he possessed as second mortgagee.

Per STRAIGHT, J., that the plaintiff was entitled to bring to sale the property charged to him under his mortgage of 1874, subject to the rights existing in favour of the first

* Appeal No. 6 of 1885, under s. 10, Letters Patent.

mortgagee of 1866 : in other words, that a purchaser at a sale in execution of the decree would have no further right than a right to take the property subject to the right of the first mortgagee to possession of the property included in his instrument, and his other rights under that instrument, so long as it endured.

THIS was an appeal to the Full Court, under s. 10 of the Letters Patent, from a judgment of OLDFIELD, J., dated the 19th March 1885. The facts out of which the appeal arose were as follows :—Jurawan Singh and Daulat Kuar, co-sharers in a village called Chattardih, mortgaged a plot of land, No. 111, situate in that village, to one Lachman Rai, in May 1866, for Rs. 401, the mortgage being a usufructuary one. Subsequently, on the 9th June 1874, the mortgagors executed a simple mortgage of their four annas share in the village, including plot No. 111, to Raghunath Prasad. In June 1878, the mortgagors executed a deed of sale, in respect of plot No. 111, in favour of Jurawan Rai and others, who paid off the mortgage of 1866 to Lachman Rai. In October 1882, the second mortgagee, Raghunath Prasad, sought to bring the four annas share to sale by enforcement of his mortgage of June 1874.

The Court of First Instance (Munsif of Balia) decreed the claim in part, exempting from the decree plot No. 111, on the ground that it had been purchased by Jurawan Rai and others, who had paid off Lachman's mortgage of 1866, which had priority over the plaintiff's mortgage of 1874. On appeal, the Subordinate Judge of Ghazipur observed as follows :—"The prior mortgage, which is alleged to have been satisfied out of the sale-price paid by Jurawan Rai, Suhawan Rai and Musammat Jairi, ceased to exist on the day it was satisfied. The mortgage to the plaintiff continued [107] to exist even after the prior mortgage was extinguished. Besides, the purchasers, having purchased the property (land No. 111) after it had been mortgaged to the plaintiff, must be held to have purchased it subject to the mortgage to him, and he is therefore entitled to enforce his mortgage on it. The decision of the lower Court is modified, and this appeal decreed by enforcing the plaintiff's mortgage on field No. 111, with cost of both Courts, and interest at the usual rate."

An appeal from this decree was preferred to the High Court, and came on for hearing before OLDFIELD and MAHMOOD, JJ. The judgments of the learned Judges will be found reported in I. L. R., 7 All., 569, and *Weekly Notes*, 1885, p. 112. The learned Judges differed in opinion, OLDFIELD, J., holding that "the prior mortgage was not extinguished, and that it afforded a defence against the claim seeking to bring the property to sale;" and that the decree of the Lower Appellate Court should be modified and that of the first Court restored; and MAHMOOD, J., holding that "a puisne incumbrancer is not prevented by the mere fact of the existence of a prior mortgage from enforcing his security, so long as such enforcement does not clash with the rights secured by the prior mortgage," and that the appeal should be decreed, and the case remanded to the Lower Appellate Court for disposal under s. 562 of the Civil Procedure Code.

The plaintiff appealed to the Full Court from the judgment of OLDFIELD, J., under s. 10 of the Letters Patent.

Mr. G. T. Spankie, for the Appellant.

Munshi Sukh Ram, for the Respondents.

Petheram, C.J.—I am of opinion, after reading the judgments of the two learned Judges of the Division Bench, and looking into the facts of the case, that on the part of one, at all events, of those learned Judges, there was some misapprehension as to the real facts, and that, had it not been for that misapprehension, no difference of opinion could have arisen. Under these circumstances, I am of opinion that the proper mode of dealing with the matter is to

alter the Munsif's order by inserting the words "in that property the interest of the plaintiff as second mortgagee only to be sold" after the words "land No. 111 be exempted from the hypothecation lien." The order as amended will be returned to the first Court for execution. [108] As regards costs, the Munsif's order will stand, but in reference to the proceedings subsequent to that order, there will be no order as to costs.

Oldfield, J.—I desire only to add that the suit was brought by the respondent against the first mortgagee of three bighas of land and in possession thereof, that mortgage being usufructuary; and I understood, and still understand, that the object of the suit, which was brought by a second mortgagee holding a second mortgage on the same property, was to bring the land to sale so as to oust the first mortgagee and get rid of his mortgage without satisfying it. This, I am of opinion, he cannot do. I was therefore in favour of affirming the decision of the first Court, dismissing the suit. The second mortgagee has a right to sell such interest as he possesses as second mortgagee, and in this view I see no objection to the form of the decree proposed by the learned Chief Justice.

Straight, J.—I have consented to this form of decree, because it virtually represents the relief to which the plaintiff is entitled, namely, to bring to sale the property charged to him under his mortgage of 1874, subject to the rights existing in favour of the first mortgagee of 1866. In other words, a purchaser at a sale in execution of this decree will have no further right than a right to take the property subject to the charge of the first mortgagee, that is, to the first mortgagee's right to possession of the property included in his instrument, and his other rights under that instrument, so long as it enures.

Brodhurst, J.—I agree in the form of decree proposed by the learned Chief Justice.

Tyrrell, J.—I also agree.

NOTES.

[This case was referred to and approved in (1894) 22 Cal., 33; (1891) 13 All., 432; (1890) 12 All., 548 where it was held that the suit, in which the second incumbrancer denies or ignores the previous incumbrance and asks for a complete sale without any reservation for the prior mortgage, must be dismissed.

See also (1892) 16 Mad. 121; (1893) 17 Mad., 62; (1907) 29 All., 348.]

[8 All. 109]

The 23rd January, 1886.

PRESENT:

**SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE STRAIGHT
MR. JUSTICE BRODHURST, MR. JUSTICE TYRRELL AND
MR. JUSTICE OLDFIELD.**

J. R. Williams.....Petitioner

versus

T. A. Brown and others.....Opposite Parties.*

*"Decree"—Order dismissing a suit under Civil Procedure Code,
s. 381—Civil Procedure Code, s. 2—Appeal.*

The definition of "decree" in s. 2 of the Civil Procedure Code means that where the proceeding of the Court finally disposes of the suit, so long as it remains upon the record, it is a "decree."

* Miscellaneous No. 218 of 1885.

[109] Held by the Full Bench that an order passed under s. 381 * of the Civil Procedure Code, dismissing a suit for failure by the plaintiff to furnish security for costs as ordered, was the decree in the suit, and appealable as such, and consequently was not open to revision by the High Court under s. 622 of the Code.

THIS was a reference to the Full Bench arising out of an application to the High Court to exercise its powers under s. 622 of the Civil Procedure Code. The facts of the case sufficiently appear from the order of reference by STRAIGHT, J., in which BRODHURST, J., concurred, which was as follows :—

"This is an application to revise an order of the Subordinate Judge of Agra, passed on the 5th June last, dismissing a suit brought by the petitioner for failure to find security for costs as ordered. The order of the Subordinate Judge professes to be passed under s. 381 of the Civil Procedure Code.

"By way of preliminary objection to our entertaining this application for revision, Babu *Baroda Prasad* for the opposite party submits that the order of the Subordinate Judge, which is now impeached, constituted a decree; that, being a decree, it was open to appeal; and that, therefore, the condition precedent required by s. 622 is absent, and the application cannot be entertained.

"In reply to this contention, Mr. *Howard* submits that it is impossible, looking to the definition of the term '*decree*' in s. 2 of the Civil Procedure Code, to contend that the dismissal of a suit under s. 381 for default in finding security for costs is an adjudication upon a right claimed in a Civil Court by a party bringing a suit therein. He frankly concedes that there is a ruling of this Court in *Siraj-ul-hyq v. Khadim Husain*, I. L. R., 5 All., 380, decided by my brothers OLDFIELD and BRODHURST, JJ., which is adverse to the position he is asserting; but he has also called our attention to a ruling by my brothers OLDFIELD and MAHMOOD, JJ., in *Dianat-ul-lah Beg v. Wajid Ali Shah*, Weekly Notes, 1884, p. 154, which favours his view. The question therefore appears to be one as to which there is some doubt; and speaking for myself, I should, with great deference to my brothers OLDFIELD and BRODHURST, hesitate about following the ruling of theirs above referred to. It certainly does appear to me to be a strong thing to hold that where a plaintiff, having been required [110] to find security for costs, fails to do so, and his suit is dismissed even before any statement of defence has been put in or issues have been fixed, such dismissal constitutes a decree within the meaning of s. 2 of the Civil Procedure Code, and amounts to an adjudication upon the rights alleged by him in his plaint, in respect of which he seeks relief.

"Under the circumstances, it seems to me that this preliminary question should be referred to the Full Bench for determination. I do order that it be so referred."

Mr. J. E. Howard and Mr. G. Ross Alston, for the Petitioner.

Mr. G. Ross Alston, for the Petitioner.—The order of the Subordinate Judge dismissing the suit under s. 381 of the Code was not a "decree" within the definition contained in s. 2: it was therefore not appealable under s. 540, and the plaintiff's only remedy is by way of revision under s. 622. By s. 2, a "decree" is "the formal expression of an adjudication upon *any right claimed* or defence set up in a Civil Court;" but the right adjudicated upon in the order under s. 381 is the plaintiff's right to sue, and not the right which he claims in the suit. The provision in Act VIII of 1859 analogous to s. 381 of the

* [Sec. 381 :—In the event of such security not being furnished within the time so fixed, the Court shall dismiss the suit unless the plaintiff or plaintiffs be permitted to withdraw therefrom under the provisions of section 373.]
Effect of failure to furnish security.

present Code was s. 35, and the words used in s. 36 were "order rejecting the plaint." If these words had been used in s. 381 of Act XIV of 1882, then, with reference to the latter portion of the definition of "decree" in s. 2, the proceeding would have been a decree; but the words in fact used are "dismiss the suit," and by substituting these for the words "rejecting the plaint," the Legislature must have intended that the order under s. 381 should not be regarded as a decree. Again, in s. 371 of the present Code, the dismissal of a suit on failure of a bankrupt plaintiff's assignee to give security for the costs of the suit, is called an "order" and not a "decree." The provisions of this section are analogous to those of s. 381; and the omission of orders passed under s. 381 from the orders enumerated as appealable under s. 588 must be regarded as accidental. Again, with reference to ss. 205 and 206, there can be no "decree" where there is no judgment, and where a suit is dismissed under s. 381 without any adjudication upon the matters in issue between the parties, there can be no "judgment" in the sense described in s. 203.

[111] *Babu Baroda Prasad Ghose*, for the Opposite Parties, was not called on to reply.

Petheram, C.J.—I am of opinion that the order under consideration was a "decree" within the definition of that term contained in s. 2 of the Civil Procedure Code. The plaintiff took the steps necessary to initiate his claim against the defendant, and filed his plaint. The defendant then made an application under the Code that the plaintiff be ordered to find security for costs, and accordingly an order to that effect was passed, which, upon the face of it, contained a provision that if security were not furnished within a certain time the suit should be dismissed. The security was not furnished within the time allowed; and thereupon a proceeding was drawn up, the effect of which was to dismiss the suit. The question before us is, whether this proceeding was the decree in the suit or whether it was a mere order. The definition of "decree" in s. 2 of the Code means that where the proceeding of the Court finally disposes of the suit, so long as it remains upon the record, it is a decree; and it is impossible to contend that so long as this proceeding remained upon the record, the suit was not disposed of. I am therefore of opinion that the order in question was the decree in the suit, and was therefore appealable as a decree, and consequently is not open to revision by this Court under s. 622 of the Code. My answer to the question referred to the Full Bench is, that the order dismissing the suit for failure by the plaintiff to find security for costs as ordered, was a "decree."

Straight, Oldfield, Brodhurst, and Tyrrell, JJ., concurred.

NOTES.

[Following this case it was held in (1894) 19 Bom., 307 that an order dismissing a suit under s. 136 C. P. C. (1882) was a decree.

But in (1895) 18 All., 101 F. B., this case was distinguished and it was held there that an order rejecting an appeal under s. 549 C. P. C. is neither an order nor a decree.]

[8 All. 111]

The 27th January, 1886.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE STRAIGHT,
MR. JUSTICE BRODHURST, MR. JUSTICE TYRRELL, AND MR.
JUSTICE OLDFIELD.

Badami Kuar.....Petitioner

versus

Dinu Rai and others.....Opposite parties.*

High Court's powers of revision—Civil Procedure Code, s. 622—

"Jurisdiction"—"Illegality"—"Material irregularity."

A suit was instituted in the Court of a Munsif to recover from the defendants a sum of Rs. 49, being the amount due under a bond and which the plaintiff alleged had been recovered on her account by one of the defendants from the [112] obligor. The Munsif, being of opinion that the determination of the plaintiff's right to the bond involved the question of her heirship to the estate of a certain deceased person, and that consequently the case before him raised a question affecting the title to property exceeding Rs. 1,000 in value, held that he had no jurisdiction to entertain the suit, and accordingly returned the plaint for presentation to the proper Court under s. 57 of the Civil Procedure Code.

Held, by the Full Bench, that the Munsif had acted upon an erroneous view, as the only subject-matter of the suit was the Rs. 49; that he had consequently failed to exercise a jurisdiction vested in him, and the High Court was therefore competent to revise his order under s. 622 of the Civil Procedure Code.

The result of *Amir Hasan v. Sheo Baksh Singh*, I. L. R., 11 Cal. 6, and *Magni Ram v. Jiwa Lal*, I. L. R., 7 All. 336, is that the questions to which s. 622 of the Civil Procedure Code applies are questions of jurisdiction only. The meaning of the decision of the Privy Council in the former case is that, if the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it, either of fact or law, and that the High Court has no jurisdiction under s. 622 to inquire into the correctness of its view of the law, or the soundness of its findings as to facts; but that, when no appeal is provided, its decision on questions of both kinds is final.

Per STRAIGHT and TYRRELL, JJ.—Clauses (a) and (b) of s. 584, specifying the grounds on which a second appeal lies to the High Court, embody what s. 622 refers to in the word "illegally;" that is to say, to cases where the Court below has, in the exercise of its jurisdiction, come to a decision which is contrary to some specified law or usage having the force of law, or failed to determine some material issue of law or usage. Clause (c) of s. 584 indicates the meaning of the words "material irregularity" in s. 622, i.e., some material irregularity in procedure, "which may possibly have produced error or defect in the decision of the case upon the merits." *Maulvi Muhammad v. Syed Husain*, I. L. R., 3 All. 203, referred to.

THIS was an application to the High Court to exercise its powers under s. 622 of the Civil Procedure Code. The record having been called for, the application came on for hearing before STRAIGHT and TYRRELL, JJ., who made the following ORDER OF REFERENCE to the Full Bench :—

"In this case the petitioner before us sued, *inter alia*, to recover from the defendants a sum of Rs. 49-11-6, being the amount due under a bond, which she alleged had been recovered on her account by Sheodin Ram, defendant, from the obligors of the bond. The Munsif before whom the case came, was

* Application No. 63 of 1885, for revision under s. 622 of the Civil Procedure Code.

of opinion that the determination of the plaintiff's right to the bond, in respect of which the said defendant had recovered the money claimed, involved the question of her heirship to the estate of Ganga Bishan, and there-
[113] fore the case before him raised a question affecting the title to property exceeding Rs. 1,000 in value. He therefore returned the plaint for presentation to the proper Court, under s. 57 of the Code."

"The petition for revision before us takes up the position that the order of the Munsif, upheld by the Judge, is open to revision under s. 622 of the Code, by reason of the Munsif, in erroneously returning the plaint to be presented in a proper Court, having failed to exercise a jurisdiction vested in him by law, within the meaning of s. 622 of the Civil Procedure Code. We refer to the Full Bench the question whether, under the above circumstances, and with reference to the Privy Council case of *Amir Hasan Khan v. Sheo Bakhsh Singh*, I. L. R., 11 Cal., 6, the provisions of s. 622 are applicable."

Pandit Sundar Lal, for the Petitioner.

Babu Sital Prasad Chattarji, for the Opposite Party.

Petheram, C. J.—I am of opinion that the question in this case must be answered in the affirmative. Section 20 of the Bengal Civil Courts Act enacts that the jurisdiction of the Munsif shall extend to suits in which the value of the subject-matter of the dispute does not exceed Rs. 1,000. The Munsif has held that he had no jurisdiction in this case, because the title to a larger sum than Rs. 1,000 was involved in the question whether the plaintiff was entitled to recover the sum of Rs. 49, for which alone the action was brought. I think that he was wrong in this view, as the only subject-matter in this suit was the Rs. 49, and that the Munsif consequently failed to exercise a jurisdiction vested in him, and that the record may be called for by this Court in revision. The section has been considered by the Privy Council in the case of *Amir Hasan v. Sheo Bakhsh Singh*, I. L. R., 11 Cal. 6, and the Full Bench of this Court in the case of *Magni Ram v. Jiwa Lal*, I L.R., 7 All., 336, and the result of those cases in my opinion is that the questions to which s. 622 applies, are questions of jurisdiction only. To make my meaning plain, I understand the Privy Council to mean that if the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it, either of fact or of law, and that the High Court has no jurisdiction under s. [114] 622 to inquire into the correctness of its view of the law, or the soundness of its findings as to facts; but that when no appeal is provided, its decision on questions of both kinds is *final*.

Straight, J.—I desire, in the first place, to say that I concur in the view expressed by the learned Chief Justice as regards the particular case referred. In the second place, I accede to the interpretation he has placed on the ruling of their Lordships of the Privy Council; and the reason I do so is, because it is most undesirable that, upon a question of practice of this kind, there should be a difference of opinion. I therefore surrender my own views in deference to the rest of the Court. But while doing so, I desire to make a few observations, because I was the Judge who wrote the judgment in the original Full Bench decision of the Court on this subject in *Maulvi Muhammad v. Syed Husain*, I. L. R., 3 All., 203; and I am anxious briefly to repeat here the reasons upon which that judgment proceeded. As the section relating to this Court's powers of revision was originally drafted in Act X of 1877, it stood without the words in the present Code which have led to so much discussion; and there can be no doubt that at that time the jurisdiction of this Court depended purely on the question whether the Court below had improperly exercised its jurisdiction, or improperly refused to exercise it. In Act XII of

1879, amending Act X of 1877, the words "in the exercise of its jurisdiction illegally or with material irregularity" were introduced; and I presume that they were introduced with meaning and intention, and were intended to have some effect and operation. In order to ascertain what that meaning and intention was, it is necessary to look into the Code to see if it can be ascertained what was meant by the words "illegally" and "material irregularity." Now in s. 584, which specifies the grounds on which a second appeal lies to the High Court, I find what appears to me to supply a reasonable interpretation for these words. The section sets forth that no second appeal shall lie, except on the following grounds, namely,—"(a) the decision being contrary to some specified law or usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law." Taking these two clauses together, they [115] appear to me to embody what s. 622 refers to in the word "illegally;" that is to say, to cases where the Court below has, in the exercise of its jurisdiction, come to a decision which is contrary to some specified law or usage having the force of law, or failed to determine some material issue of law or usage. Then, with reference to the words "material irregularity" in s. 622 cl. (c) of s. 584 indicates their meaning thus:—"A substantial error or defect in the procedure as prescribed by this Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits." In other words, I construe the words "material irregularity" to mean some material irregularity in procedure "which may possibly have produced error or defect in the decision of the case upon the merits." As an illustration of my meaning I will put two cases. A Munsif who is seised of a suit below Rs. 500 in value, directs, in execution of the decree in the suit, that the tools of the judgment-debtor be sold. In such a case, an appeal would lie to the Judge; but there would be no second appeal to this Court. Here the Munsif makes an order which is contrary to law, because it is forbidden under s. 266 of the Code, and so he acts illegally. Again, a Munsif who has dismissed a suit *ex parte* entertains an application under s. 108 of the Code, and, without notice to the other side, orders that the suit be replaced upon his file and tried. This action on his part is a material irregularity in procedure, because it contravenes the directions of s. 109 to the effect that no such order shall be made without notice to the other side. These two instances appear to me to be such as the "illegality" and "material irregularity" of s. 622 contemplate.

I need only add that, in my opinion, if there is one power which it is of the first importance that this Court should possess, it is the power of sending for the record in civil cases where no appeal lies. Experience shows that in a very great many such cases grave illegalities and material irregularities do occur in the proceedings of the Courts below, and it is essential that in such cases the High Court should have the power of interference.

Oldfield, J.—I concur in the answer proposed by the learned Chief Justice.

Brodhurst, J.—I entirely concur in the conclusions arrived at by the learned Chief Justice with reference to the decision of [116] the Privy Council in the case of *Amir Hasan Khan v. Sheo Bakhsh Singh*, I. L. R., 11 Cal., 6.

Tyrrell, J.—I concur in every word that has fallen from my brother STRAIGHT upon this matter.

NOTES.

[I. REVISIONAL POWERS.—

1. With regard to questions of jurisdiction:—

(a) *Error of law, no ground*:—(1902) 1903 A. W. N., 12; 7 C. W. N., 545; 80 Cal.,

I.L.R. 8 All. 117 KANJI MAL &c. v. BIBI SAILO [1886]

397; (1910) 14 C. W. N., 703; (1904) 28 Bom., 458; (1903) 25 All., 509 F. B., ; 17 C. W. N., 501.

- (b) Error of law on the question *jurisdiction* :—See (1912) 24 M. L. J., 112; 18 I. C., 555 F. B.; (1918) 24 M. L. J., 205. 1913 M. W. N., 101, and other cases cited therein.

2. With regard to *Material Irregularity*.—(1886) 18 Cal., 225 (application of section of the code not applicable to the case); (1886) 9 All., 104 F. B.; (1904) 7 Bom. L. R., 12 (when the proper issue in the case was not decided).

II. EXTENSION OF APPLICATION.

S. 622 (=S. 122 C.P.C. 1908) is applicable to interlocutory orders also :—(1887) 14 Cal., 768; (1914) 25 I. C., 207 (All.)]

[8 All. 116]

APPELLATE CIVIL

The 1st February, 1886.

PRESENT:

MR. JUSTICE STRAIGHT AND MR. JUSTICE TYRRELL.

Kanji Mal and others.....Judgment-debtors

versus

Bibi Sairo.....Decree-holder.*

Execution of decree—Sale of immoveable property—Error in proclamation of sale as to incumbrance to which property was liable—Civil

Procedure Code, ss. 311, 312.

In a sale of immoveable property in execution of a decree, the proclamation of sale notified that the decree-holder held two charges on the property, aggregating about Rs. 1,000. There was in fact one charge only, amounting to about Rs. 800.

Held that the error in the proclamation of sale amounted to such an irregularity in publishing the sale and putting up the property to the biddings of the public as must have materially marred the fairness of the auction and affected the price, and that the sale must therefore be set aside, on the ground of material irregularity in publishing and conducting it.

THIS was an appeal from an order of the Munsif of Moradabad City, dated the 7th September 1885, refusing to set aside a sale of immoveable property in execution of a decree. The facts of the case are sufficiently stated in the judgment of the Court.

Babu Ratan Chand, for the Appellants (Judgment-debtors).

Munshi Hanuman Prasad and Babu Baroda Prasad Ghose, for the Respondent (Decree-holder)

Straight and Tyrrell JJ.—This is an appeal by a judgment-debtor, whose masonry house has been sold at auction and bought by the decree-holder for a sum of Rs. 552. Material irregularity in publishing and conducting the sale, with consequent depreciation in price, is alleged. We need not go into the question as to the conduct of the sale, whether it was held at the time notified or not. For we are of opinion that there was admittedly such an irregularity in publishing the sale and putting up the property to the biddings of the public as must have materially marred the [117] fairness of the auction and affected the price. It was notified that the decree-holder held two charges on the property, aggregating about Rs. 1,000, but, in fact, there was one charge only, and that about Rs. 800. Now this fact must have been known to the

* First Appeal No. 148 of 1885, from an order of Maulvi Muhammad Ezad Bakhsh, Munsif of Moradabad City, dated the 7th September 1885.

decree-holder who became the purchaser; and it is almost a necessary consequence that, assuming the house to be worth, as the Court below thought, Rs. 1,500, and it fetched Rs. 552 only, it would have commanded a higher price if the public had known, as the decree-holder did, that it was charged with Rs. 800 only.

We allow the appeal, set aside the sale, and direct that it be held anew, in the event of the decree not being in the meantime otherwise satisfied according to law.

The appellants will have the costs of this appeal.

Appeal allowed.

[8 All. 117]

The 1st February, 1886.

PRESENT:

MR. JUSTICE STRAIGHT AND MR. JUSTICE TYRRELL.

Gudri Lal and another.....Plaintiffs

versus

Jagannath Ram.....Defendant.*

*Jurisdiction—Place of suing—Suit for sale of mortgaged property—
Civil Procedure Code, ss. 16, 20.*

In 1879 *R* gave *J* a bond containing a simple mortgage of immoveable property. Subsequently *R* and *P* jointly gave *D* a bond containing a simple mortgage of the same property. In 1881 *D* obtained a decree for the sale of the property under his mortgage, and it was put up for sale and purchased by the plaintiffs. In 1882 *J* obtained a decree in the Court of the Munsif of *G* (within the local limits of whose jurisdiction the property was not situated), for enforcement of his mortgage bond by sale of the property. The plaintiffs objected to the sale, and, their objection having been disallowed, brought a suit for cancellation of *J*'s decree, so far as it ordered the sale.

Held, that *J*'s decree could only be regarded as a simple money decree, because, as shown by s. 16 of the Civil Procedure Code, the Munsif had no power under the law to direct enforcement of hypothecation against immoveable property situate beyond the local limits of his jurisdiction; and neither the proviso to s. 16 nor s. 20 † of the Code met the circumstances.

* Second Appeal No. 211 of 1885, from a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 17th November 1884, affirming the decree of Maulvi Azizul Rahman, Munsif of Bansaon, dated the 17th May 1884.

† [Sec. 20 :—If a suit which may be instituted in more than one Court is instituted in a

Power to stay proceedings where all defendants do not reside within jurisdiction.

Court within the local limits of whose jurisdiction the defendant or all the defendants does not or do not actually and voluntarily reside, or carry on business, or personally work for gain, the defendant or any defendant may, after giving notice in writing to the other parties of his intention to apply to the

Court to stay proceedings, apply to the Court accordingly;

and if the Court, after hearing such of the parties as desire to be heard, is satisfied that justice is more likely to be done by the suit being instituted in some other Court, it may stay proceedings either finally or till further order, and make such order as it thinks fit as to the costs already incurred by the parties or any of them.

In such case, if the plaintiff so requires, the Court shall return the plaint with an endorsement thereon of the order staying proceedings.

Application when to be made.

Every such application shall be made at the earliest possible opportunity, and in all cases before the issues are settled; and any defendant not so applying shall be deemed to

have acquiesced in the institution of the suit.]

Held, therefore, that the plaintiffs were entitled in this suit to have it declared that J's decree was a simple money-decree only, on the basis of which no process in execution could issue in respect of the property in dispute to oust the plaintiffs' possession from any part of it.

[118] THE plaintiffs in this suit claimed the cancellation of a decree, dated the 9th September 1882, in so far as it ordered the sale of a certain garden. It appeared that on the 4th April 1879, Ram Tahal, one of the defendants, gave one Jagannath Ram a bond containing a simple mortgage of a garden situated within the local limits of the Munsif of Bansgaon, in the Gorakhpur district, which belonged to Ram Tahal and his brother Prag Ram jointly, in equal moieties. On the 16th September 1879, Ram Tahal and Prag Ram jointly gave one Durga Dayal a bond also containing a simple mortgage of the same garden. On the 10th May 1881, Durga Dayal obtained a decree for the sale of the mortgaged property; and it was put up for sale, and was purchased by the plaintiffs in the present suit, sons of Durga Dayal. On the 9th September 1882, Jagannath Ram having sued in the Court of the City Munsif of Gorakhpur (within the local limits of whose jurisdiction the garden was not situated), to enforce his mortgage-bond, obtained a decree in that suit for, *inter alia*, the sale of the garden. The plaintiffs in this suit objected to the re-sale of the property; and their objections were disallowed. They then brought this suit against Jagannath, Ram Tahal, and Prag Ram in the Court of the Munsif of Bansgaon. Their claim was based on the ground, amongst others, that the decree of the City Munsif of Gorakhpur, so far as it ordered the sale of the property, was made without jurisdiction, the property not being situated within the local limits of his jurisdiction. The Court of First Instance disallowed this contention, but gave the plaintiffs a decree in respect of Prag Ram's moiety of the property, on the ground that Ram Tahal was not competent to mortgage the same, dismissing the suit so far as the moiety of Ram Tahal was concerned. The plaintiffs appealed; and the Lower Appellate Court (Subordinate Judge of Gorakhpur) affirmed the decree of the first Court.

The plaintiffs in second appeal contended again that the decree of the City Munsif of Gorakhpur, so far as it ordered the sale of the property, was made without jurisdiction, and was therefore so far void.

Munshi Kashi Prasad, for the Appellants.

Munshi Hanuman Prasad, for the Respondent (Jagannath Ram).

[119] Straight and Tyrrell, JJ.—We are of opinion that the lower Courts have taken a wrong view in dismissing that part of the suit which relates to the share of Ram Tahal. The plaintiffs are the purchasers of the whole property at a sale in execution of a decree obtained by their father, Durga Dayal, against Ram Tahal and Prag, and their purchase took place on the 3rd January 1884. No doubt at that time the defendant-respondent, Jagannath Ram, had a charge on the property by reason of the bond which was given him by Ram Tahal on the 4th April 1879; and on the basis of this bond he had obtained a decree from the City Munsif of Gorakhpur on the 9th September 1882. Now, of course, if the City Munsif of Gorakhpur had power to pass a decree on the basis of Jagannath Ram's bond, and so to enable Jagannath Ram to enforce the decree by selling Ram Tahal's share in the grove in Bansgaon, the plaintiffs could not maintain the present suit, because, not only was the charge of Jagannath Ram prior to their own, but a decree upon the bond had been obtained by him before the plaintiffs had purchased the whole grove. Unfortunately for the defendant-respondent, Jagannath Ram, his decree on the bond given by Ram Tahal in April 1879, can only be

had no power under the law to direct enforcement of hypothecation against immoveable property situate beyond the local limits of his jurisdiction; and that he was prohibited from doing so, is clear from the terms of s. 16 of the Civil Procedure Code. We do not think that the proviso to that section alters the position; and we dissent altogether from the remark of the Subordinate Judge, that s. 20 of the Civil Procedure Code meets the circumstances. Our conclusion accordingly is, that the plaintiffs are entitled in this suit to have it declared that the decree in favour of the defendant-respondent upon the bond given to him by Ram Tahal was only a simple money-decree, and that, on the basis of that decree, no process in execution could issue in respect of the grove to oust the plaintiffs' possession from any part of it. Whether or not the respondent can institute proceedings in any Court for enforcement of his lien, we are not concerned to discuss. The appeal is decreed with costs, and the decrees of the lower Courts modified by decreeing the plaintiffs' claim with costs in all Courts.

Appeal allowed.

NOTES.

[This case was followed in (1896) 17 Bom., 570.]

[120] APPELLATE CRIMINAL.

The 21st December, 1885.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE.

Queen-Empress

versus

Imdad Khan.

Criminal breach of trust—Master and servant—Servant entrusted with moneys for payment to tradesman of account settled by master for a specific sum—Gratuity by tradesman to servant—Right of master to benefit of gratuity—Act XLV of 1860 (Penal Code), ss. 405, 409—Powers of Appellate Court to alter finding of Court of First Instance—Criminal Procedure Code, s. 423—Accomplice—Evidence—Corroboration.

Where a master entrusts his servant with money for the payment of an open account, i. e., an account of which the items have never been checked or settled, and the tradesman makes the servant a present, and the transaction amounts to a taxation of the bill and a reduction of the price by the servant, the latter obtains the reduction for his master's benefit, the money in his hands always remains the master's property, and, if he appropriates it, he commits criminal breach of trust. But where the master himself has settled the account with the tradesman for a specific sum, and sends the servant with the money, and the servant, after making the payment, accepts a present from the tradesman, in that case the servant does not commit criminal breach of trust, inasmuch as the money is given to him by a person whom he believes to have a right to give it, though it may be that, according to the strict equitable doctrines of the Court of Chancery, he is bound to account to the master

for the money. *Hay's Case* [In re Canadian Oil Works Corporation, L.R., 10 Ch. App., 598] referred to.

Where the Court of Session had tried, convicted, and sentenced an accused person under s. 409 of the Penal Code, and the High Court was of opinion that the conviction was not sustainable under that section, the Court refused to alter the finding under s. 428 of the Criminal Procedure Code, to a conviction for some other offence for which the accused had not been charged or tried.

Observations on the necessity of requiring corroboration, in material particulars, of the evidence of an accomplice. *Empress v. Ram Saran*, Weekly Notes, 1885, p. 311, referred to.

THIS was an appeal from an order of Mr. F. E. Elliot, Sessions Judge of Allahabad, dated the 19th January 1885, convicting the appellant, under s. 409 of the Penal Code, upon two charges of criminal breach of trust as a public servant, and upon three other charges, under s. 50 of the Post Office Act (XIV of 1866), and sentencing him to three years' rigorous imprisonment upon each of the two charges first mentioned.

It appeared from the evidence for the prosecution that the appellant, Imdad Khan, was employed at Allahabad in the Railway Mail Service of the Government Postal Department as Examiner [121] and Superintendent of Stores. It was his duty to receive stores supplied by contractors, to see that the contractors supplied the proper quantity and quality of stores, and to despatch the stores to out-stations on indents. It was also his duty to keep an account of the expenditure in respect of such stores. It was also his duty to receive the monthly bills of the contractors, to check the bills, and to draw the amounts required for their settlement from Government, in contingent bills made out and signed by himself, and countersigned and passed by the Inspector-General of the Railway Mail Service. It was also his duty, having drawn these amounts, to remit them to the contractors.

Among the contractors supplying stores was a firm at Calcutta trading under the name of Tarni Charan Dat and Co. The contract between this firm and the Railway Mail Service was that the former should supply goods of a particular kind to the department for a period of two years, at prices specified in a schedule. Among the goods enumerated was a cloth called "*gazzi*," which was used in large quantities in the Postal Department. The scheduled price of this was Re. 1-12-6 per "*than*" or piece of eighteen yards. Up to January 1881, *gazzi* was despatched by the firm from Calcutta. In that month the appellant returned fifty-four pieces as being of inferior quality. Shortly after this, it was arranged between the appellant and Tarni Charan Dat and Co. that instead of their supplying *gazzi* from Calcutta, he should purchase it at Allahabad, draw from Government at the rate of Re. 1-12-6 per *than*, pay for the *gazzi*, and remit to them their profit. The profit was first fixed at 9 pies per *than*, but was subsequently increased to 1 anna. Under this arrangement *gazzi* was supplied at Allahabad by one Sadhu Lal. The quantities of *gazzi* cloth supplied were communicated to Tarni Charan Dat and Co.; the firm forwarded invoices for such quantities; upon the receipt of these invoices in duplicate, one was signed and returned by the appellant and the other retained in his office; the firm, having received the signed invoices, sent in bills; these bills were attached as vouchers to the contingent bills sent by the appellant to the Inspector-General for counter-signature; the countersigned bills were cashed by the appellant at the General Post Office at Allahabad; the contractors were ostensibly paid in full; and they gave receipts for the full amounts [122] of their bills. In May 1884, it was discovered by the department that the *gazzi* was supplied by Sadhu Lal, and that he was paid for it at the rate of Re. 1-6-0 per *than*.

The case for the prosecution was that the appellant had retained the difference between the actual price paid to Sadhu Lal for the *gazzi* and the profit which he remitted to Tarni Charan Dat and Co., and his conduct amounted to criminal breach of trust by a public servant, within the meaning of s. 409 of the Penal Code; and that, by sending to the firm remittance letters purporting to show that the whole of the sum specified in each was remitted, whereas a portion only was sent, he was guilty of incorrectly preparing documents with a fraudulent intention, within the meaning of s. 50 of the Post Office Act (XIV of 1866). There was no allegation that the *gazzi* supplied by Sadhu Lal was, upon any occasion, inferior in quantity or in quality to that which Tarni Charan Dat and Co. were bound under their contract to supply.

The case for the defence was that although, in consequence of the arrangement made with Tarni Charan Dat and Co., *gazzi* was supplied to the Railway Mail Service stores by Sadhu Lal at Re. 1-6-0 a piece, no part of the difference between that sum and the contract price of Re. 1-12-6 was retained by him, but the whole of such difference was transmitted regularly to the contractors.

The Sessions Judge of Allahabad, disagreeing with the assessors, was of opinion that the charges of criminal breach of trust and of incorrect preparation of documents with a fraudulent intention, were proved. He accordingly convicted the appellant upon those charges, and sentenced him, under s. 409 of the Penal Code, to six years' rigorous imprisonment, but considered a further sentence under s. 50 of the Post Office Act unnecessary.

The accused, Imdad Khan, appealed from the Sessions Judge's order to the High Court, in whose judgment the other material facts of the case are sufficiently stated.

Mr. W. M. Colvin (with him Mr. Habib-ullah and Mr. Durga Charan), for the appellant, contended that the evidence for the prosecution was insufficient to support the conviction. He further argued that, assuming the facts alleged by the prosecution to be proved, they did not constitute the offence of criminal breach of [123] trust as defined in s. 405 of the Penal Code. The definition of that offence involved a "dishonest" misappropriation or conversion to the use of the offender of property entrusted to him; but here the appellant did not act "dishonestly" according to the definition contained in s. 24 of the Code, inasmuch as he did not cause "wrongful loss." The Government never paid a higher price for *gazzi* cloth than they had contracted to pay, namely, Re. 1-12-6 a piece, and there was no evidence whatever to suggest that the cloth supplied was, upon any occasion, inferior either in quantity or in quality to that which Tarni Charan Dat and Co. had contracted to supply. This being so, the conviction and sentence under s. 409 of the Penal Code were bad, and should be set aside.

The Public Prosecutor (Mr. C. H. Hill), with him Babu Ram Prasad, for the Crown:—The evidence taken in the Court of Session establishes the facts alleged by the prosecution. [To show this, the Public Prosecutor referred to the evidence in detail.] These facts amount to the offence of criminal breach of trust, as defined in s. 405 of the Penal Code. A person to whom money is remitted for the purpose of payment to a third party, holds the money for the use of the remitter until, by some act done, or by some engagement with the person who is the object of the remittance, the agent has consented to appropriate it to his use: Addison *On the Law of Contracts*, 4th edition, p. 72. If the purpose fails for which the property is entrusted to the agent, he is under an obligation to return it to the remitter, and the property of the remitter is not divested until the object is performed: *Buchanan v. Findlay*, per TENTERDEN, C. J.,

9 B. & Cr., 738, at p. 749. *Toovey v. Milne*, 2 B. & Ald., 688, also shows that where money is paid for a special purpose, and the purpose fails, the money remains the property of the person paying it. In the present case, the moneys remitted to the appellant always remained the property of Government, because the object of the remittance was never fulfilled. That object failed when Tarni Charan Dat and Co. agreed with the appellant to receive payment at a lower rate than was fixed by their contract, and thereupon the appellant, who had all along held the moneys for the use of Government, became bound to refund them. Not having done so, but having converted them to his own use, he [124] caused "wrongful loss" to Government and "wrongful gain" to himself, and so acted "dishonestly" within the meaning of s. 23, and committed criminal breach of trust within the meaning of s. 405, of the Penal Code.

In *Harrington v. The Victoria Graving Dock Company*, L. R., 3 Q. B. D., 549, it was laid down that "when a bribe is given, or a promise of a bribe is made to a person in the employ of another by some one who has contracted or is about to contract with the employer, with a view to inducing the person employed to act otherwise than with loyalty and fidelity to his employer, the agreement is a corrupt one" and its tendency "must be to bias the mind of the agent, and lead him to act disloyally to his principal. . . . It is quite immaterial that the employer was not in fact damaged." The commission paid by Tarni Charan Dat and Co. to the appellant was a profit made by him in the course of his employment as agent, and Government was entitled to take the benefit of such profit, and the appellant committed criminal breach of trust in converting it to his own use

[PETHERAM, C. J.—Where one man employs another for a particular purpose, as, for instance, to sell property, and the agent takes money from a person to whom that property is sold it is clear that the money must be received for the employer's benefit. It is a profit made by the agent in the course of his employment. But where the customer gives a present to an agent who is not employed for the purpose of selling, is the master entitled to take the benefit of it?]

The reasoning of COCKBURN, C.J., in *Harrington v. The Victoria Graving Dock Company*, L. R., 3 Q. B. D., 549, appears to cover such a case.

[PETHERAM, C J —Suppose that a man employs another to buy a carriage for him, and the agent makes the purchase. Here, if the carriage builder gives the agent a present, the master is no doubt entitled to take it, because the effect of the transaction is to reduce the price. But suppose the master himself makes the bargain, and settles the price, and sends his servant to the builder with the money, and the builder gives the servant £5. How is the master entitled to that? The £5 is no doubt given in order [125] that, when the carriage arrives, no fault shall be found with it. The benefit to the servant does not here spring out of a contract in which he is an agent.]

That case is not completely analogous to the present, for it supposes that the servant has actually handed over the money, and that the tradesman afterwards presents him with a *douceur*. Our case, on the other hand, is that the appellant appropriated the moneys entrusted to him while they were on their way from Government to the contractors. It is, however, immaterial whether the difference between the contract price and the actual price paid for the *gazz* cloth was retained by the appellant, or whether he remitted the entire contract price to the contractors and received back from them the difference. In *Panama and South Pacific Telegraph Company v India Rubber, Gutta Percha, and Telegraph Works Company*, L. R., 10 Ch. App., 515, JAMES, L. J., laid down

the rule that "any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal," and entitles him to have the contract rescinded, and that "a surreptitious sub-contract with the agent is regarded as a bribe to him for violating or neglecting his duty."

[PETHERAM, C.J.—Does not the Lord Justice there mean by "agent" an agent for the purpose of making the contract?]

I submit that his meaning is wider, and that he lays down a general proposition applicable to all surreptitious transactions between an agent and the person with whom his principal is dealing. In *Leake's Digest of the Law of Contracts*, p. 481, it is said:—"It seems that, although the payment to the agent be voluntary and made after the execution of the agency, it would be recoverable by his principal." In *Hays's Case* [In re *Canadian Oil Works Corporation*, L. R., 10 Ch. App., 593], MELLISH, L.J., said:—"There is no doubt about the rule of this Court, that an agent cannot, without the knowledge and consent of his principal, be allowed to make any profit out of the matter of his agency, beyond his proper remuneration as agent." Again, at p. 603, MELLISH, L.J., gave the following illustration:—"A gentleman employs his servant to pay his tradesman's bills, and the servant goes to the tradesman and says, 'I have received [126] the money to pay your bill, but you must make me a present out of it.' The tradesman says, 'I am willing to make you a present.' Then a sum is deducted, the money is put down, and it is handed back. In a certain sense, no doubt, that sum of money will become the property of the servant. He could not be indicted for embezzlement, nor probably for putting it into his own pocket and using it; but there is no doubt that if an account was properly taken in any Court of justice, he would be answerable for it, because it is perfectly obvious that if the creditor who received the payment is willing to make a deduction and discount from the sum he had received, that must be for the benefit of the master who is making the payment, and not for the benefit of the servant, who, without the consent of his master, has no right to receive any such profit." The reason why it is said that the servant could not be indicted for embezzlement is that, under the English statutes relating to that offence, it is an essential element of embezzlement that the property should be given to the offender for the use of the master, and in the above case, the money was not paid to the servant for the master's use. This is not, however, an essential of criminal breach of trust as defined in s. 405 of the Penal Code; so that, in India, the conduct of the servant described in MELLISH, L.J.'s illustration would be criminal breach of trust.

[PETHERAM, C.J.—MELLISH, L. J., speaks of the tradesman as making a "deduction." This expression rather suggests that what the Lord Justice had in his mind was an open and not a settled account. It is arguable that there could be no "deduction" from an account previously agreed and settled between the master and the tradesman. If, for instance, the master sends his servant to pay a bill the total of which the master has not settled with the tradesman, and the items amount to £100, then if the agent and the tradesman make an arrangement by which ten per cent. is deducted from the total and £90 only are paid, and the servant, concealing the fact that a deduction has been made, appropriates the sum deducted, that is clearly embezzlement. But if the master has settled with the tradesman to pay £100, and the agent pays over the whole £100 according to his instructions, and the tradesman then gives him £10, surely that is a present to which the master has no claim.]

[127] In *McKay's Case*, L. R., 2 Ch. D., 1, MELLISH, L. J., referred to *Hay's Case*, L. R., 10 Ch. App., 593, and other authorities as showing that

all the benefits which the agent of one party receives under such circumstances from the other must be treated as received for the benefit of his principal. "All the remuneration which an agent so receives he receives on behalf of his principal, and it does not matter whether it formed part of the original bargain, or was a present as remuneration for services." So too, in *Parker v. McKenna*, L. R., 10 Ch. App., 96, Lord CAIRNS, L.C., said :—"The rule of this Court, as I understand it, as to agents, is not a technical or arbitrary rule. It is a rule founded upon the highest and truest principles of morality. No man can in this Court, acting as an agent, be allowed to put himself into a position in which his interest and his duty will be in conflict. . . . The Court will not inquire, and is not in a position to ascertain, whether the bank has lost or not lost by the acts of the directors. All that the Court has to do is to examine whether a profit has been made by an agent, without the knowledge of his principal, in the course and execution of his agency." JAMES, L.J., said :—"It appears to me very important, that we should concur in laying down again and again the general principle that in this Court no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal ; that that rule is an inflexible rule, and must be applied inexorably by this Court, which is not entitled, in my judgment, to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent ; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that." See also *Robinson v. Mollet*, L. R., 7 H. L., 812, and in particular the observations of MELLOR, J.

These authorities are sufficient to show that the conduct of the appellant amounted to criminal breach of trust by a public servant. In *Archbold's Pleading and Evidence in Criminal Cases*, 18th edition, p. 478, the nature of the evidence necessary to establish the commission of embezzlement is described. Thus, "the usual presumptive evidence" in such cases is said to be "that the defendant [128] never accounted to his master for the money, etc., so received by him, or that he denied having received it." These conditions are satisfied in the present case. The appellant did not defend himself, as he might have done, by admitting the appropriation of the commission paid by the contractors, and setting up a claim of right to such appropriation. He met the charge by an absolute denial.

The fact that the contractors consented to the transaction does not affect the appellant's guilt. If they did not consent, his guilt would of course be obvious, for in that case no payment would be made, and Government would remain liable. But the agent cannot be absolved because the payee conspires with him to deprive the principal of his money.

In the next place, assuming that the acts of the appellant do not constitute the particular offence of which he has been convicted, this Court has power, under s. 423 of the Criminal Procedure, to alter the finding to a conviction for any offence which they do constitute, and at the same time maintain the sentence. If the facts do not establish the offence of criminal breach of trust, they establish the offence of cheating, under s. 415, and of cheating and dishonestly inducing a delivery of property, under s. 420 of the Penal Code. Or the finding may be altered to a conviction under s. 161 (public servant taking a gratification other than legal remuneration, in respect of an official act), or under s. 165 (public servant obtaining any valuable thing, without consideration, from a person concerned in any proceeding or business transacted by such public servant.)

[PETHERAM, C.J.—Do you suggest that this Court may, in appeal, convict the appellant of an offence for which he was never charged or tried in the Court below, and in respect of which other evidence would have been necessary than that which was actually given?]

No, I confine myself to saying that, if this Court agrees with the Court below as to the facts, but is of opinion that the Court below has drawn an erroneous legal inference from them, or taken a wrong view as to the offence which they establish, it may, under s. 423, alter the finding so as to express their true legal effect.

[129] [PETHERAM, C.J.—The appellant has never been charged or tried for the offences you mention. It appears to me that s. 423 only empowers an Appellate Court to alter the finding within certain limits and upon a particular charge. For instance, there may be a finding of murder upon a charge on which there might have been a conviction for manslaughter; and in such a case the Appellate Court may alter the finding from murder to manslaughter. Such a course would be proper only where both findings were equally consistent with the charge upon which the appellant was tried.]

I submit that the scope of s. 423 is wider. It will be observed that s. 227 of the Criminal Procedure Code empowers a Court to alter any charge at any time before judgment is pronounced, or, in trials before the Court of Session or High Court, before the verdict of the jury is returned, or the opinions of the assessors are expressed. It is only where the absence of a charge, or an error in the charge, can be shown to have prejudiced or misled the prisoner in his defence, that a Court of appeal or revision will interfere (s. 232). Cheating (s. 415 of the Penal Code), and cheating and dishonestly inducing a delivery of property (s. 420), are offences *ejusdem generis* with criminal breach of trust (ss. 405, 409), and hence the alteration of a finding from a conviction under the latter to a conviction under the former sections is clearly within the powers of the Appellate Court. A conviction under s. 161 would also be proper.

[PETHERAM, C.J.—The difficulty there is that it is not clear what the appellant's powers precisely were. Before it can be proved what the gratification was intended to buy, we must know what he could have done in return for it]

Section 165 is also applicable. The expression "valuable thing" used in that section includes money given not for any of the objects described in s. 161, but as "*dasturi*": *Queen-Empress v. Kampta*, I. L. R., 1 All., 530.

Section 236 of the Criminal Procedure Code provides that where the facts are such that it is doubtful which of several offences they constitute, the accused may be charged with having committed [130] all or any of such offences, and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences. Section 237 provides that if, in the case mentioned in s. 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, though he was not charged with it. Now, in the present case, the acts of the appellant were of such a nature that it is doubtful whether they constituted criminal breach of trust, or cheating, or taking an illegal gratification.

[PETHERAM, C.J.—These offences are, in the abstract, hardly *ejusdem generis*. Criminal breach of trust and accepting a bribe, for instance, are, popularly at all events, considered as unlike each other as any two crimes could be.]

Mr. W. M. Colvin, in reply.—The argument of the learned Public Prosecutor is that the appellant received from Tarni Charan Dat and Co., purchasers payments, that these payments represented profits made by him in the course of his employment as agent, that these profits were the property of his employers, and that, not having handed them over or accounted for them to Government, but having converted them to his own use, he acted dishonestly and was guilty of criminal breach of trust. My answer to this is that, assuming the appellant to have received the payments from Tarni Charan Dat and Co., he did not receive them in the course of his employment as agent. The agency was discharged *quoad* the particular transaction, as soon as payment to the contractors had been made, and any subsequent gift or commission to the appellant could not be described as profits made by him in the course of his employment, or in the matter of his agency. There was no *animus furandi* on the part of the appellant. The only authority directly in point which has been cited on behalf of the Crown is a *dictum* of MELLISH, L.J., in *Hay's Case*, L. R. 10 Ch. App., 593. That *dictum* must be read in connection with the particular circumstances of that case. It was an illustration [131] used in a case where an agent had received moneys from persons desiring to sell certain property to his principals, and had been invested by his principals with large powers of altering and even rescinding the contract. In that case, the moneys were undoubtedly received by the agent in the course of his employment, and his possession was distinctly antagonistic to that of his principals. There were, under the circumstances, good reasons for not allowing the agent to retain what had been paid to him. But in the present case the appellant had no power to alter the terms and conditions of the contract. Reading MELLISH, L.J.'s illustration with the facts of the case in which it was used, it evidently was intended to apply to an open and not to a settled account, and it is therefore not applicable to the circumstances of the present case.

[PETHERAM, C.J.—You say that the rule applies only to cases where there is an account capable of reduction by the servant.]

Yes, because those are the only cases in which the acceptance of the gratuity puts the servant into a position antagonistic to the master. The principle of the cases which have been cited is that the acceptance of the gift operates as a reduction of the price, and that the master is entitled to the benefit of such reduction. It has no application to a case where the price, fixed and agreed between the master and the tradesman, has been fully paid by the servant, and the tradesman then makes him a present. In MELLISH, L.J.'s illustration, there was no real payment to the tradesman, and the handing over of the money was a mere pretence.

The next question is whether the finding can now be altered to a conviction under some other section than s. 409 of the Penal Code. In the first place, s. 165 is not applicable. That section is confined to cases where a public servant obtains a valuable thing "without consideration or for a consideration which he knows to be inadequate." But in the present case there was ample consideration, for the appellant took upon himself nearly all Tarni Charan Dat's duties under the contract with Government.

[PETHERAM, C.J.—That was no consideration, because the appellant was already bound, as a Government servant, to give all his time to the service of Government. You need not, however, argue the question whether the finding should now be altered.]

[132] Petheram, C.J.—The accused Imdad Khan has been convicted upon two charges, framed under s. 409 of the Penal Code, of criminal breach of trust,

and upon three charges framed under s. 50 of the Post Office Act (XIV of 1866). The accusation against him under the last-mentioned section is, in substance, one of falsifying documents with the object of concealing or assisting towards the criminal breach of trust to which the other charges relate. So that, as the Sessions Judge has held, the charges all stand or fall together; and if the accused be found guilty under any one of them, he must also be found guilty under the others, though it is not necessary that there should be a separate sentence in respect of each. Those being the matters charged, it is necessary, in the first place, to see what are the facts which are admitted, or, if not admitted, which have been established by the prosecution, and whether they constitute any offence; next, to ascertain what offence, if any, these facts, when taken together, constitute under the Penal Code.

The facts, as I gather them, are, that in the Post Office Service of these Provinces there is a department called the Railway Mail Service, and, as a part of this, there is at Allahabad a large store-house, in which are kept the stores required for the use of that department. There is no evidence upon the record which shows by whom or upon whose authority such stores are ordered, or whose mind it is that decides from time to time what stores are required. It is, however, clear that the accused Imdad Khan had for some years held an office in the Railway Mail Service at Allahabad as "Examiner" and "Superintendent" of stores. How long he filled this office is not shown. It is necessary next to ascertain, so far as the evidence shows us, what his duties were. There is nothing on the record to suggest that he had any power of deciding what stores were required, or of giving any order for them. His duty was to supervise the stores when they came into stock, and to pass them as according to the sample, if they were of the quality they should be, and of the amount ordered and charged for. This was his business, so far as examination of the stores is concerned. Besides this it was his duty, after the goods had come into stock and had been passed, to check the accounts of the tradesmen supplying them, and, after checking them, to [133] forward in a lump all the tradesmen's bills which at that time were due—having first got them countersigned by his superior officer—to the person whose business it was to pay them. Then, having obtained the money to be paid to the group of tradesmen, it was his duty to distribute it among them.

The charge against Imdad Khan is that, having obtained moneys from Government for the purpose of paying a particular tradesman, who is said to have supplied goods to this store, he appropriated these moneys to his own use, and thereby committed the offence of criminal breach of trust.

We must therefore see how the evidence upon this charge stands. The case set up by the prosecution is as follows:—It is said that a particular firm at Calcutta, trading under the name of Tarni Charan Dat and Co., had made a contract with Government for the supply of certain stores. The precise terms of the contract are not before us, but, from the action of the parties, and from the heading of the memorandum, it appears that the contractor, Tarni Charan Dat, agreed to supply stores of a certain class, for a period of two years, at a price specified on a list or schedule of prices. I think it must be taken as proved that the contract between the parties was that Government, on the one hand, bound themselves for a period of two years to take these stores from the firm, and, on the other hand, the firm bound themselves for the same period to supply the stores at the rates agreed on. Among the articles enumerated in the schedule was a cloth called "*gazzi*," and the schedule price for this was Re. 1-12-6 a piece. The contractors therefore were under an obligation to supply Government with as much *gazzi* cloth as might be required at

Re. 1-12-6 a piece, and the Government were under an obligation to take from the contractors all the *gazzi* cloth that was wanted, for two years, at the price stated.

The person whose business it was to give orders did order *gazzi* cloth from the Calcutta firm, and accordingly they sent the cloth to the storekeeper at Allahabad till January 1881. At that time a certain quantity of *gazzi* cloth, which was sent to Allahabad by Tarni Charan Dat, and which came to the stores, was examined by Imdad Khan, and he rejected it as not corresponding [134] with the sample kept in his office as a test piece. After this a different arrangement was made from that which had before prevailed. It was agreed that, instead of the *gazzi* being sent to Allahabad from the contractors' own shop, it should be supplied to the stores by a trader in Allahabad in the Calcutta contractors' name, and it appears that in some way or other the directions to this trader to send in the cloth for the firm came through Imdad Khan. How they came, and how it was communicated to this person what quantity was required, is not clear, all that does appear is that, after the occasion in 1881 to which I have referred, the cloth was sent direct to the stores from the warehouse in Allahabad, in the name of the contractors in Calcutta, and that, this was done in some way upon Imdad Khan's directions. It is necessary to see, in the next place, how the price of the cloth was dealt with. When the goods were supplied to the stores by the Allahabad tradesman, the form of the accounts, so far as Government were concerned, was not altered. The amount of *gazzi* which was sent to the stores was charged for in the accounts sent by the Calcutta firm to Government, as if they had supplied them, just as before the change had been made, and the same price, Re. 1-12-6 a piece, was charged as Government were, under their contract to Tarni Charan Dat, bound to pay. So that, so far as concerned Government, there was no apparent change. The goods were still apparently sent by the Calcutta firm, and invoiced at the same prices as before, and Government continued to hand money to Imdad Khan to pay the tradesmen, and, among others, to pay Tarni Charan Dat for *gazzi* cloth.

At length it came to the knowledge of the authorities that the price which the Allahabad house were getting for *gazzi* was Re. 1-6 a piece, and that therefore the contractors were not getting the price which Government were paying, but six and a half annas a piece less. This discovery made them inquire who was pocketing the difference. Upon being questioned, Imdad Khan stated it was true that, in consequence of an arrangement made with Tarni Charan Dat, the person supplying the goods got Re. 1-6, but that he, as storekeeper, who had to draw the Re. 1-12-6 from Government, transmitted the whole of the price to the contractors. [135] This is the statement which he made at the outset of the inquiry, and to which he has ever since adhered.

The Government, however, were satisfied that the statement was not true. They made inquiries of the persons actually supplying the goods, and of the Calcutta contractors, and they came to the conclusion that, after Imdad Khan's rejection of the *gazzi* cloth in 1881, a new arrangement was made between Imdad Khan and the contractors alone, by which the former contract was practically abrogated, that after this the *gazzi* was no longer supplied by the Calcutta firm at Re. 1-12-6 a piece, but by some person at Allahabad on behalf of the Calcutta firm, or of Imdad Khan, at Re. 1-6 a piece only, and that the balance went into the pocket of Imdad Khan. In other words, it is alleged that, after the transaction in 1881, there was an agreement between the storekeeper and the contractors that the price of *gazzi* should be reduced from Re. 1-12-6 to Re. 1-6, that to conceal this reduction from the person who

had to pay for the *gazzi*, the books and accounts were falsified; and that the resulting profit was appropriated by Imdad Khan, who, though drawing the larger price, paid only the smaller.

Now, it is obvious that if this state of facts has been proved, it amounts to the offence of criminal breach of trust. It is, by whatever technical name it may be called, a stealing of the difference between the two prices by a servant of Government, and a falsification of accounts with the object of concealing the crime. This is, in fact, the case which the prosecution contend is proved, and upon which they rely. To see whether they are justified in this, we must examine the evidence which they assert to be proof, and see if it can be relied on.

Bearing in mind the nature of the offence charged, it is clear that, if it has been committed at all, it has been committed by Imdad Khan and the tradesmen jointly. It was, in fact, a conspiracy, to which all of them were parties, and of which the object was to obtain the cloth at a reduced price, and to steal the difference for the benefit of all. This being so, it follows that the tradesmen are no less guilty than Imdad Khan. It is important to note this in considering whether the commission of the offence [136] has been proved against Imdad Khan, who alone has been charged with it.

Now, if the facts are as I have just stated, the persons who must have been aware of the circumstances are Imdad Khan, Tarni Charan Dat, and the tradesman at Allahabad who supplied the cloth in Tarni Charan Dat's name. It is natural that when one of these persons is charged with criminal breach of trust, the others should be called as witnesses by the prosecution. And unless their evidence establishes the case against Imdad Khan, there is nothing upon the record that does.

The first of these witnesses that was called was a member of Tarni Charan Dat's firm. The contractors' story, if true, undoubtedly proves the case for the prosecution. They virtually say:—"We supplied these goods till 1881, and got for them a price of Re. 1-12-6 a piece. After the rejection of the goods in January 1881, Imdad Khan said that he could get the stuff upon better terms at Allahabad; we replied, agreeing that he should do so upon any terms he pleased, and to carry on the accounts in such a way as to conceal the transaction, on condition of our receiving a share of the profit. We did not know who supplied the goods, or the price which he charged for them."

This statement, if true, proves the case of the prosecution, because it shows that the old arrangement was abrogated, that a new arrangement was made for the supply of *gazzi* cloth at a reduced price, and that the account books were falsified in order that this arrangement might be kept secret. It also implies that Tarni Charan Dat and Co. are equally guilty with Imdad Khan, and upon their own statement there is no reason why they should not be tried and convicted.

The next witness for the prosecution, of those implicated in the transaction, and who would naturally be aware of the circumstances, is Sadhu Lal, the tradesman at Allahabad, who supplied the goods after January 1881. His evidence, however, absolutely contradicts that of Tarni Charan Dat. He virtually says:—"It is true that I supplied the cloth at Re. 1-6-0 a piece. But I did not supply it upon instructions given by Imdad Khan. I supplied it upon a contract with the Calcutta firm, and I sent it to the stores [187] in their name. I was the person who had the contract with Government before the Calcutta firm had it. Besides *gazzi* cloth there were other articles which I supplied to the stores under the same arrangement as I have described."

Here, then, we have the evidence of two persons who, according to one of them, are accomplices of Imdad Khan in the offence of criminal breach of trust. One of the three criminals is in the dock, and the other two are called as witnesses to prove the charge against him. One of them is not only an accomplice, but, if the case for the prosecution is true, must have falsified accounts in order to assist the accused. The other, if his statements are true, in effect, destroys that case. How is it possible that any Court could safely convict the prisoner upon such evidence and under such circumstances as these?

The only other matters relied on by the prosecution are the books of Tarni Charan Dat. These have been examined with the object of proving the untruth of Imdad Khan's statement that he handed over the whole price to the contractors, because they are said to show that the whole price was never received. But the books are evidence only to this extent—that, in giving his testimony, Tarni Charan Dat might look at them for the purpose of refreshing his memory. They cannot, however, carry his evidence any further, nor do they alter the fact that the state of things alleged by Tarni Charan Dat rests upon his evidence, and upon his evidence only, denied by the appellant, and contradicted on oath by Sadhu Lal.

We have therefore the common case in which the only evidence against an accused person is the evidence of his accomplice. It is not necessary for me to refer in detail to the numerous cases in which Judges of the greatest eminence and experience, both in this country and in England, have held that unless evidence of this kind is corroborated in material particulars, it cannot safely be relied on. The reasons upon which this opinion is based are various. It is plain that where a witness against an accused person tells a story which equally incriminates himself, there is no reason for preferring his story to the prisoner's. If the story of Tarni Charan Dat is true, then he and Imdad Khan are both of [138] them rogues, and there is no ground for regarding either as more trustworthy than the other. By way of authority for this view, I need only refer to the judgment of my brother STRAIGHT in the case of *Empress v. Ram Saran*, Weekly Notes, 1885, p. 311, in which the English cases are collected, and which fully explains the grounds upon which the highest authorities have decided that it is not safe to depend upon this class of evidence. It is enough for me to say that I entirely and absolutely agree with that judgment of my brother STRAIGHT, and with his opinions expressed thereon, which the authorities he refers to establish. For these reasons, I am of opinion that it would be unsafe to convict the appellant Imdad Khan upon evidence of this character, which is the only evidence against him, and I hold that he must be acquitted of the charges of criminal breach of trust.

Next, with reference to the charges of falsification of accounts, they stand or fall with the charges of criminal breach of trust. They are charges of the falsification of the accounts which were sent by Tarni Charan Dat, showing that the goods were being supplied under the original contract at the original prices, with the object of enabling the criminal breach of trust to be carried out. They are, in fact, substantially the same accusation, and depend upon the same evidence. and, for the reasons I have already given, I think that, upon these charges also, the accused must be acquitted.

I desire now to make a few observations upon the law of criminal breach of trust in cases of this nature, with reference to the reduction of the price of goods.

Mr. *Hill* has laid much stress upon a *dictum* of Lord Justice MELLISH in *Huy's Case* [In re *The Canadian Oil Works Corporation*, L.R., 10 Ch. App., 593]. It is to the effect that, if a master sends his servant to pay a bill, and gives

him money for the payment, then if the tradesman makes the servant a present, the master is entitled to the benefit of it, because it amounts to a reduction of the price of the goods.

Now, if the account is an *open* one, that is, an account of which the items have never been checked or settled, and if the transaction amounts to a taxation of the bill and a reduction of the price [139] by the servant, it is obvious that the servant obtains the reduction for his master; that the money in his hands always remains the master's property, and that if he appropriates it, he steals it. But if the master himself has *settled* the account with the tradesman for a specific sum, and he sends the servant with the money, and the servant after making the payment, asks the tradesman for a present, then, if the servant takes the present and keeps it, he is not guilty of stealing, because he has no intention to steal: the money is given to him by a person whom he believes to have a right to give it. It may be that, according to the strict equitable doctrines of the Court of Chancery, the servant is bound to account to his master for the money. But, however this may be, his act is a very different matter from a criminal offence, and I do not think he can be convicted of criminal breach of trust merely because, by a mere equitable doctrine of the Court of Chancery, it was obligatory upon him to render an account.

In the present case, however, this question does not really arise. The case for the prosecution is, not that part of the price was *given back* to the accused, but that he actually stole it by reducing it in pursuance of a conspiracy. And as this case rests entirely upon the evidence of the accomplices who are said to have conspired with him, I think, as I have already said, that it cannot safely be regarded as proved.

I have been pressed by the learned Public Prosecutor to alter the findings, so as to convict Imdad Khan of some other offence under some other provision of the law. For my part, I have serious doubts as to whether I could alter the finding in any case in such a manner. It is, however, enough for me to say that, in my opinion, such a course would not be right in the present case. If Imdad Khan is guilty of some other offence, he may be charged and tried for it. Upon this point I desire to express no opinion. All that I am concerned with is the offence for which he has been charged and tried, and I am of opinion that the evidence upon which he has been convicted is not such as can safely be relied on. Under these circumstances, I allow the appeal, and, setting aside the conviction and sentence, direct that the prisoner be released.

Conviction set aside.

[140] APPELLATE CIVIL.

The 9th January, 1886.

PRESENT:

SIR W. COMER PETHERAM, K.T., CHIEF JUSTICE, AND
MR. JUSTICE STRAIGHT.

Ramtahal Ram and another..... Defendants

versus

Rameshar Ram.....Plaintiffs*

*Suit, adjournment of hearing of—Ex-parte decree—"Appearance" of
defendant—Civil Procedure Code, ss. 108, 157.*

A Munsif, before whom a suit was pending, fixed, by way of adjournment, a particular date for its disposal. Upon the date so fixed, it was necessary to take evidence upon issues of fact which had previously been settled. The plaintiffs appeared on that day. The defendants did not appear, but there was in Court a pleader, who had been instructed by the two principal defendants at the outset and who had filed his *vakalat-nama*. There was nothing to show that he had ever received any other instructions whatever, either as to the facts of the case or the conduct of the defence, or that the defendants had done anything beyond giving the pleader the instructions above referred to. Under these circumstances the plaintiffs gave their evidence and the Munsif decreed the claim.

Held, that, under the circumstances stated, the defendants' pleader must be taken not to have been in Court on the date fixed, for the purpose of defending the suit on behalf of the defendants, inasmuch as, upon that part of the case, he had not been instructed, that it was therefore a fair inference that the defendants did not appear and the case was disposed of under s. 157 of the Civil Procedure Code, and that, under these circumstances the provisions of s. 108 were applicable and the decree was an *ex parte* decision, which it was open to the Munsif to reconsider.

Hwa Dai v Hwa Lal, I L R., 7 All., 538, followed.

THE plaintiff in this suit claimed possession of certain immoveable property. The Court of First Instance (Munsif of Saidpur) on the 17th August 1883, gave him a decree. On the 20th September 1883, the defendants applied, under s. 108 of the Civil Procedure Code for an order setting aside this decree. On the 23rd November 1883, the Court granted this application, and appointed the 7th December 1883, for proceeding with the suit. On the last-mentioned date the Court tried the suit and dismissed it. The plaintiff appealed, and the Lower Appellate Court (Additional Subordinate Judge of Ghazipur) held that the decree first made by the Court of First Instance was not an *ex parte* decree, within the meaning of s. 108 of the Civil Procedure Code, and [141] should not have been set aside under that section, and it restored that decree, reversing the second decree made by the Court of First Instance.

In second appeal it was contended on behalf of the defendants that the decree first made by the Court of First Instance was an *ex-parte* decree which could properly be set aside under s. 108 of the Civil Procedure Code.

The circumstances in which that decree was made are stated in the judgment of PETHERAM, C. J.

Mr. T. Conlar and Lala Juala Prasad, for the Appellants.

* Second Appeal No. 441 of 1885, from a decree of Pandit Ratan Lal, Additional Subordinate Judge of Ghazipur dated the 6th March 1885, reversing a decree of Muhammad Aziz ul-Rahman, Munsif of Saidpur, dated the 7th December 1883.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the Respondent.

Petheram, C.J.—I am of opinion that this appeal must be allowed, and the Subordinate Judge directed to reinstate the case upon his file, and to dispose of it according to its merits. The material facts of the case are as follows :—The action was brought at the beginning of the year 1883 by the plaintiffs against the defendants to recover possession of certain property. A summons was issued to the five defendants, citing them to appear before the Munsif on the 30th April 1883, the action then pending, but no one appeared on that day. Two of the defendants—whether before or after the 30th April is not clear—applied to the Munsif to postpone the case, and upon this application the Munsif fixed the 15th May for the disposal of the suit, and the defendants were directed to file written statements before the 7th of the month. No written statements, however, were filed, and on the 15th May the plaintiffs appeared before the Munsif, and of the five defendants only two appeared and asked for further time to be allowed. This was granted and a date fixed, but when that day arrived and the matter again came before the Munsif, apparently no one appeared, and the Court passed a decree for the plaintiffs *ex parte*. On the 8th June, the two principal defendants applied to the Munsif, under s. 108 of the Civil Procedure Code, on the ground that the decree against them had been passed *ex parte*, and prayed that it might be set aside. This application was granted, and the Munsif reinstated the case upon his file, and fixed the 17th August for its disposal. I understand that the issues had been [142] settled, and on the 17th August what the Munsif had to do was to try the case. The questions in issue were questions of fact, so that it would be necessary to take evidence. When the 17th August arrived, the plaintiffs appeared. The defendants did not appear, but there was in Court a pleader, who had been instructed by the two principal defendants at the beginning of the case, and who had filed a *vakalat-nama* in pursuance of the statute. But so far as I can ascertain, when the case came before the Court on the 17th August, the pleader had only his original instructions to enter an appearance and file his *vakalat-nama*. He had no instructions as to the facts of the case or as to evidence to be adduced, nor was he provided with any of the means of conducting the defence. Under these circumstances the plaintiffs gave their evidence, and a decree was passed in their favour in the defendants' absence.

The question now arises whether this was an *ex parte* decree which the Munsif could reconsider under s. 108 of the Civil Procedure Code, or whether, on the other hand, it was a decree of such a nature that it could only be dealt with by appeal. The determination of this point depends upon the further question whether the defendants, on the 17th August 1883, did "appear" within the meaning of s. 157 of the Civil Procedure Code.

Now this Court, in the case of *Hira Dai v. Hira Lal*, I L. R., 7 All., 538, has decided that the mere fact of instructing a pleader who has filed his *vakalat-nama* is not by itself sufficient to prevent a defendant from failing to make an appearance. We are bound by that ruling, and I entertain no doubt whatever of its propriety, and am prepared to follow it.

There is nothing on the record to show that anything was done by the defendants beyond the instructions to the pleader at the outset to defend the suit; and this being so, I am of opinion that the pleader must be held not to have been present in Court on the 17th August 1883, for the purpose of defending the suit on behalf of the defendants, because, as regards that part of the case, he had not been instructed, and therefore it is a fair inference that the defendants did not appear, and that the suit was disposed of under s. 157 of the Code. Under these circumstances the provisions of [143] s. 108 were applicable,

and it was open to the Munsif to reconsider his decision ; and the Judge, instead of interfering with the Munsif's discretion, ought to have disposed of the appeal upon its merits, and not upon a technical point. For these reasons I am of opinion that the appeal should be allowed, and the Judge directed to reinstate the appeal upon his file, and to dispose of it according to the merits. Costs will be costs in the cause.

Straight, J.—I am of the same opinion

Appeal allowed.

NOTES.

[See *Ante*, Notes to 7 All., 588.]

[8 All. 143]

The 15th January, 1886.

PRESENT

MR. JUSTICE STRAIGHT AND MR. JUSTICE BRODHURST.

Lachman Kuar.....Plaintiff

versus

Mardan Singh and others.Defendants.*

*Hindu widow—Re-marriage—Presumption of legality of marriage—
Act XV of 1856.*

L sued for possession of certain immoveable property as the widow and heiress of a Hindu, a Gaur Rajput, and governed by the law of the Mitakshara, alleging him to have been at the time of his death separate from the other members of his family. The suit was dismissed by the Lower Appellate Court, on the grounds that the plaintiff at the time when her connection with the deceased began was the widow of one of his cousins, that, according to the custom of the caste the marriage of a widow with a relative of her husband was invalid ; and that consequently the plaintiff could not be considered the lawfully married wife of the deceased, and entitled as such to the inheritance of his estate.

Held, that, the plaintiff having in the first Court given evidence to show that she was married to the deceased and that her two infant daughters were the offspring of that marriage, and, looking to the provisions of Act XV of 1856, the presumption was in favour of the legality of such marriage until the contrary was shown, i.e., until the defendants had established that, according to the custom of the caste of Gaur Rajputs, the marriage of a cousin, with his deceased cousin's widow, was prohibited

THE plaintiff in this suit claimed possession of a share in a certain village, as widow and heiress of one Aman Singh, a Hindu governed by the law of the Mitakshara, whom she alleged to have been at the time of his death separate from the other members of his family. The defendants were cousins of Aman Singh, and after his death had obtained an order in the Revenue Court, directing their names to be recorded in his place in respect of the share in suit. They contended that Aman Singh had lived jointly [144] with them ; that the plaintiff was not his wife but his mistress, and that she, having been excommunicated from the brotherhood on account of immorality, had no right of

* Second Appeal No 467 of 1885, from a decree of Sayyid Farid-ud-din Ahmad, Subordinate Judge of Cawnpore, dated the 5th February 1885, reversing a decree of Babu Jai Lal, Munsif of Aklarpur, dated the 16th August 1884.

inheritance, under the Hindu Law, to the estate of Aman Singh. It appeared that the plaintiff was originally the wife of Achru Singh, a cousin of Aman Singh, and had lived with the latter after the death of the former. The caste of the family was.—The family were Gaur Rajputs—Kshatriya.

The Court of First Instance (Munsif of Akbarpur) found that, according to the custom of the caste to which the parties belonged, the plaintiff, having been kept by Aman Singh as his wife, must be regarded as having been lawfully married to him. The Court also found that the allegation of the defendants, to the effect that Aman Singh had lived jointly with them, and as to the immorality of the plaintiff, were groundless. It accordingly decreed the claim. On appeal, the Subordinate Judge of Cawnpore reversed the Munsif's decree and dismissed the suit, observing as follows:—"This Court, differing from the opinion of the first Court, holds that as Aman Singh was a Thakur Kshatriya by caste, and the plaintiff was the widow of the elder brother, she cannot be said to be a lawfully-married wife by reason of her being a concubine, and hence cannot be entitled to the inheritance of Aman Singh. There are three superior tribes among Hindus. Among them one is Kshatriya, and in such castes the marriage with a widow has never been held to be valid. If any widow lives in the keeping of any relation of her husband, she can never be considered to be the lawfully-married wife of that person."

In second appeal by the plaintiff, it was contended on her behalf, first, that the Subordinate Judge was in error in holding that the marriage of a widow with a relative of her deceased husband was illegal; and, secondly, that the existence of such a custom of marriage in the caste to which the parties in the case belonged, had been established by the evidence.

Munshi Kashi Prasad, for the Appellant.

Babu Dwarka Nath Banarji, for the Respondents.

Straight and Brodhurst, JJ.—We both feel that what professes to be the judgment of the Subordinate Judge in appeal is a [145] most inadequate and unsatisfactory production, and that it is not proper for us, upon the basis of it, to determine a question of such vital importance to the plaintiff and her two children as is involved in the present suit. She claimed upon the basis of her being the widow of one Aman Singh, deceased, and the mother of his two infant daughters, to have her right declared as his widow to possession of the property in suit; the effect of which declaration, if granted, would have been that the two infant daughters, if they survived her, would, on her death, succeed to the share; assuming always that the allegation made by the defendants that they were joint with Aman Singh was not made out. The plaintiff seems, in the first Court, to have given evidence to show that she was married to Aman Singh, and that her two infant daughters were the offspring of that marriage. Under these circumstances, and looking to the provisions of Act XV of 1856, we are inclined to think that the presumption was in favour of the legality of such marriage, until the contrary was shown, that is, as in the present case, until the defendants have established that, according to the custom of the caste of Gaur Rajputs, to which Achru and Aman Singh belonged, the marriage of a cousin with his deceased cousin's widow is prohibited. With these remarks, and without repeating what we have already said as to the character of the decision of the Subordinate Judge appealed from, we think that the appeal was not in reality tried at all by that officer, for he entirely failed to grasp the legal points involved in the case, or to record a decision with which, looking to the real questions raised between the parties, it is possible for us to deal as a Court of Appeal. The only proper course appears to us to decree the appeal, and set aside the judgment and decree of the Lower Appellate Court.

We remand the case to the present Subordinate Judge of Cawnpore, for restoration of the appeal to his file and for trial *de novo* on the merits in adherence to our remarks as to Act XV of 1856, and with due regard to the pleas taken in the memorandum of appeal to the Lower Appellate Court. The costs of this appeal and the other costs hitherto incurred in the litigation will be costs in the cause.

*Appeal allowed.**

[146] FULL BENCH.

The 21st January, 1886.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE STRAIGHT,
MR. JUSTICE OILFIELD, MR. JUSTICE BRODHURST
AND MR. JUSTICE TYRKELL.

Basti Ram.....Defendant

versus

Fattu.....Plaintiff.*

Civil Procedure Code, s. 244—Question for Court executing decree—Separate suit—Civil Procedure Code, ss. 266, 316.

The provisions of s. 244 (c) of the Civil Procedure Code prohibit not only a suit between parties and their representatives, but also a suit by a party or his representatives against a purchaser at a sale in execution of the decree, the object of which is to determine a question which properly arises between the parties or their representatives, and relates to the execution, discharge, or satisfaction of the decree.

A judgment-debtor, whose occupancy-tenure had been sold in execution of a decree for money sued the purchaser for recovery of the property, on the ground that the sale of occupancy-rights in execution of decree was illegal and void, being in contravention of the provisions of s. 9 of Act XII of 1881 (N.-W. P. Rent Act).

Held, by the Full Bench, that the question involved in the suit was one of the nature referred to in s. 244 (c) of the Civil Procedure Code as determinable only by order of the Court executing the decree, and that the suit was therefore not maintainable. *Narain v. Puran*, Weekly Notes, 1883, p. 218, referred to.

THE defendant in this suit held a decree for money against the plaintiff. In execution of that decree he caused to be attached and advertised for sale the plaintiff's right of occupancy in certain lands. The plaintiff objected to the attachment on the ground that the sale in execution of decree of such a right was prohibited by s. 9 of Act XII of 1881 (N.-W. P. Rent Act). The Court executing the decree disallowed this objection on the 9th August 1883, and the tenure was put up for sale, and purchased by the defendant on the 20th August 1883; and possession of the lands was delivered to him.

The plaintiff brought this suit against the defendant to set aside the order disallowing his objection and the sale, and to recover possession of the land, on the ground that the sale was illegal and void, being in contravention of the

* Second Appeal No. 1482 of 1884, from a decree of C. W. P. Watts, Esq., District Judge of Saharanpur, dated the 23rd July 1884, affirming a decree of Kuar Mohan Lal, Munsif of Muzaffarnagar, dated the 23rd April 1884.

provisions of s. 9 of the Rent Act. The Court of First Instance (Munsif of Muzaffarnagar) gave the plaintiff a decree as claimed. The defendant appealed on [147] certain grounds. At the hearing of the appeal he urged, in addition to those grounds, the ground that s. 244 of the Code of Civil Procedure was a bar to the suit. This ground the Lower Appellate Court refused to consider, as it was a new one and had not been taken below, and affirmed the decree of the first Court.

The defendant, in second appeal, again contended that the suit was barred by s. 244 of Civil Procedure Code.

With reference to this contention, the Court (PETHERAM, C. J., and TYRRELL, J.) referred the following question to the Full Bench :—

“Is a suit brought by a *quondam* judgment-debtor against the purchaser of his occupancy-tenure, who was also his decree-holder, barred by the rule in s. 244 (c) of the Civil Procedure Code?”

Munshi Kashi Prasad, for the Appellant.

Pandit Sundar Lal, for the Respondent.

Oldfield, J. (PETHERAM, C.J., and STRAIGHT, BRODHURST, and TYRRELL, JJ., concurring).—By s. 244, Civil Procedure Code, it is provided that certain questions shall be determined by order of the Court executing the decree, and not by separate suit. Amongst these are all questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge, or satisfaction of the decree.

The questions must be questions which arise between parties to the suit or their representatives, and which relate to the execution, discharge, or satisfaction of the decree.

If they are questions of this nature, and which properly arise between the parties or their representatives, they must be determined by order of the Court executing the decree, and not by separate suit; and the provision disallowing separate suit to determine these questions applies not only to prohibit a suit between parties and their representatives, but also a suit by a party or his representatives against an auction-purchaser in execution of the decree, the object of which is to determine a question which properly arises between parties or their representatives, and relates to the execution, discharge, or satisfaction of the decree.

[148] If the question be of this nature, it is one which by s. 244 must be determined by order of the Court executing the decree, and not by separate suit; and it is immaterial whether the party did or did not raise it prior to the auction-sale at the time of execution. If he did not, he lost the remedy which the Legislature has provided.

That this was the intention of the Legislature, and that a question of this kind cannot be raised by a party to the suit in which the decree was passed against a purchaser in execution of that decree seems evident from s. 316, which provides that, as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of the sale-certificate.

In the case before us a judgment-debtor has sued the auction-purchaser to recover the property sold in execution of the decree, on the ground that the property, which is a tenant's right in land, is not by law saleable in execution of a decree. This question is one which arose between the plaintiff judgment-debtor and the decree-holder, who is also the purchaser, and was determined against the former by the Court which executed the decree prior to the sale; and it is a question which must be considered to relate to the execution, dis-

charge, or satisfaction of the decree. It is, in effect, whether certain property was liable to attachment and sale to satisfy the decree.

Certain things are, by s. 266, Civil Procedure Code, not liable to attachment and sale; and questions regarding liability to attachment and sale arising out of the provisions of s. 266 would clearly be questions within the meaning of s. 244, Civil Procedure Code. The question of the liability of the property, the subject of this suit, to attachment and sale, arises out of a provision in the Rent Act; but equally with questions under s. 266, Civil Procedure Code, it is one which falls within the meaning of s. 244, Civil Procedure Code.

For these reasons I am of opinion that the suit is not maintainable, and on re-consideration I modify the opinion I expressed in the case of *Narain v. Puran*, Weekly Notes, 1888, p. 218.

NOTES.

[This case was followed in (1899) 22 All., 86 (the question was between one of the parties and the auction-purchaser as regards execution, discharge or satisfaction of decree); (1899) 22 All., 108 (the question was as regards the non-liability of the property decreed against); (1899) 26 Cal., 727 (non-saleability of the holding). But see (1904) 26 All., 447 F. B., where this and other cases were not followed]

In (1897) 24 Cal., 355 this case was distinguished and observed upon as follows:—"In the present case (24 Cal., 355), the party who raises the objection that the plaintiff has acquired no right by his auction-purchase because the holding sold was a non-transferable one, has not brought any suit. He is only raising that objection in defence to the suit which the other side has brought, and section 244 is not, in our opinion, any bar to this plea being raised by the defendant in his defence".]

[149] *The 21st January, 1886.*

PRESENT :

SIR COMER PETHERAM, KT., CHIEF JUSTICE. MR. JUSTICE STRAIGHT,
MR. JUSTICE OLDFIELD, MR. JUSTICE BRODHURST AND
MR. JUSTICE TYRRELL.

Abdul Kadir.....Plaintiff

versus

Salima and another.....Defendants.*

*Suit for restitution of conjugal rights—Muhammadan Law—
Dower—Plea of non-payment—Form of decree.*

According to the Muhammadan law, marriage is a civil contract, upon the completion of which by proposal and acceptance, all the rights and obligations which it creates, arise immediately and simultaneously. There is no authority for the proposition that all or any of these rights and obligations are dependent upon any condition precedent as to the payment of dower by the husband to the wife. Dower can only be regarded as the consideration for connubial intercourse by way of analogy to price under the contract of sale. Although prompt dower may be demanded at any time after marriage, the wife is under no obligation to make such demand at any specified time during coverture, and it is only upon such demand being made that it becomes payable. This claim may be used by her as a means of obtaining payment of the dower, and as a defence to a claim for cohabitation on the part of the husband without her consent; but, although she may plead non-payment, the husband's right to

* Second Appeal No. 414 of 1884, from a decree of M. S. Howell, Esq., District Judge of Mirzapur, dated the 15th March 1884, reversing a decree of Munshi Madho Lal, Munsif of Mirzapur, dated the 12th December 1883.

claim cohabitation is antecedent to the plea, and it cannot be said that until he has paid prompt dower his right to cohabitation does not accrue. The sole object of the rule allowing the plea of non-payment of dower is to enable the wife to secure payment. Her right to resist her husband so long as the dower remains unpaid is analogous to the lien of a vendor upon the sold goods while they remain in his possession and so long as the price or any part of it is unpaid; and her surrender to her husband resembles the delivery of the goods to the vendee. Her lien for unpaid dower ceases to exist after consummation, unless at such time she is a minor or insane or has been forced, in which case her father may refuse to surrender her until payment. It cannot in any case be pleaded so as to defeat altogether the suit for restitution of conjugal rights, which is maintainable upon the refusal of either party to cohabit with the other; and it can only operate in modification of the decree for restitution by rendering its enforcement conditional upon payment of so much of the dower as may be regarded as prompt, in accordance with the principles recognized by Courts of equity under the general category of compensation or lien, when pleaded by a defendant in resistance or modification of the plaintiff's claim.

It is a general rule of interpretation of the Muhammadan Law that, in cases of difference of opinion among the jurisconsults Imam Abu Hanifa and his two disciples Qazi Abu Yusuf and Imam Muhammad, the opinion of the majority must be followed; and, in the application of legal principles to temporal matters, the opinion of Qazi Abu Yusuf is entitled to the greatest weight.

Moonshiee Buzloor Ruheem v. Shums-oon-nissa Begum, 11 Moo. I. A. 551, *Mulleeka v. Jumeela*, L. R., Sup. Vol., Ind. Ap. 135; 11 B. L. R., 375, *Ranee Khajooroonissa v. Rane Ryeesoonissa*, L. R., 2 Ind., Ap. 235; 5 B. L. R., 84, *Nawab Buhadoor Jung Khan v. [180] Useez, Begum*, N.-W. P. S. D. A. Rep., 1843-46, p. 180, *Jaun Beebee v. Sheikh Moonshiee Beparee*, 3 W. R., C. R., 93, *Gatha Ram Mistree v. Moohtra Kochin Atteah Doomoonie*, 14 B. L. R., 298, and *Eidan v. Mazhar Husain*, I. L. R., 1 All., 483, referred to. *Sheikh Abdool Shukkoar v. Raheem-un-nissa*, N.-W. P. H. C. Rep., 1874, p. 94, *Wilayat Husain v. Allah Rakhi*, I. L. R., 2 All., 831, *Nasrat Husain v. Ilamidan*, I. L. R., 4 All., 205, and *Nasir Khan v. Umrao*, Weekly Notes, 1882, p. 96, overruled.

In a suit brought by a husband for restitution of conjugal rights, the parties being Sunni Muhammadans governed by the Hanafi Law, the defendant pleaded that the suit was not maintainable, as the plaintiff had not paid her dower-debt. The plaintiff thereupon deposited the whole of the dower-debt in Court. It appeared that the defendant's dower had been fixed without any specification as to whether it was to be wholly or partly prompt. It also appeared that she had attained majority before the marriage, and that she had cohabited with the plaintiff for three months after marriage, and there was no evidence that she had ever demanded payment of her dower before the suit was filed, or that she had refused cohabitation on the ground of non-payment. Besides the plea already mentioned, she also relied upon allegations of divorce and cruelty, but these allegations were found to be untrue. The Lower Appellate Court dismissed the suit, holding that inasmuch as the plaintiff had not paid the dower-debt at the time when he brought his suit, he had no cause of action under the provisions of the Muhammadan Law.

Held by the Full Bench that the Lower Appellate Court's view of the Muhammadan Law relating to conjugal rights and the husband's obligation to pay dower, was erroneous; and that the plaintiff, under the circumstances of the case, had a right to maintain the suit.

THE plaintiff in this suit claimed restitution of conjugal rights. The parties to the suit were Sunni Muhammadans governed by the Hanafi law. The plaintiff was married to the defendant Salima on the 15th March 1883, and her dower was fixed without any specification as to whether it was to be partly or wholly prompt or deferred. She cohabited with her husband, the plaintiff, up to the 15th June 1883, when she went on a visit to her father, the defendant Chimman. On the 28th June 1883, the plaintiff instituted the present suit on the allegation that he requested Chimman to allow Salima to return to cohabitation with him, but that Chimman "flatly refused to comply

with the plaintiff's request, and obstructed him in bringing the defendant Salima with him;" that the defendant Salima had "been won over by the defendant Chimman to his own side;" and that the plaintiff's wife, the defendant Salima, was "not therefore willing to come with the plaintiff." Upon these allegations the plaintiff prayed that "the defendant [151] Chimman be ordered to send the defendant Salima with the plaintiff, and not to interfere with the latter in bringing her with him, and the defendant Salima be also ordered to come with the plaintiff and live with him as his wife."

To the suit so instituted two separate defences were made on one and the same day, the 24th July 1883.

The defendant Chimman simply protested against being impleaded in the suit, stating that he "never refused to send Salima to her husband's house;" that she was "herself wise and major," and could "form a judgment as to her own interests."

The defendant Salima raised three main pleas in defence:—*First*, that she had been irrevocably divorced by the plaintiff, and was therefore no longer his wife; *secondly*, that "notwithstanding the divorce, the plaintiff had not paid the defendant's dower," so that, "even if the plaintiff had not repudiated the defendant, he was not competent to bring his suit so long as he did not satisfy her dower-debt;" and *thirdly*, that the plaintiff had treated her with cruelty, and she was therefore in fear of grave personal injury.

In this stage of the case the plaintiff deposited the whole dower-money in Court on the 20th August 1883, and the Court of First Instance (Munsif of Mirzapur) having examined the evidence produced on either side, held that the allegations set up in defence were not proved; that the nature of dower not having been "specified at the time of marriage, only a part of the dower becomes, under the Muhammadan law, payable on demand;" that "before the institution of the suit, the dower was never demanded by the defendant;" that "the defendant having insisted on payment of the dower, the plaintiff has paid the money into Court;" and that such payment under the circumstances of the case entitled the plaintiff "to succeed in his claim for bringing his wife to his house."

Upon appeal by both the defendants, the Lower Appellate Court (District Judge of Mirzapur), relying upon certain rulings, and without going into the merits of the case as to the pleas regarding divorce and cruelty, held that "the whole of the dower is to be considered as prompt" under the Muhammadan law, and that "payment into Court after institution of the suit was insufficient, because the husband had no cause of action at the time when he [152] brought his suit." Upon this ground the District Judge, decreeing the appeal, dismissed the suit *in toto*.

The plaintiff appealed to the High Court, impugning the view of the Muhammadan law taken by the Lower Appellate Court.

The appeal came on for hearing before OLDFIELD and MAHMOOD, JJ., who, having regard to the rulings of the Court in *Sheikh Abdool Shukkoar v. Raheem-on-nissa*, N.-W.P. H. C. Rep., 1874, p. 94, *Wilayat Husain, v. Allah Rakhi*, I.L.R., 2 All., 831, and *Nazir Khan v. Umrao*, Weekly Notes, 1882, p. 96, referred to the Full Bench the question "Whether, under the circumstances of this case, the plaintiff had the right to maintain the suit."

Mr. *Amir-ud-din*, for the Appellant.

Pandit *Ajudhia Nath*, for the Respondents.

Pethuram, C.J. (STRAIGHT, OLDFIELD, BRODHURST, and TYRRELL, JJ., concurring):—This case was argued before the Full Bench on the 26th March

1885, when the Judges constituting the Court were the same as now, except that Mr. Justice MAHMOOD was officiating for Mr. Justice TYRRELL. Mr. Justice MAHMOOD has now left the Court, but we have had the advantage of his written opinion, which we adopt and deliver as the judgment of the Court. His opinion answers the question referred to the Full Bench in the affirmative, as follows:—

Mahmood, J.—The question raised by this reference is one not free from difficulty, arising partly from the manner in which the subject has been dealt with in the text-books of Muhammadan law, and partly from the *ratio decidendi* adopted in some of the reported cases which I shall presently refer to and discuss. But before doing so, I consider it necessary to recapitulate the facts of this case, so far as they are required for the purposes of answering this reference.

(After stating the facts as stated above, the learned Judge continued as follows): The plaintiff has preferred this second appeal impugning the view of the Muhammadan law taken by the Lower Appellate Court, and the question raised by the contention of the parties is one the decision of which will affect the domestic family life of the Muhammadan community. It therefore [153] falls essentially within the purview of s. 24 of the Bengal Civil Courts Act (VI of 1871), which binds us to adhere to the rules of Muhammadan law in determining such questions. The clause is a reproduction of s. 15, Bengal Regulation IV of 1793. Referring to that clause, the Lords of the Privy Council, in *Moonshee Buzloor Ruheem v. Shums-oon-nissa Begum*, 11 Moo. I A., 551, which was a suit for restitution of conjugal rights by a Muhammadan against his wife, made certain observations which furnish the guiding principle upon which such cases should be determined. After quoting certain passages from the judgment of the learned Judges of the Calcutta High Court, their Lordships went on to say:—"The passages just quoted, if understood in their literal sense, imply that cases of this kind are to be decided without reference to the Muhammadan law, but according to what is termed 'equity and good conscience,' i.e., according to that which the Judge may think the principles of natural justice require to be done in the particular case. Their Lordships most emphatically dissent from that conclusion. It is, in their opinion, opposed to the whole policy of the law in British India,.....and they can conceive nothing more likely to give just alarm to the Muhammadan community than to learn by a judicial decision, that their law, the application of which has been thus secured to them, is to be over-ridden upon a question which so materially concerns their domestic relations. The Judges were not dealing with a case in which the Muhammadan law was in plain conflict with the general municipal law, or with the requirements of a more advanced and civilized society, as for instance if a Mussulman had insisted on the right to slay his wife taken in adultery. In the reports of our Ecclesiastical Courts there is no lack of cases in which a humane man, judging according to his own senses of what is just and fair, without reference to positive law, would let the wife go free; and yet, the proof falling short of legal cruelty, the Judge has felt constrained to order her to return to her husband" (pp. 614-615).

I have quoted the passage at such length, because it has come within my notice that vague and variable notions of the rule of "justice, equity and good conscience" are sometimes regarded as affecting the administration of native laws in such matters to a [154] degree not justified or necessitated by the general municipal law applicable to all persons, irrespective of their race or religion: and applying the observations of the Lords of the Privy Council to the present case, I have no doubt that this case must be decided according

to the rules of Muhammadan law, the order of the Court whatever it may be, being, of course, subject to such rules as the exigencies of the general municipal law may require.

In this view of the case the reference cannot, in my opinion, be satisfactorily answered without considering, *first*, the exact nature and effect of marriage under the Muhammadan law upon the contracting parties; *secondly*, the exact nature of the liability of the husband to pay the dower; *thirdly*, the matrimonial rights of the parties as to conjugal cohabitation; and *fourthly*, the rules of the general law as to the decree of Court in such cases.

But, as preliminary to the consideration of these various points, I may observe that a suit for restitution of conjugal rights is a suit "of a civil nature," within the meaning of s. 11 of the Civil Procedure Code, and this view is supported by the terms of articles 34 and 35, sch. ii, Limitation Act (XV of 1877), and the provisions of s. 260 of the Code itself. To quote the language of the Privy Council in the case already referred to, "upon authority, then, as well as principle, their Lordships have no doubt that the Mussulman husband may institute a suit in the Civil Courts of India for a declaration of his right to the possession of his wife, and for a sentence that she return to cohabitation; and that that suit must be determined according to the principles of the Muhammadan law" (p. 610).

What, then, are the rules of the Muhammadan law upon the first three points which I have already enumerated? I will deal with each of those points separately, and in doing so will refer to the important rulings which constitute the case law upon the subject.

In dealing with the first point, I adopt the language employed in the Tagore Law Lectures (1873) in saying that "marriage among Muhammadans is not a sacrament, but purely a civil contract; and though it is solemnised generally with recitation of certain verses from the Kuran, yet the Muhammadan law does not [155] positively prescribe any service peculiar to the occasion. That it is a civil contract is manifest from the various ways and circumstances in and under which marriages are contracted or presumed to have been contracted. And though a civil contract, it is not positively prescribed to be reduced to writing, but the validity and operation of the whole are made to depend upon the declaration or proposal of the one, and the acceptance or consent of the other, of the contracting parties, or of their natural and legal guardians before competent and sufficient witnesses; as also upon the restrictions imposed, and certain of the conditions required to be abided by according to the peculiarity of the case" (p. 291). That this is an accurate summary of the Muhammadan law is shown by the best authorities, and Mr. Bailhe, at page 4 of his Digest, relying upon the texts of the *Kanz*, the *Kifayah*, and the *Inayah*, has well summarized the law:—"Marriage is a contract which has for its design or object the right of enjoyment and the procreation of children. But it was also instituted for the solace of life, and is one of the prime or original necessities of man. It is therefore lawful in extreme old age after hope of offspring has ceased, and even in the last or death illness. The pillars of marriage, as of other contracts, are *Eejah-o-kubool*, or declaration and acceptance. The first speech, from whichever side it may proceed, is the declaration, and the other the acceptance." The Hedaya lays down the same rule as to the constitution of the marriage contract, and Mr. Hamilton has rightly translated the original text (1).—"Marriage is contracted—that is to say, is effected and legally

(1) النكاح يتم بالالإيجاب والقبول بلفظين ويعبر بهما عن المسمى (هداية كتاب النكاح)*

confirmed—by means of declaration and consent, both expressed in the preterite". These authorities leave no doubt as to what constitutes marriage in law, and it follows that, the moment the legal contract is established, consequences flow from it naturally and imperatively as provided by the Muhammadan law. I have said enough as to the *nature* of the contract of marriage, and in describing its necessary legal effects I cannot do better than resort to the original text of the *Fatawa-i-alamgiri* which Mr. Baillie has translated, in the form of paraphrase, at page 13 of his Digest, [156] but which I shall translate here literally, adopting Mr. Baillie's phraseology as far as possible:—"The legal effects of marriage are that it legalizes the enjoyment of either of them (husband and wife) with the other in the manner which in this matter is permitted by the law; and it subjects the wife to the power of restraint, that is, she becomes prohibited from going out and appearing in public; it renders her dower, maintenance, and raiment obligatory on him; and establishes on both sides the prohibitions of affinity and the rights of inheritance, and the obligatoriness of justness between the wives and their rights, and on her it imposes submission to him when summoned to the couch; and confers on him the power of correction when she is disobedient or rebellious, and enjoins upon him associating familiarly with her with kindness and courtesy. It renders unlawful the conjunction of two sisters (as wives) and of those who fall under the same category (1)" (with reference to prohibitions of the marriage law).

That this conception of the mutual rights and obligations arising from marriage between the husband and wife bears in all main features close similarity to the Roman law and other European systems which are derived from that law cannot, in my opinion, be doubted; and even regarding the power of correction, the English law seems to resemble the Muhammadan, for even under the former "the old authorities say the husband may beat his wife;" and if in modern times the rigour of the law has been mitigated, it is because in England, as in this country, the criminal law has happily stepped in to give to the wife personal security which the matrimonial law does not. To use the language of the Lords' of the Privy Council in the case already cited:—"The Muhammadan law, on a question of what is legal cruelty between [157] man and wife, would probably not differ materially from our own, of which one of the most recent expositions is the following:—"There must be actual violence of such a character as to endanger personal health or safety, or there must be a reasonable apprehension of it." 'The Court,' as Lord STOWELL said, in *Evans v. Evans*, 'has never been driven off this ground'" (pp. 611-612).

Now the legal effects of marriage, as enumerated in the *Fatawa-i-alamgiri*, come into operation as soon as the contract of marriage is completed by proposal and acceptance; their initiation is simultaneous, and there is no authority in the Muhammadan law for the proposition that any or all of them

(1) اما احكامه فحل استمتاع كل منهما بالآخر علي الوجه المأذون فيه شرعاً
 كذا في فتح القدير وملك الحبس وهي ميورتها ممدوعة عن الخروج والبروز و
 وجوب المهر والنفقة او الكسوة عليه وحرمة المصاهرة والارث من الجابين ووجوب
 العدل بين النساء وحقوقهن ووجوب اطاعته عليها اذا ادعاهن الي الفواش وولاية
 تاديبها ذا لم تطعه بان نشزت واستحباب معاشرتها بالمعروف هكذا في البحر الرائق
 و تحريم الجمع بين الاختين و من في معادهما كذا و فالمسراج الموهاج (عالمكيدي
 كتاب النكاح) *

are dependent upon any condition precedent as to the payment of dower by the husband to the wife.—

This leads me to the consideration of the second point, upon which the greatest stress has been laid in the argument at the bar. It was contended by the learned pleader for the respondent that, under the Muhammadan law, the wife's dower is regarded as nothing more or less than price for connubial intercourse, and that the right of cohabitation does not therefore accrue to the husband till he has paid the dower to the wife. The argument, so urged, renders it convenient to deal with the third point along with the second.

I have already shown that, under the Muhammadan law, the right of cohabitation comes into existence at the same time and by reason of the same incident of law as the right of dower. That the latter right may modify and affect the former cannot be doubted: how it affects and modifies it is the main subject of this reference. Dower, under the Muhammadan law, is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage, and even where no dower is expressly fixed or mentioned at the marriage ceremony, the law confers the right of dower upon the wife as a necessary effect of marriage. To use the language of the Hedaya, "the payment of dower is enjoined by the law merely as a token of respect for its object (the woman), wherefore the mention of it is not absolutely essential to the validity of a marriage; and, for the same reason, a marriage is also valid, although the man were [158] to engage in the contract on the special condition that there should be no dower."—(Hamilton's Hedaya by Grady, p. 44). Even after the marriage the amount of dower may be increased by the husband during coverture (Baillie's Digest, p. 111); and indeed in this, as in some other respects, the dower of the Muhammadan law bears a strong resemblance to the *donatio propter nuptias* of the Romans which has subsisted in the English law under the name of marriage settlement. In this sense and in no other can dower under the Muhammadan law be regarded as the consideration for the connubial intercourse, and if the authors of the Arabic text-books of Muhammadan law have compared it to price in the contract of sale, it is simply because marriage is a civil contract under that law, and sale is the typical contract which Muhammadan jurists are accustomed to refer to in illustrating the incidents of other contracts by analogy. Such being the nature of the dower, the rules which regulate its payment are necessarily affected by the position of a married woman under the Muhammadan law. Under that law marriage does not make her property the property of the husband, nor does coverture impose any disability upon her as to freedom of contract. The marriage contract is easily dissoluble, and the freedom of divorce and the rule of polygamy place a power in the hands of the husband which the Law-giver intended to restrain by rendering the rules as to payments of dower stringent upon the husband. No limit as to the amount of dower has been imposed, and it may either be prompt, that is immediately payable upon demand, or deferred, that is payable upon the dissolution of marriage, whether by death or divorce. The dower may also be partly prompt and partly deferred; but when at the time of the marriage ceremony no specification in this respect is made, the whole dower is presumed to be prompt and due on demand [*Mirza Bedar Bukht Mahomed Ali Bahadoor v. Mirza Khurram Bukht Yahya Ali Khan Bahadoor*, 2 Suth., P. C. J., 823.] The question when such dower becomes payable was discussed by the Lords of the Privy Council in *Mulleeka v. Jumeela*, L. R. Sup. Vol., Ind. Ap., 135: 11 B. L. R., 375, and in *Ranee Khajocroomissa v. Ranee Ryeesoonissa*, L. R., 2 Ind. Ap., 235: 5 B. L. R., 84, and in the former of these cases their Lordships approved the

rule laid down by the Sadr Diwani Adalat of these provinces in *Nawal [159] Buhadoor Jung Khan v. Uzeez Begum*, N.-W. P. S. D. A. Rep., 1843-46, p. 180, wherein the Court considered "the nature of the exigible dower to be that of a debt payable, generally on demand after the date of the contract, which forms the basis of the obligations, and payable at any period during the life of the husband, on which that demand shall be actually made, and therefore until the demand be actually made and refused, the ground of an action at law cannot properly be said to have arisen." These rulings leave no doubt that although prompt dower may be demanded at any time after the marriage, the wife is under no obligation to make such demand at any specified time during coverture, and that it is only upon making such demand that it becomes payable in the sense of performance being rendered in fulfilment of an obligation.

The right of dower confers another right upon the Muhammadan wife, and the nature of this second right is described in the *Hedaya* in a passage on which the learned pleader for the respondent has relied for his contention. The passage is to be found in Grady's edition of Hamilton's *Hedaya*, at page 54 ; but as the translation is not sufficiently close, and is moreover interpolated with paraphrases, I translate the original text here literally, since much depends upon the exact meaning of the passage :—"It is the wife's right that she may deny herself to her husband until she receive the dower, and she may prevent him from taking her away (that is, travelling with her), so that her right in the return may be fixed in the same manner as that of the husband in the object of the return and become like sale. And it is not for the husband that he may prevent her from travelling or going out of his house and visiting her friends until he has paid the whole exigible dower, because the right of restraint is for securing fulfilment (of his right) to the rightful person, and he has not the right to securing fulfilment before rendering fulfilment (himself) ; and if the whole dower is deferred, it is not for her to deny herself because of her having dropped her right by deferring it, as in sale. And in this matter Abu Yusuf holds the contrary opinion." And if the husband has retired with her, the same would be the answer according to Abu Hanifa : but the two disciples have said she has not the right to deny herself, and the difference of opinion subsists [160] where there is retirement with her consent ; but if she was forced or an infant or insane, her right of denying herself does not drop according to the unanimous opinion of our Doctors."(1)

Another passage to be found in the *Durrul Mukhtar* has also been cited by the learned pleader for the respondent, and I translate it here before considering the exact effect of these authorities upon the present case :—

"It is the wife's right to prevent the husband from connubial intercourse, and that which is implied therein and from journeying with her, even though

(1) للمرأة ان تمنع نفسها حتي تأخذ المهر وتمنع ان يخرجها اي يسافر بها ليعتم حقها في البدل كما تعين حق الزوج في المبدل وصار كالبيع وليس للزوج ان يمنعها من السفر والخروج من منزلها وزارت أهلها حتي يوفى بها المهر كله اي المعجل لان حق الحبس لا يستيفاء المستحق وليس له حق الاستيفاء قبل الايفاء ولو كان المهر كله موعداً ليس لها ان تمنع نفسها لاسقاطها حقها بالذحيل كما في البيع وفيه خلاف ابي يوسف رح وان دخل بها فكذلك الجواب عن ادبي حنيفه رح وقال ليس لها ان تمنع نفسها والخلاف فيما اذا كان الدخول برضاها حتي لو كانت مكرهه او كانت صبية او مجنونة لا يسقط حقها في الحبس بالاتفاق (هداية كقاب الدكاح) *

after connubial intercourse and retirement to which she has consented, because all connubial intercourse has been contracted with her, and the rendering of some does not imperatively require the rendering of the rest. This right is for the purpose of obtaining what has been stated as prompt dower, whether wholly or partly.' (1)

Relying upon these passages, the learned pleader for the respondents contends that the right of cohabitation does not accrue to the husband at all until he has paid the prompt dower, and that, inasmuch as the plaintiff in the present case had not paid the dower to his wife, defendant No. 2, her refusal to cohabit with him did not afford a cause of action for a suit for restitution of conjugal rights. In support of this contention certain reported cases have been cited, which I wish to notice here. In *Sheikh Abdool Shukkoar* [161] v. *Raheem-con-nissa*, N.-W.P. H. C. Rep., 1874, p. 94, it was held that a suit will not lie by a Muhammadan to enforce the return of his wife to his house, even after consummation with consent, until her prompt dower has been paid. The rule was followed to its fullest extent in *Wilayat Husain v. Alloh Rakh*, I.L.R., 2 All. 831, and in *Nasrat Husain v. Hamidan*, I. L. R., 4 All. 205, and in the former of these cases it was held that a Muhammadan cannot maintain a suit against his wife for restitution of conjugal rights, even after such consummation with consent as is proved by cohabitation for five years, where the wife's dower is prompt and has not been paid. In *Eidan v. Mazhar Husain*, I. L. R. 1 All. 483, where the suit prayed for restitution of conjugal rights, and the defendant in her written statement having claimed dower, the Lower Appellate Court, setting aside the decree of the first Court, decreed the claim conditional upon payment of prompt dower, this Court upheld the decree by a judgment which is silent upon the specific question whether the dower not having been paid before suit, the plaintiff had the right to come into Court with such a prayer. In *Nazir Khan v. Umrao*, Weekly Notes, 1882, p. 96, however, a Division Bench of this Court upheld the decree of the Lower Appellate Court, which had dismissed the suit *in toto*, reversing the decree of the Court of First Instance, which had passed a decree in favour of the plaintiff (husband) conditional upon his paying the prompt dower. The ruling is in full accord with the *ratio decidendi* adopted in the case of *Sheikh Abdool Shukkoar*, N.-W. P. H. C. Rep., 1874, p. 94, which appears to be the leading case upon the point under consideration, so far as this Court is concerned. No ruling of any other High Court was cited at the hearing in support of the respondents' contention except the case of *Jaun Beebee v. Sheikh Munshree Beparee*, 3 W. R. C. R. 93, which does not appear to me to be decisive on either side of the contentions raised in the case. The ruling of this Court in *Sheikh Abdool Shukkoar v. Raheem-con-nissa*, N.-W. P. H. C. Rep., 1874, p. 94 is, therefore, the only leading case upon the subject, but, with due deference, I am unable to agree in the rule there laid down.

The texts cited by the learned pleader for the respondents undoubtedly show, what is a well-recognised rule of the Muhammadan law of marriage, that the marriage contract having been [162] completed and its legal effects having been established, the right of claiming prompt dower comes into existence in favour of the wife, and that she can use such a claim as a means of obtaining payment of the dower and as a defence for resisting a claim for cohabitation on the part of the husband against her consent. And when I say

(1) لها منعه من الوطى و دواعيه شرح جميع السفر بها و لو بعد وطى او خلوة
رضيتها لان كل وطئة معقود عليها فتسليم البعض لا يوجب تسليم الباقي لاخذ ما بين
تسجيله من المهر كلاً او بعضاً (در المختار باب المهر) *

this, I put the case in favour of the respondents in its strongest possible light, for even upon this question in cases where co-habitation has taken place, the conflict of authority is too great to render it an undoubted proposition of the Muhammadan law. The learned Judges in the case to which I have just referred seem to have appreciated this difficulty, but preferred to adopt the view of Imam Abu Hanifa in preference to the concurrent opinions of his two eminent disciples, Qazi Abu Yusaf and Imam Muhammad, notwithstanding the fact that a passage was cited to them from the *Durrul Mukhtar* in support of the view that "where on such a point there is a difference between Abu Hanifa and his disciples, the opinion of the latter should prevail." Both Imam Abu Hanifa and Imam Muhammad were purely speculative juriconsults, who spent their lives in extracting legal principles from the traditional sayings of the Prophet; but Qazi Abu Yusaf, whilst equally versed in traditional lore, had, in his position as Chief Justice of the Empire of the *Khalifa* Harun-ul-Rashid, the advantage of applying legal principles to the actual conditions of human life, and his *dicta* (especially in temporal matters) command such high respect in the interpretation of Muhammadan law, that whenever either Imam Abu Hanifa or Imam Muhammad agrees with him, his opinion is accepted by a well-understood rule of construction. But before proceeding any further, I wish to quote a passage from the celebrated *Fatawa Qazi Khan*, a text-book as high in authority as the *Durrul Mukhtar* :—

"A wife, having surrendered herself to her husband before the fulfilment (i.e., payment) of dower, subsequently denies herself (to him) for securing fulfilment of the dower. She has this right in the opinion of Abu Hanifa; but Abu Yusaf and Imam Muhammad maintain that she has not the right of prohibiting him from connubial intercourse, and doubts have arisen in regard to their opinions as to the power of preventing her from journeying. And [163] according to the opinion of Abul Qasim Assaffar, it is her right that she may prevent him from taking her on a journey (1)." But the best summary of the law is to be found in the latest authoritative work on the Muhammadan law, the *Fatawa-i Alamgiri* in a passage which Mr. Baillie has translated somewhat briefly at pages 124-25 of his celebrated Digest. The passage being the most complete exposition of the law upon the subject, I translate it here myself as closely as possible, from the original text itself :—

"In all places, when the husband has had connubial intercourse with her, or validly retired with her, the whole dower is confirmed. If she intends to deny herself to him for securing fulfilment (i.e., payment) of her exigible dower, it is her right to do so according to Imam Abu Hanifa; but this is opposed to the opinions of his two disciples (Qazi Abu Yusaf and Imam Muhammad), and in like manner the husband cannot prevent her from going out or travelling or going on a voluntary pilgrimage, according to Abu Hanifa, except when she goes out in an indecent manner. As to her right to all this before she has surrendered herself (consummation), there is unanimity of opinion, as there is as to the rule when the husband has had connubial intercourse with her whilst she is a minor or has been forced or insane, in which cases her father might refuse to surrender her until the payment of her prompt dower—so in the *Itabyyyah*. And if the husband has had connubial intercourse with

(1) امراة سلمت نفسها الي زوجها قبل استيفاء المهر ثم منعت نفسها لاستيفاء المهر كان لها ذلك في قول ابي حنيفة رحمة الله و قال ابو يوسف ومحمد ليس لها ان يمنعه من الوطي و اثنيت الروايات عنهما في الاعتناء عن المسافرة و علي قول ابي القاسم الصغار لها ان يمنعه عن المسافرة (فذوي قاضي خان كتاب النكاح) *

her or retired with her with her consent, it is her right to refuse herself to go on a journey until payment of her whole dower according to the written engagement, or the prompt part of it according to the custom of our country. This view is according to Abu Hanifa, but his two disciples maintain that she has no such right, and the Shaikh-ul-Imam, the jurisconsult, the pious Abul Qasim Assaffar, was accustomed to decide according to Abu Hanifa, so far as going on a journey is concerned; but in matter [164] of refusing herself, he used to decide according to the opinions of the two disciples, and several of our learned doctors have approved of this distinction (1)."

Having cited these various passages from text-books of the highest authority upon the Muhammadan law, I proceed to consider the exact effect they have upon the present case. And here I have to point out that in this case the Court of First Instance found that no demand for dower had been made by the wife (defendant No. 2) before the institution of the suit, and that she had already cohabited with her husband, the plaintiff, and there is no question that she had attained majority when she was married. These matters were not dealt with by the Lower Appellate Court, which decided the case upon the preliminary point, and they may be taken to be so for the purpose of this reference.

I have already said enough to show that the right of dower does not precede the right of cohabitation which the contract of marriage necessarily involves, but that the two rights come into existence simultaneously and by reason of the same incident of law. The right of the wife to claim maintenance from her husband arises in the same manner as one of the legal effects of marriage, and to say that any of those effects are not simultaneously created by the contract of marriage amounts, in my opinion, to a violation of the fundamental notions of jurisprudence regarding correlative rights and obligations arising from one and the same perfected legal relation. Indeed, so far as the question now under consideration is concerned, the rules of Muhammadan [165] law leave no doubt when that system of law is consulted as a whole and not upon isolated points. The fact of the marriage gives birth to the right of cohabitation not only in favour of the husband but also in favour of the wife, and to say that the payment of dower is a condition precedent to the vestiture of the right, is to hold that a relationship, of which the rights and obligations are essentially correlative, may come into existence at one time for one party and another time for the other party. If the payment of dower were a condition precedent to the initiation of the right of cohabitation, a Muhammadan wife, having quarrelled with her husband, could not sue him for cohabitation till she had in a previous litigation sued and, obtaining a decree, realized her dower, because, *ex hypothesi*, her right of cohabitation with her husband would be dependent for its coming into existence upon the

(1) في كل موضع دخل بها او صحت الخوة و تأكد كل المهر لوارثات ان تمنع نفسها لاستيفاء المهر لها ذلك عدة خلاف لها و كذا لا يزوج من الخروج والسفر والحج الطوع عدة الا اذا خرجت خروجاً فاحشاً و قبل تسليم النفس لها ذلك بالاجماع و كذا اذا دخل بها و هي صغيرة او مكروهة او مجنونة فلاب حبسها حتي يوفى لها المهر كذا في العتاييه ولو دخل الزوج بها او خلاها برضاها وئها ان تمنع نفسها عن السفر بها حتي تسوفي جميع المهر علي جواب الكتاب والمهر في عرف ديارنا عند ابي حنيفة رح و قال لا يس له ذلك و كان الشيخ الامام الفقيه الزاهد ابو القاسم الصفار رح يقتي في السفر بقول ابي حنيفة رح و في منع النفس بقولها و استحسن بعض مشايخنا رج اختياره كذا في المحيط *

payment of her dower. Yet such is the logical result of the argument pressed upon us on behalf of the respondents. Such, however, is not the rule of the Muhammadan law, and even the passages which have been cited on behalf of the respondents do not support any such proposition. The passage in the *Hedaya*, which I have closely translated from the original Arabic text, no doubt entitles the wife to resist the claim of the husband for cohabitation with her by pleading the non-payment of her prompt dower, but it proceeds essentially upon the assumption that his right to put forward such a claim is antecedent to the plea. In the passage itself he is called "the rightful person," and the impediment to the enforcement of his right of cohabitation with his wife is stated to be the non-payment of her prompt dower, a rule which, having been borrowed from the Muhammadan law of sale, is based simply upon the analogy of the lien which the vendor possesses upon the goods for payment of the price before delivery. The rule is simply analogical, and giving to it its fullest scope, it falls far short of maintaining the proposition upon which the argument for the respondents rests. The passage from the *Durrul Mukhtar*, following the analogy of sale even further, expressly lays down that the right of the wife to resist the husband's claim for cohabitation is intended to be for the purpose of realizing her prompt dower. The same is the effect of the passage which I have cited from the *Fatawa Qazi Khan* and the *Fatawa Alamgiri*, and the rule, as stated by the Muhammadan [166] jurists, bears, in the eye of jurisprudence, the strongest possible analogy to the ordinary rule of the law of sale, which has been best stated in s. 95 of the Indian Contract Act (IX of 1872), namely, that "unless a contrary intention appears by the contract, a seller has a lien on sold goods as long as they remain in his possession and the price or any part of it remains unpaid." The same is the principle upon which, in the law of sale, the right of stoppage *in transitu* is based, and the lien which the vendor has amounts to nothing more or less than the definition given by GROSE, J., in *Hammonds v Barclay*, 2 East, 227, that it is "a right in one man to retain that which is in his possession belonging to another till certain demands of him, the person in possession, are satisfied." But this lien essentially presumes the right of ownership in the vendee, and terminates as soon as delivery has taken place. I have followed up the analogy of sale so far, because nearly the whole argument of the learned pleader for the respondents proceeded upon the circumstance that in the passages, which he cited, marriage has been compared to sale, dower to the price, and surrender of the wife to her husband to delivery of goods in the law of sale.

But to return to the passages which I have quoted from the *Fatawa Qazi Khan* and the *Fatawa Alamgiri*, it is apparent that the sole object of the rule which entitles the wife to resist cohabitation is to enable her to secure payment of her prompt dower. And it is equally apparent from those passages that the opinion of Imam Abu Hanifa is contradicted, not only by his two eminent disciples, Qazi Abu Yusuf and Imam Muhammad, but also by Shaikh Assaffar so far as the question of cohabitation is concerned. Imam Abu Hanifa and his two disciples are known in the Hanifa school of Muhammadan law as "the three Masters," and I take it as a general rule of interpreting that law, that whenever there is a difference of opinion, the opinion of the two will prevail against the opinion of the third. Now, bearing this in mind, it is clear that the two disciples of Imam Abu Hanifa, regarding the surrender of the wife to her husband as bearing analogy to delivery of goods in sale, held that the lien of the wife for her dower, as a plea for resisting cohabitation, ceased to exist [167] after consummation. According to the ordinary rule of interpreting Muhammadan law, I adopt the opinion of the two disciples as representing the majority of "the three Masters," and hold that, after consummation of

marriage, non-payment of dower, even though exigible, cannot be pleaded in defence of an action for restitution of conjugal rights; the rule so laid down having, of course, no effect upon the right of the wife to claim her dower in a separate action.

But the rule enunciated by me need not be applied in its fullest extent to the present case, because here, in the first place, it has not been found that the wife ever demanded her dower before the suit was filed, or that she declined to cohabit with her husband the plaintiff upon the ground that her dower had not been paid. She relied upon allegations of divorce and cruelty, both of which were found by the Court of First Instance to be untrue, and upon these findings I hold that she had no defence to the action. The plaintiff, as I have already shown, acquired by the very fact of the marriage the right of cohabitation; he was not bound to pay the dower before it was demanded, and upon the findings of the first Court, the first intimation which he had of such demand was the written defence of his wife (defendant No. 2) in the course of this unfortunate litigation. And upon intimation of such a demand, he actually brought the money into Court and deposited it for payment to his wife, the defendant No. 2, as her dower. Under such circumstances, the view of the learned District Judge, which follows the rulings to which he has referred, simply amounts to saying that the plaintiff must institute another suit like the present for enforcing the same remedy. I have already said that the present suit, bearing in mind the conjugal rights created by the Muhammadan law, was not premature, and the view of the learned District Judge can only have the effect of circuity of action in contravention of the maxim that it is to the benefit of the public that there should be an end to litigation.

This leads me to the consideration of the fourth point formulated by me at the outset, namely, the general law as to decrees in such cases. The question involves mixed considerations of substantive law and procedure, and the answer to it is fully furnished by the *dicta* of the Lords of the Privy Council in the case of *Munshie Buzloor Ruheem v. Shums-on-nissa Begum*, 11 Moo., L. A., 551, to which reference has already been made. After giving a brief sketch of the matrimonial law of the Muhammadans, Their Lordships went on to say: "The Muhammadan wife, as has been shown above, has rights which the Christian—or at least the English—wife has not against her husband. An Indian Court might well admit defences founded on the violation of those rights, and either refuse its assistance to the husband altogether, or grant it only upon terms of his securing the wife in the enjoyment of her personal safety and her other legal rights; or it might, on a sufficient case, exercise that jurisdiction which is attributed to the Qazi Enough has been said to show that, in Their Lordships' opinion, the determination of any suit of this kind requires careful consideration of the Muhammadan law, as well as strict proof of the facts to which it is to be applied (p. 612)."

Abiding by this *dictum*, I have carefully considered the Muhammadan law as I have already stated, whilst the facts of the case must, for the purposes of this reference, be taken to be those found by the Court of First Instance. And upon this state of things I am of opinion that the decree passed by the Court of First Instance was right and proper. The question as to the form of decree in such cases and the manner in which it may be executed was discussed in a very learned judgment by MARKBY, J., in *Gatha Ram Mistree v. Moohita Kochin Atteah Doomoonee*, 14 B. L. R., 298, in which that learned Judge, after briefly reviewing the laws of other civilized countries, came to the conclusion that the Ecclesiastical Law of England was the only system which justified the view that "a Court could enforce the continuous performance of conjugal duties by unlimited fine and imprisonment;" but the learned

Judge declined to follow that law in Indian cases, and held that the provisions of s. 200 of the old Civil Procedure Code (Act VIII of 1859) were not applicable to decrees for restitution of conjugal rights. The Legislature has, however, stepped in to remove doubts upon this point, and ss. 259 and 260 leave no doubt as to the manner in which a decree for recovery of a wife or for restitution of conjugal rights can be enforced under the present Code. The case before [169] Mr. Justice MARKBY was, however, one between Hindus, and all that he said in that case would not necessarily apply to a case between Muhammadans. Nor need the English law upon the subject be consulted, though I may observe that, judging by the ruling of Mr. Justice COLERIDGE in *In re Cochrane*, 8 Dowling's P. C., 630: 4 Jur., 534, the rule of English law as to the husband's general power over the wife's personal liberty goes as far as any civilized law can go in the direction of subjecting the wife to the control of the husband. An account of that case is given by Mr. Macqueen in his treatise on the *Rights and Liabilities of Husband and Wife*, and it appears that the order of the Court in that case was very peremptory—"Let her be restored to her husband." The rules of our law, however, necessitate no such course, and in passing decrees in suits for restitution of conjugal rights among Muhammadans, the *dictum* of the Privy Council already quoted furnishes the guiding principle. Courts of Justice in India, in the exercise of their mixed jurisdiction as Courts of Equity and Law, are at full liberty to pass conditional decrees to suit the exigencies of each particular case, upon the principles which have been so well stated by Mr. Justice STORY in his celebrated work on *Equity Jurisprudence*, 11th ed., ss. 27 and 28. So I understand the principle upon which the observations of the Lords of the Privy Council in the case to which I have so often referred were based, and I may with advantage cite another passage from that judgment:—"It seems to them clear that if cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife might, if properly proved, afford good grounds for refusing to him the assistance of the Court. And, as their Lordships have already intimated, there may be cases in which the Court would qualify its interference by imposing terms on the husband. But all these are questions to be carefully considered, and considered with some reference to Muhammadan law (pp. 615-616)."

In the case in which Their Lordships made these various observations the question of non-payment of dower as a defence to the action did not arise, nor do the facts of the case as found in the [170] report show whether the dower was prompt or deferred, whether it had been demanded or not before institution of the suit, and of course there was nothing in the way of deposit by the husband of the amount of dower during the course of the trial in the Court of First Instance. These are the distinguishing features of this case; and if the distinction has any tendency to alter the principle, such tendency is entirely in favour of the plaintiff-appellant's case.

To return once more to the case of *Sherkh Abdool Shukkur v. Raheem-oon-nissa*, N.-W. P. H. C. Rep., 1874, p. 94, which is the leading case upon the subject, I have to observe, with profound deference, that the *ratio decidendi* adopted in that case seems to me to proceed upon a misconception of the rule of Muhammadan law as to the exact time when the right of mutual cohabitation vests in the married parties, and also as to the exact nature of the husband's liability to payment of dower, and the exact scope of the right which

a Muhammadan wife possesses to plead non-payment of dower in defence of a suit by her husband for restitution of conjugal rights. It is one thing to say that such a defence may be set up under certain conditions: it is a totally different thing to say that "until the dower was paid no cause of action could accrue to the plaintiff." The payment of dower not being a condition precedent to the vesting of the right of cohabitation, a suit for restitution of conjugal rights, whether by the husband or by the wife, would be maintainable upon refusal by the other to cohabit with him or her; and in the case of a suit by the husband, the defence of payment of dower could, at its best, operate in modification of the decree for restitution of conjugal rights by rendering the enforcement of it conditional upon payment of so much of the dower as may be regarded to be prompt. Such was actually the form of the decree which was upheld by this Court in *Eidan v. Mazhar Husain*, I. L. R., 1 All., 483, and a decree to the opposite effect was approved by another Bench of this Court in *Nazu Khan v. Umrao*, Weekly Notes, 1882, p. 96. Defences which do not go to the root of the action, but only operate in modification of the decree, are well known to our Courts, and the principles upon which they are based are recognised by Courts of Equity both in England and in America under the general category of compensation or lien when pleaded by the defendant in resistance or modification of the plaintiff's claim. I have already said enough, with reference to the argument of the learned pleader for the respondents, to introduce an analogical comparison between the contract of sale and the contract of marriage under the Muhammadan law, and between the claim of a Muhammadan wife for her dower and a lien as understood in the law of sale. "A lien is not in strictness either a *jus in re* or a *jus ad rem*, but it is simply a right to possess and retain property until some charge attaching to it is paid or discharged.....It is often created and sustained in equity where it is unknown at law; as in cases of the sale of lands, where a lien exists for the unpaid purchase-money" - (Story Eq. Jur., 11th ed., s. 506). So that, pushing the analogy of the law of sale to its fullest extent, the right of a Muhammadan wife to her dower is at best a lien upon his right to claim cohabitation, and I am unaware of any rule of Muhammadan law which would render such lien capable of being pleaded so as to defeat altogether the suit for restitution of conjugal rights.

There is one more consideration which I wish to add to the reasons which I have already given at such length in support of my view. The Muhammadan law of marriage recognizes nothing except *right*, in its legal sense, as the basis of legal relations and of those consequences which flow from them. And if the husband did not before payment of dower possess the right of cohabitation with his wife, it would follow as a necessary consequence in Muhammadan jurisprudence that, where the dower is prompt and cohabitation has taken place before the payment of such dower, the issue of such cohabitation would be illegitimate. It would be easy to show that such would be the logical consequence in Muhammadan law of the reasoning pressed on behalf of the respondents, but I need not go further in considering this matter, as I have referred to it only because in the course of the argument it was said that, before payment of prompt dower, the cohabitation of a Muhammadan wife with her husband was simply a matter of concession and not of right as understood in that law.

For these reasons I would answer the question referred to the Full Bench in the affirmative, leaving it to the Bench that re-[172]ferred the case to deal with its other aspects. And I may add that I have considered it my duty to go so fully into this question out of respect for the rulings which were cited on behalf of the respondents, but in which I have been unable to concur, and

also because such questions, which unusually arise only among the poorer classes of the Muhammadan population, seldom come up to this Court for adjudication, but of course affect domestic relations of the Muhammadan community at large.

NOTES.

[RESTITUTION OF CONJUGAL RIGHTS—MAHOMEDAN LAW:—

After consummation, a wife cannot resist a suit for restitution on the ground that a portion of her prompt dower remains unpaid:—(1888) 11 Mad., 327; (1890) 17 Cal., 670; (1905) 30 Bom., 122.

But this case was dissented from in (1912) 15 I. C., 747 (Oudh) where it was held that among *Sunnis*, in spite of consummation, non-payment of prompt dower is a sufficient bar to a suit for restitution by the husband.]

[8 All. 172]

The 22nd January, 1886.

PRESENT :

SIR W. COMER PETHERAM, KT, CHIEF JUSTICE, MR. JUSTICE STRAIGHT,
MR. JUSTICE OLDFIELD, MR. JUSTICE BRODHURST, AND
MR. JUSTICE TYRRELL.

Deokishou.....Defendant

versus

Bansi and another.....Plaintiffs*

Res judicata—*Civil Procedure Code*, ss. 562, 588 (28)—*Second appeal*—*Civil Procedure Code*, ss. 565, 566—

Determination of case by High Court.

In a suit for pre-emption in respect of a share of a village, the Court of First Instance dismissed the claim on the ground that no right of pre-emption had been proved to exist in the village. The Lower Appellate Court, dissenting from this opinion, reversed the first Court's decree, and remanded the case under s. 562 of the Civil Procedure Code for a decision on the remaining question of fact, *viz.*, the amount of the consideration for the sale. In appeal from the order of remand, the High Court, on the 3rd January 1884, observed that it was not disposed to interfere with the finding of fact that the plaintiffs had a right of pre-emption, and accordingly dismissed the appeal, but added that the Judge was in error in remanding the case under s. 562 of the Code; that his order must so far be set aside; and that he should proceed under s. 565† or s. 566, ‡ as might be applicable. The Judge, on

* Second Appeal No. 1284 of 1884, from a decree of E. B. Thornhill, Esq., District Judge of Jaunpur, dated the 17th July 1881, reversing a decree of Babu Sinwal Singh, Munsif of Jaunpur, dated the 1st March 1884.

†[Sec. 565:—When the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court shall, after resetting the issues, if necessary, finally determine the case, notwithstanding that the judgment of the Court against whose decree the appeal is made has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.]

‡[Sec. 566:—If the Court against whose decree the appeal is made has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, and the evidence upon the record is not sufficient to enable the Appellate Court to determine such issue or question, the Appellate Court may frame issues for trial, and may refer the same for trial to the Court against

whose decree the appeal is made, and in such case shall direct such Court to take the additional evidence required,

and such Court shall proceed to try such issues, and shall return to the Appellate Court its finding thereon together with the evidence.]

receipt of this order, replaced the case on his file, remitted an issue to the Court of First Instance, under s. 566, as to the amount of consideration, and, accepting the first Court's finding upon that issue, decreed the plaintiffs' claim. In second appeal by the defendants the High Court was of opinion that the Judge had disposed of the case upon a condition of things which the plaintiffs had never asserted, inasmuch as he had treated the right of pre-emption which was in issue as one arising from custom, and not, as alleged by the plaintiffs, as arising from a contract between the ancestors of the parties. All the evidence necessary to the determination of the case was on the record.

Held, by the Full Bench that the defendants were not prevented by the operation of the High Court's order of the 3rd January 1884, from disputing the right of pre-emption, inasmuch as that order was a decision of a merely interlocutory character passed in the same suit, and the questions of fact involved therein were [173] decided only so far as was necessary for the purpose of passing the order, and it could not be regarded as determining the main question in the suit, which was still open, and must be decided in the final decree in the suit.

Per STRAIGHT, J., that the jurisdiction of the High Court in appeal under s. 588 of the Code from the Judge's order of remand was, like the jurisdiction of the Judge in passing the order, limited by the terms of s. 562; and hence the remark made in the High Court's order, dealing with the plaintiffs' right of pre-emption, could only be regarded as an *obiter dictum*, and not as determining any question as to the pre-emptive right.

Held, by PETHERAM, C.J., and OLDFIELD and TYRRELL, JJ., that the High Court was competent, in second appeal from the Judge's decree, to look into the evidence already on the record for the purpose of finding whether a right of pre-emption existed, in fact, in the village, if the evidence for answering this question was already on the record, and that in such a case, the question need not be referred to the Court of first appeal. *Bal Kishen v. Jasoda Kuar*, I. L. R., 7 All., 765, referred to.

Per STRAIGHT and BRODHURST, JJ., *contra*. *Bal Kishen v. Jasoda Kuar*, I. L. R., 7 All., 765, referred to.

THIS was a reference to the Full Bench by PETHERAM, C.J., and STRAIGHT, J. The facts of the case and the questions referred are stated in the order of STRAIGHT, J.

STRAIGHT, J.—This is a suit for pre-emption. The plaintiffs assert a right of pre-emption on the basis of an award effected between the ancestors of the plaintiffs and the ancestors of the defendants 2 and 3, as also upon a condition of the terms of the *wajib-ul-arz*, a copy of which they allege themselves unable to produce by reason of the same having been destroyed at the time of the mutiny. On the basis of these allegations, the plaintiffs seek to avoid and cancel an alleged sale by the 2nd and 3rd defendants to the 1st defendant of an 8 annas share of mauza Chuk-Sadho. The defendants pleaded that Chuk-Sadho was not a village to which the award relied on by the plaintiffs had reference; that no custom of pre-emption existed in that village; and that the amount of consideration for the sale impeached and sought to be set aside by plaintiffs was paid in full. It therefore comes to this, that the plaintiffs come into Court asserting that an agreement was come to, by which their ancestors were entitled to assert pre-emption in respect of Chuk-Sadho. The Munsif of Jaunpur, who tried the suit as a Court of First Instance, virtually disposed of it on the point that the village Chuk-Sadho did not form part of Basdeo Patti, to which [174] alone the award had reference; and he seems to be of opinion that no custom of pre-emption had been established. The learned Judge, before whom the case came in first appeal, differed from the Munsif on the point of Chuk-Sadho being unaffected by the award, and considered that there was a strong presumption in favour of the village Chuk-Sadho having formed an integral part of Basdeo Patti.

He further held that by the award of 1248 Fasli the right of pre-emption is proved to have existed in Basdeo Patti, and therefore corollarily in Chuk-Sadho. He further noticed that in the *wajib-ul-arz* for 1881 the co-sharers of Chuk-Sadho have acknowledged the custom of pre-emption to exist "in the future." "I have no doubt," he observed, "that it also existed in the past as alleged by the plaintiffs."

Having found these facts, the Judge reversed the decision of the Munsif, decreed the appeal, and remanded the case under s. 562, to the Munsif, for a decision on the remaining issue of fact.

This order of remand under s. 562 of the Code was open to appeal to the High Court under s. 588 and was so appealed. The pleas in such appeal shortly were that the District Judge was wrong in holding that Chuk-Sadho village was part of Basdeo Patti, that the *wajib-ul-arz* was not admissible as evidence; and that the custom had not been proved. The High Court, consisting of the Hon'ble Mr. Justice OLDFIELD and the Hon'ble Mr. Justice BRODHURST, heard this appeal on the 3rd of January 1884, and passed the following order:—

"We are not disposed to interfere with the finding, which is one of fact, that the plaintiffs have a right of pre-emption: the appeal is therefore dismissed with costs.

"The Judge was in error in remanding the case under s. 562, and his order so far is set aside, and he is directed to proceed under ss. 565 or 566, Civil Procedure Code, as may be applicable."

Now a great deal of argument has been addressed to us with respect to this order of the 3rd January 1884: but before considering this further, it will be convenient to notice what followed upon the passing of this order.

[175] The case went back to the District Judge of Jaunpur, and I must conclude that the last portion of the order was the operative part of the same, namely—

"The Judge was in error in remanding the case under s. 562, and his order so far is set aside, and he is directed to proceed under ss. 565 or 566, Civil Procedure Code, as may be applicable."

The Judge of Jaunpur then replaced the case on his file; but as the issue as to the amount of consideration had not been tried, he remanded the suit under s. 566 for evidence and a finding on this point; and in due course a finding was recorded, and the Judge having accepted that finding, which was necessarily confined to the question of the amount of consideration, the case now comes up again in second appeal in the High Court and three pleas have been urged before us—(1) that neither according to the *wajib-ul-arz* nor local custom have plaintiffs a right of pre-emption; (2) that inasmuch as some of the plaintiffs were strangers and not co-sharers, the co-sharer plaintiffs had lost any right of pre-emption they might have had, and (3) that the suit was barred by limitation.

The point we have been concerned with and have heard argued at great length is, whether the finding as to the custom of pre-emption is *res judicata* by reason of the order of this Court dated the 3rd January 1884. It seems to me, however, that that question does not strictly arise in this appeal, because, in my opinion, the Judge of Jaunpur, who was first seized with it, dealt with it and disposed of it upon a condition of things which plaintiffs had never asserted. The Judge treated it as a custom, and not, as alleged by plaintiffs, as arising from the terms of a contract or agreement between the ancestors of the parties. In my opinion the Judge has not decided according to law; and if I were deciding the case I should order the case to be sent to the District

Judge to be tried according to the allegation of the plaintiffs; but there is a difficulty, as all the evidence that is necessary to the determination of the case is on the record, and the learned Chief Justice is strongly of opinion that under s 565 of the Code we are bound—although the case is before us in second appeal, and there being the whole evidence on the record—to examine that evidence, [176] and decide the case according to that evidence. I am committed to a contrary opinion; and, as at present advised, see no reason to alter that opinion, and therefore, under these circumstances, and looking to the fact that my brothers OLDFIELD and BRODHURST may be able to afford us their assistance, we propose to submit the question for the decision of the Full Bench in the following terms —

(1) Are the defendants prevented by the operation of the order of this Court, dated the 3rd January 1884, from disputing the right of pre-emption in any way?

(2) Can this Court look into the evidence already on the record for the purpose of finding whether a right of pre-emption exists, in fact, in the village Chuk-Sadho, if the evidence for answering this question is already on the record, or must this Court refer the question to the Court of first appeal?

PETHERAM, C J—I concur with my brother STRAIGHT in submitting the above questions for the consideration and decision of a Full Bench.

Lala Juala Prasad and Pandit Ajudhia Nath, for the Appellant.

Munshi Hanuman Prasad and Munshi Kashi Prasad, for the Respondents.

Petheram, C J—I am of opinion that our answer to the first of the two questions which have been referred to us should be in the negative. The reason for this opinion is, that the decision which is relied on and set up as concluding the matter, is a decision of a merely interlocutory character, which was passed in the same suit which is now before us. I am of opinion that the questions of fact involved in that interlocutory proceeding were decided only so far as was necessary for the purpose of passing the order, and that that decision must not be regarded as determining the main question in the suit, which is still open, and must be decided in the final decree in the suit.

Upon the second question referred to the Full Bench, I am of opinion that our answer should be in the affirmative. In the case of *Bal Kishen v. Jasoda Kuar*, I L. R., 7 All., 765, I have already stated my [177] views upon this subject, and I have nothing to add to what I then said except that I entirely adhere to it.

Straight, J—With reference to the first question referred to the Full Bench, I am of the same opinion. The decision of this Court, which is prayed in aid and set up as matter of *res judicata* as regards the plaintiff's right of pre-emption, is one which was passed on an appeal from an order of remand by the Judge under s 562 of the Civil Procedure Code, which was preferred to this Court under s 588. Under the provisions of s. 562, the Judge before whom the appeal from the Munsif came, was only competent to remand the case to the Munsif, if it appeared to him that the Munsif's decree had "disposed of the case upon a preliminary point, so as to exclude any evidence of fact" essential to the determination of the rights of the parties. The jurisdiction of the Judge to pass an order of remand under s. 562 was limited by the terms of that section, and that being so, the jurisdiction of this Court was similarly limited in dealing with an appeal from his order preferred under s. 588. Under these circumstances the remark made in the order of this Court, dealing with the plaintiff's right of pre-emption, can only be regarded as an *obiter dictum*, and not as determining any question as to the pre-emptive right. The part of

this Court's order which was within the competence of the Court to make under ss. 562 and 588 was the latter part, in which it was held that the Judge was wrong in remanding the case under s. 562, because, as a matter of fact, the Court of First Instance had not disposed of the suit in the manner contemplated by that section.

Upon the second question referred to the Full Bench, as I understand the majority of the Court to be in favour of giving an answer in the affirmative, and as the question is one relating to practice, I am unwilling to say anything that might seem like a reflection upon the opinion of the majority of the Court; and I prefer to say merely that I adhere to the view which I expressed in *Bal Kishen v. Jasoda Kuar*, 1 L. R., 7 All., 765.

Oldfield, J.—I concur with the learned Chief Justice in the answers which he proposes to both of the questions referred to the Full Bench.

[178] Brodhurst, J.—I concur with the learned Chief Justice upon the first question. Upon the second, it is enough for me to say that I concur in the opinion expressed by my brother STRAIGHT in *Bal Kishen v. Jasoda Kuar*, 1 L. R., 7 All., 765.

Tyrrell, J.—I concur upon both questions in the answers proposed by the learned Chief Justice.

NOTES.

[This case was overruled by (1886) 9 All. , 147 F B. on the question of the remission of issue by the High Court to the lower Court for trial.

See also (1893) 15 All., 513 , (1892) 14 All., 348]

[8 All. 178]

APPELLATE CIVIL.

The 29th January, 1886

PRESENT

MR. JUSTICE STRAIGHT AND MR. JUSTICE BRODHURST.

Suba BibiPlaintiff

versus

Bal gobind Das...Defendant.*

Fraudulent transfer—Burden of proof—Muhammadian Law—Sale of immoveable property by Muhammadian in satisfaction of wife's dower—Consideration—Deferred debt.

A genuine sale made for good and valid consideration to one creditor, even if effected to delay and defeat another, apart from cases in which either insolvency or bankruptcy is involved, is not void. If a man owes another a real debt, and in satisfaction thereof sells to his creditor an equivalent portion of his property, transferring it to the vendee, and thereby extinguishing the debt, the transaction cannot be assailed, though the effect of it is to give the selected creditor a preference *Wood v Dixie*, 7 Q. B., 892, *Chowne v. Baylis*, 31 L. J. Ch. 757, and the authorities collected in the notes to *Twyne's Case*, 1 Smith's L. C., 12, referred to.

Pending a suit for recovery of a debt, the defendant, who was a Muhammadian, executed a deed of sale dated in June 1882, of a four annas zamindari share in favour of his wife,

* Second Appeal No. 518 of 1885, from a decree of C. Denovan, Esq., Officiating District Judge of Benares, dated the 19th December 1884, reversing a decree of Shah Ahmad-ul-lah, Munsif of Benares, dated the 8th February 1884.

the consideration recited therein being the amount of the vendee's deferred dower-debt. Subsequently the creditor obtained a simple money decree against the defendant, and in execution thereof attached the four annas share. The vendee objected to the attachment, on the basis of her sale-deed, but her objection was disallowed on the ground that the instrument was collusive. She thereupon brought a suit against the judgment-creditor for a declaration of her right, and to set aside the attachment order.

Held, that if there was in fact a subsisting debt due for dower from the husband to the wife, and he transferred and she accepted the four annas share in satisfaction of it, the transaction was a perfectly legitimate one, and no Court had any power to disturb it. It was for the defendant, the judgment-creditor, to establish either that the deferred dower-debt did not constitute such a present consideration as would support the sale, or that the transaction was merely colourable and a fictitious one, which was never intended to have operation or effect [179] either as a transfer of the property or an extinguishment of the dower-debt; and that despite what appeared in the sale-deed, the parties remained in precisely the same position as before it was executed—the four annas still remaining the property of the vendor, and as such liable to the attachment.

Held, applying the general principles of the Muhammadan law as to deferred debts, that there was good consideration for the sale of June 1882, and that, in the absence of proof of fraud of the kind above indicated, the vendee was entitled to maintain it, and to succeed in the suit.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of STRAIGHT, J.

Lala Juala Prasad, for the Appellant (Plaintiff).

Mr. T. Conlan and Munshi Sukh Ram, for the Respondent (Defendant Balgobind Das).

Straight, J.—This was a suit brought under the following circumstances :—The plaintiff, Suba Bibi, is the wife of the defendant Muhammad-ud-din and was married to him in 1877. On the 22nd May in that year, Muhammad-ud-din executed a *kabin-nama*, deed of dower, in her favour, declaring the sum of Rs. 4,000 to be the amount of deferred dower due to her, and hypothecating a four-anna zamindari share. This instrument was not registered. Some time in June 1882, the defendant Balgobind Das commenced a suit against Muhammad-ud-din for recovery of a debt due to him from that person, and applied for attachment before decree of the four-anna share, which application was refused. On the 23rd June 1882, Muhammad-ud-din executed a deed of sale of the four-anna share in favour of Suba Bibi, the plaintiff, the consideration recited therein being the amount of the dower-debt. Subsequently Balgobind Das obtained a simple-money-decree against Muhammad-ud-din for Rs. 925-5-0, and in execution attached the four-anna share. Suba Bibi objected to the attachment on the basis of her sale-deed, but her objection was disallowed on the ground that the instrument was collusive. Hence the present suit for a declaration of her right, and to set aside the attachment order. The Subordinate Judge decreed the claim; but the Judge, on appeal, holding that "the sale-deed was written simply in view to delay and defeat the creditor of the vendor," reversed his decision, and dismissed the suit. It is from the Judge's decree that the appeal to this Court [180] by Suba Bibi is preferred. It will be convenient here to remark that the proof put forward by the defendant in answer to the plaintiff's claim consists of the plaint in the former suit against Muhammad-ud-din, and the order of attachment obtained by him under his simple money-decree, bearing date the 5th July 1882. Beyond this there is no other proof. The question, then, with which we are concerned is whether the Judge's judgment can be sustained. In my opinion it cannot. A genuine sale made for good and valid consideration to one creditor, even if effected to delay and defeat

another, apart, of course, from cases in which either insolvency or bankruptcy is involved, is not void. In other words, if a man owes another a real debt, and in satisfaction thereof sells to his creditor an equivalent portion of his property, transferring it to the vendee and thereby extinguishing the debt, the transaction cannot be assailed, though the effect of it is to give the selected creditor a preference. In *Wood v. Dixie*, 7 Q. B., 892, the Court of Queen's Bench held that a sale of property for good consideration is not, either at common law or under the statute, void merely because it is made with intent to defeat the expected execution of a judgment-creditor; and in the days when there was forfeiture on conviction for felony, it was ruled that an assignment before conviction, if made *bona fide*, was not assailable—*Chowne v. Baylis*, 31 L. J., Ch., 757; and see the authorities collected in the notes to *Twyne's Case*, 1 Smith's L. C., 12. In the present case, if there was, in fact, a subsisting debt due for dower from the husband to the wife, and he transferred and she accepted the four-anna share in satisfaction of it, the transaction was a perfectly legitimate one, and no Court has any power to disturb it. It was for the defendant Balgobind Das to establish either that the deferred dower-debt did not constitute such a present consideration as would support the sale, or that the transaction was merely colourable and a fictitious one, which was never intended to have operation or effect, either as a transfer of the property or an extinguishment of the dower-debt, and that, despite what appeared in the sale-deed, the parties remained in precisely the same position as before it was executed—the four-anna share still continuing the property of Muhammad-ud-din and as such liable to the attachment. I [181] have already stated that the only materials put forward by the defendant Balgobind Das to support his plea of fraud are the plaint and the order of attachment in the suit of 1882. These of themselves are next to worthless; for, as I have observed, if Muhammad-ud-din did make the assignment of his property to his wife *bona fide*, and in payment of the dower-debt, it does not, in the slightest degree, matter that he did so to defeat any steps in execution that might be taken against him by Balgobind Das. The Judge's decision, therefore, so far as the grounds upon which he bases it are concerned, cannot be sustained. It remains, however, to be seen whether there was consideration for the sale; in other words, was the deferred dower-debt good and valid consideration? The general rule of the Muhammadan law is, that "dower, like any other debt, may be made a consideration for a transfer of property from the husband to the wife"—*Tagore Lectures*, 1873, p. 362; and when after dower has been fixed at a certain amount at marriage, and the husband subsequently sells his immoveable property in lieu of a part or the whole of such amount of dower, a person entitled to the right of pre-emption may assert it—*Fida Ali v. Muzaffar Ali*, I. L. R., 5 All., 65. Upon the subject of deferred debts, the following passage from the *Fatawa-i-Qazi Khan*, Vol. III., p. 502, is important:—"If a person by whom a deferred debt is due makes a compromise with the creditor that the debt shall become exigible forthwith, it is valid when made without consideration, because the postponement was the right of the debtor, which he was entitled to forego. Similarly, if he should say 'I have annulled the postponement of this debt,' or 'I have relinquished the postponement,' this would amount to his saying 'I have rendered the debt exigible forthwith.'" So at p. 497 of the second volume of the same work, it is laid down:—"If a person to whom a deferred debt is due should purchase anything from his creditor in lieu of the deferred debt, and after taking possession should return the same by cancellation of the sale, the condition as to postponement of the debt does not revive." Applying these general principles as to deferred debts to the particular dower-debt with which we are concerned

in the present case, I think that there was good consideration for the sale of the 23rd of June [182] 1882, by Muhammad-ud-din to the plaintiff, and that, in the absence of proof of fraud of the kind I have indicated by Balgobind Das, she is entitled to maintain it, and to succeed in the present suit. I quite agree as to the propriety of scrutinizing closely transactions of such a character between husband and wives, but as in, I should say, ninety-nine out of a hundred cases among Muhammadans a dower-debt is due from the husband—a fact of which most people are aware—those who deal with the husbands have no reason to complain if, having failed to obtain security, they find themselves defeated by the preferential payment of a debt which stands upon just as legal a footing and equality as their own. In the view I take of the matter, the appeal is decreed with costs, and the decision of the Subordinate Judge being restored, the plaintiff's claim will stand decreed with costs in all Courts.

Brodhurst, J.—For the reasons given by my brother STRAIGHT, I concur with him in decreeing the appeal, and in restoring the judgment of the Court of First Instance, with costs in all the Courts.

Appeal allowed.

NOTES.

[I. FRAUDULENT TRANSFER.

- (a) Mere knowledge on the part of the transferee of an impending execution does not vitiate the sale to him, if it was genuine and for valid consideration :—(1897) 24 Cal., 825.
- (b) But inadequacy of consideration may be a ground for inferring fraud :—(1900) 25 Bom., 202.
- (c) Sale for payment of barred debt by a Hindu widow was set aside in (1887) 11 Bom., 666.

II. ONUS OF PROOF.

On the question of onus of proof, this case was *not followed* and in (1908) 30 All., 321, it was observed upon as follows :—“In that case STRAIGHT and BRODHURST, JJ. laid the burden on the defendant. This decision loses weight from the fact that in the later case STRAIGHT, J., resiled from the position which he took up in it and took part in the decision of the case of *Ram Nath v. Bindrabau*, (1896) 18 All., 369, which we have cited.”]

[8 All. 182]

The 5th February, 1886

PRESENT:

MR. JUSTICE BRODHURST AND MR. JUSTICE TYRRELL.

Allah Bakhsh.....Defendant

versus

Sada Sukh and others.....Plaintiffs.*

Mortgage by conditional sale—Interest—Foreclosure.

A deed of mortgage by conditional sale, executed in 1872, giving the mortgagee possession, contained a stipulation that the principal money should be paid within ten years from the date of execution of the deed, and that, in default of such payment, the conditional sale should become absolute. It contained the following condition as to interest :—“As to interest, it has been agreed that the mortgagee has no claim to interest, and the mortgagor has none to profits.” The mortgagee, however, did not obtain possession. In 1878, the mortgaged property was purchased by the appellant at a sale in execution of decree. In

* Second Appeal No. 556 of 1885, from a decree of Rai Cheda Lal, Subordinate Judge of Farukhabad, dated the 26th February 1885, affirming a decree of Maulvi Muniruddin Ahmad, Munsif of Chibramau, dated 10th December 1884.

1884, the mortgagee brought a suit for foreclosure against the purchaser and the heirs of the mortgagor, claiming the principal money with interest at 8 annas per cent. per mensem. The defendants pleaded that the plaintiff was not entitled to claim interest.

Held, that whatever claim the mortgagee might have against his mortgagors for compensation or damages by way of interest in consequence of the failure to [183] get possession under the contract, he had none enforceable in this respect against the land, which had passed free from charge for interest to the purchaser. *Rameshar Singh v. Kanahia Sahu*, I. L. R., 8 All., 653, referred to.

THE plaintiff in this suit claimed to foreclose a mortgage. It appeared that on the 27th May 1872, a certain person mortgaged by conditional sale, for Rs. 150, certain immoveable property to the plaintiff. The mortgage-deed provided that possession should be given to the mortgagee, and that the principal money should be paid within ten years from the date of execution of the deed, and in default of such payment, the conditional sale should become absolute. It contained the following condition as to interest :—"It has been agreed that the mortgagee has no claim to interest, and the mortgagor has none to profits." The mortgagee, however, did not obtain possession. On the 18th June 1878, the mortgaged property was purchased by the defendant Allah Bakhsh, at a sale in execution of decree. On the 20th September 1884, the plaintiff brought the present suit against the heirs of the mortgagor and the purchaser in the Court of the Munsif of Chibramau, praying for foreclosure, and claiming the mortgage-money with interest at 8 annas per cent. per mensem. The defendants pleaded, *inter alia*, that, having regard to the terms of the mortgage-deed, the plaintiff was not entitled to claim interest. On this point the Munsif made the following observations :—"It is admitted that the plaintiff did not get possession. There is consequently no reason why he should not get interest or mesne profits or damages. It is proved from the statement of the plaintiff's witnesses that the mortgaged share yielded a profit of Rs. 200 a year. The plaintiff was deprived of that profit. If the plaintiff had brought a suit for compensation, he would have got it to the extent proved ; but, instead of claiming compensation or mesne profits, he has claimed interest at a very low rate. This is not at all unfair. In my opinion, he is undoubtedly legally entitled to get the interest claimed. Interest has always been allowed in cases where the mortgagee has not received possession." The Munsif decreed the claim, and ordered that if, within six months from the date of decree, the principal sum, with the interest claimed, were not paid by the defendants, the [184] latter should be absolutely debarred of all right to redeem the property.

The defendant Allah Bakhsh appealed from this decree, on the grounds that "if the respondent failed to obtain possession according to the condition, it was his own fault ;" and that "as the mortgage was not made known at the time of the purchase by the appellant, the interest on the mortgage-money cannot be charged on the mortgaged property." The appeal was heard by the Subordinate Judge of Farukhabad, whose judgment contained the following observations :—"As possession was not delivered, there is no reason why the plaintiff should not recover interest on the mortgage-money. There is no rate of interest entered in the mortgage-deed, but the plaintiff has claimed a very low rate of interest. Hence the plaintiff's claim to interest is open to no objection. The defendant's plea that as the plaintiff delayed in obtaining possession, his claim to interest abated is improper As the auction-purchaser purchased the property subject to lien, that property is liable for all that lien with which it stood charged at the time of the purchase, or with which it was charged subsequent to the purchase. . . . It has been contended that the interest in such cases is simply damages, which ought to be charged on the person of

the executant or his representative, and that it has nothing to do with the property. This argument of the appellant is rebutted in this way, that the mortgage-deed is dated the 27th May 1872, and is conditional for ten years, while the defendant purchased the property on the 18th June 1878, at auction. Therefore, just as the original mortgagor was personally liable for damages, the auction-purchaser also became liable for damages in consequence of his not delivering possession within the prescribed time." The Court dismissed the appeal.

In second appeal by the defendant Allah Bakhsh, it was contended on his behalf that the lower Courts had erred in allowing interest as claimed, and in decreeing foreclosure in respect of interest as well as the principal due under the mortgage.

Munshi *Kashi Prasad*, for the Appellant.

Munshi *Hanuman Prasad* and Munshi *Madho Prasad*, for the Respondents, heirs of the original plaintiff, deceased

[185] **Brodhurst and Tyrrell, JJ.**—The ruling in the Full Bench case of *Rameshar Singh v Kanahia Sahu*, I. L. R., 3 All., 653, the principle of which was adopted in the case of F. A. No 37 of 1885, determined here on the 27th January 1886, is altogether in point, the case of the present appellant being even stronger than that of the Full Bench ruling above cited. In the contract made between the vendor and the respondents on the 27th May 1872, it was expressly agreed that no interest was exigible or payable under the conditional sale-deed. Whatever claim the respondents may have against their mortgagors for compensation or damages by way of interest in consequence of the failure to get possession under the contract, they have none enforceable in this respect against the land which has passed free from charge for interest to the appellant by purchase. The appeal must prevail, and is decreed with costs.

Appeal allowed.

[3 All 185]

The 12th February, 1886.

PRESENT

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE OLDFIELD.

Dip Narain Rai and others. Plaintiffs

versus

Dipan Rai and others..... Defendants.¹

—
Bond—Interest—Penalty.

The lender of money, for the use of which interest is to be paid, may, at the time of making the loan, protect himself against breach of the borrower's contract to pay the interest when due, either by a stipulation that in case of such breach, he shall be entitled to recover compound interest, or by a stipulation that, in such a case, the rate of interest shall be increased. But a condition that, upon failure by the borrower to pay the interest when due, both compound interest and an increased rate shall be payable, amounts to a penalty, inasmuch as the two stipulations together cannot be regarded as a fair agreement with reference to the loss sustained by the lender

In a bond dated in February 1877, for a sum of money payable in June 1882, it was provided that interest should be paid at the rate of Rs 9 per cent per annum on the

¹ First Appeal No. 69 of 1885, from a decree of Pandit Ratan Lal, Additional Subordinate Judge of Ghazipur, dated the 27th January 1885.

Puran mashi of every Jaith, and that, if the interest were not duly paid, the rate should be increased to Rs. 15 per cent. per annum, and compound interest should be payable. There was no provision for payment of interest from the time when the principal became due. In December 1884, the obligee brought a suit on the bond against the obligor, claiming interest from the date of the bond [186] to the date of the institution of the suit at Rs. 15 per annum, and compound interest for the same period at the same rate.

Held, that the stipulations contained in the bond must be regarded as penal, and it was therefore the Court's duty to limit the penalty to what was the real amount of damage sustained by the plaintiff in consequence of the defendant's breach of the contract to pay the interest at the due date.

Held that, for this purpose, the proper course was to reduce the interest to Rs. 9 per cent. per annum, reckoned at compound interest, with yearly rests, to the due date of the bond; and that, inasmuch as the plaintiff was to blame for not having enforced his remedy at an earlier date, he should only recover simple interest at Rs. 9 per cent. from the due date of payment, upon the entire sum which was due when the bond became due, i. e., the principal added to the compound interest calculated at Rs. 9 per cent.

The same obligee held another bond executed by the same obligors in June 1879, for a sum of money payable in June 1882, with interest at Rs. 9 per cent. per annum. There was a provision in the bond that if the principal and interest were not paid on the due date, the obligee should be entitled to recover the principal with interest at the rate of Rs. 24 per cent. per annum from the date of the bond. In December 1884, the obligee brought a suit on the bond against the obligor, claiming interest on the principal amount from its date to the date of the institution of the suit at the rate of Rs. 24 per cent. per annum.

Held that the increased rate of interest might fairly be considered as representing the damages sustained by the lender by reason of the borrower's failure to pay interest at the specified time, and should therefore be paid down to the due date of the bond; and that, as the plaintiff failed to enforce payment for a long time, the interest, from the due date, might fairly revert to the old rate of Rs. 9 per cent. per annum, and the amount should be calculated from that date, on that basis, on the whole amount of principal and interest then due on the bond.

THE suit out of which this appeal arose was one for the principal moneys and interest due on two bonds. The first bond, which was dated the 3rd February 1877, was one for Rs. 1,475 payable on the last day of Jaith 1289 fasli, corresponding with the 1st June 1882. The rate of interest was Rs. 9 per cent. per annum, and the interest was payable on the Puran-mashi of every Jaith, and there was a proviso in the bond that if the interest were not duly paid, the rate should be increased to Rs. 15 per cent. per annum, and compound interest should be payable. The second bond, which was dated the 25th June 1879, was for Rs. 725, payable with interest at the rate of Rs. 9 per cent. per annum on the same date as the principal of the first bond was payable. There was a proviso that if the principal and interest [187] were not paid on the due date, the obligees should be entitled to recover the principal with interest at the rate of Rs. 24 per cent. per annum from the date of the bond. The plaintiffs claimed interest on the principal amount of the first bond from its date to the date of the institution of the suit at the rate of Rs. 15 per cent. per annum, and compound interest for the same period at the same rate. They claimed interest on the principal amount of the second bond from its date to the date of the institution of the suit at the rate of Rs. 24 per cent. per annum. The suit was instituted on the 2nd December 1884. The Court of First Instance refused, in respect of the first bond, to allow compound interest or the increased rate of interest except from the date of default, that is to say, it allowed interest from the date of the bond to the date it became due at the original rate, and from the latter date to the date of the institution of the suit it allowed interest on the consolidated

amount of principal and interest at Rs. 15 per cent. In respect of the second bond, the Court awarded interest from its date at Re. 1 per cent. thus increasing the original rate by four annas per cent. per mensem.

The plaintiffs appealed on the ground that they were entitled to recover the whole amount of interest claimed by them.

Munshi Hanuman Prasad and Lala Juala Prasad, for the Appellants.

Mr. C. H. Hill and Pandit Sundar Lal, for the Respondent.

Petheram, C. J.—This appears to me to be a case in which it will be well to consider the proper manner of dealing with bonds of this description. The suit was brought to recover the principal and interest due on two bonds, and the question was what amount was recoverable for interest? By the terms of the first bond, the interest was to be at the rate of Rs. 9 per cent., and was payable yearly, and there was a proviso that if it was not paid when due, it should be increased to Rs. 15 per cent., and should be calculated as compound, and not as simple interest. It is clear that when a man lends money, for the use of which interest is to be paid, and the interest is not paid when it becomes due, the borrower breaks his contract, and the lender may re-[188]cover damages for such breach, and, at the time of making the contract, it is open to the parties to consider and agree the amount of damage which in such a case the borrower shall pay for having broken his contract, or may name a penal sum which shall be the outside limit of the damage which can be recovered. It is clear that an agreement, that if the interest is not paid punctually, the lender shall be entitled to add it to the principal, and so recover compound interest, will indemnify the lender against loss, because although he does not get his money, he leaves it at interest, and therefore sustains no loss. Again, it is clear that a lender may indemnify himself in another way. He may do so by stipulating that, in the event of interest not being paid punctually upon the date it is due, the rate of interest shall be increased. But it is obvious that if he insists on *both* kinds of damages, that cannot be a fair agreement with reference to the loss sustained by him, as the two together amount to more than an indemnity against loss, and so must be a penalty.

In this case, the lender stipulates for both kinds of damages. He stipulates for compound interest as an indemnity against loss, and also for interest to be paid at an increased rate. These two stipulations put together cannot, as I have said, be regarded as a fair agreement with reference to the loss sustained by the lender, but as a penalty; and it is therefore the Court's duty to limit that penalty to what is the real amount of damage sustained by the plaintiff, who is the lender, in consequence of the defendant's breach of the contract to pay the interest at the due date. The rate of interest at which the money was lent was Rs. 9 per cent. per annum, and if the interest be calculated with rests, that is if compound interest is allowed, the lender will be completely indemnified against loss. The proper course therefore will, I think, be to reduce the interest to Rs. 9 per cent. per annum, reckoned at compound interest, with yearly rests, to the due date of the bond. From the time when the principal became due under the bond, no provision for payment of interest is made, and the plaintiff is to blame for not having enforced his remedy at an earlier date, and, in my opinion, he should only recover simple interest at Rs. 9 per cent. from the due date of the bond to the date of payment, upon the entire sum which was due when the bond [189] became due, that is to say, the principal added to the compound interest calculated at Rs. 9 per cent.

With reference to the second bond, in which the parties agreed upon an increased rate of interest on non-payment by the borrower at the specified

time, and in which they did not agree that interest should be calculated at compound interest, it seems to me that such increased rate of interest may fairly be considered as representing the damages sustained by the lender by reason of the borrower's failure to pay on the due date, and therefore that Rs. 2 per cent. per mensem, the increased amount agreed on, should be paid down to the date when the bond became due. But as the plaintiff failed to compel payment, and allowed it to remain overdue for a long time, I think that the interest may fairly revert to the old rate of Rs. 9 per cent. from the due date of the bond, and the amount must be calculated from that date on that basis on the whole amount of principal and interest then due on the bond. Costs will be paid in both cases in all Courts in proportion to success.

Oldfield, J.—I am of the same opinion

NOTES

[This case was not followed in (1887) 10 Mad , 203 Both those cases were referred to in (1906) 29 Mad., 491. See also (1892) 20 Cal , 328]

[8 All 189]

FULL BENCH

The 13th February, 1886

PRESENT

SIR W. COMER PETHERAM, Kt , CHIEF JUSTICE, MR. JUSTICE STRAIGHT,
MR. JUSTICE OLDFIELD, MR. JUSTICE BRODHURST, AND
MR. JUSTICE TYRRELL

Mahadeo PrasadPlaintiff

versus

Mathura and others..... Defendants.*

*Act XII of 1881 (N.-W. P. Rent Act), ss 7, 95 (1) -Ex-proprietary tenant—
Determination of rent by Revenue Court—Suit for arrears of rent as
so determined for period prior to such determination.*

An application was made in the Revenue Court under s 95 (1) of the N. W. P. Rent Act (XII of 1881), by the purchaser of proprietary rights in a mahal, for determination of the rent payable by his vendors, who had become, under s 7, his ex-proprietary tenants in respect of the land they had previously held as *su*. The Revenue Court, by an order dated the 18th February 1884, fixed the rent at a particular sum payable annually, after making the deduction of four annas in the rupee required by s 7 of the Rent Act. In May 1884, the purchaser sued the ex-proprietary tenants to recover from them arrears of rent at the sum so fixed, for a period of three years prior to the Revenue Court's order.

[190] Held by the Full Bench, that the plaintiff was entitled to recover arrears of rent for the years in suit at the amount determined by the Revenue Court's order of the 18th February 1884, subject to any question of limitation that might arise.

* Second Appeal No. 151 of 1885, from a decree of W. Barry, Esq , District Judge of Banda, dated 12th December 1884, reversing a decree of Babu Hannam Chander Seth, Assistant Collector of Karwi, dated the 25th August 1884.

THIS was a reference to the Full Bench by OLDFIELD and BRODHURST, JJ. The facts of the case and the point of law referred are stated in the order of reference, which was as follows:—

"The plaintiff purchased the proprietary rights and interests of the defendants, and obtained possession in January 1881. The defendants thereupon became ex-proprietary tenants of the plaintiff in respect of the land they had previously held as *sir* under s. 7 of the Rent Act. In 1883 the plaintiff filed an application in the Revenue Court under s. 95 (l), for determination of the rent payable by the defendants on the holding.

"It appears that the *sir* holding had been recorded in the *jamabandis* with a rent payable on it of Rs. 168-9-3, and the plaintiff asked to have the same enhanced at the prevailing rates. The Revenue Court fixed the rent payable annually by the defendants at Rs. 170-14-11, after making the deduction of four annas in the rupee required by s. 7 of the Rent Act.

"The Revenue Court's order is dated 18th February 1884.

"The plaintiff has now brought this suit to recover arrears of rent, at the sum so fixed, for the years 1289, 1290, 1291 *fasli*, ending the 30th June 1884, that is, for a period prior to the order of the Revenue Court determining the rent.

"We may add that there has been no express contract on the part of the defendants to pay rent, nor have they paid any rent to the plaintiff on the holding, but the defendants became, by operation of law (s. 7 of the Rent Act), tenants of the plaintiff from the time of sale, with a liability to pay him rent at four annas less than the prevailing rate payable by tenants-at-will for land of similar quality and similar advantages; and the question arises whether they are not in consequence bound to pay rent from the date of sale at the amount fixed subsequently by the Revenue Court; and if the order of the Revenue Court cannot have retrospective effect, whether they are not, as tenants, under a liability to pay some rent which a Revenue Court can enforce, and if so, on what principle should the amount of rent be decreed?

[191] "We refer to the Full Bench the question whether the plaintiff is entitled to recover arrears of rent for the years in suit, at the amount determined by the Revenue Court's order of the 18th February 1884, and if not, can he recover any, and what amount of rent in the Revenue Court?"

Pandit *Ajudhia Nath* and *Munshi Sukh Ram*, for the Appellant (plaintiff).

Mr. W. H. Colvin and *Babu Sital Prasad Chattarji*, for the Respondents (defendants).

Petheram, C. J.—I am of opinion that in this case the plaintiff is entitled to recover arrears of rent for the years in suit at the amount determined by the order of the Revenue Court, dated the 18th February 1884, subject, of course, to any question that may arise under the Limitation Act, which is not before us, and upon which I express no opinion. My reasons for this opinion are, that the tenancy was created by the plaintiff's purchase of the original landlord's interest, and the rent, when fixed under the statute which provides the means for determining the rent payable, becomes the rent which is to be paid during the whole tenancy, or the rent of the land held by the tenant during the whole of his tenancy; and as soon as that has been fixed, the landlord can put his remedies in force, if the tenant fails to pay the debt. I would answer the questions referred in the affirmative.

Straight, Oldfield, Brodhurst and Tyrrell, JJ., concurred.

NOTES.

[This case was referred to and distinguished on facts in (1894) 16 All., 209; (1886) 9 All., 185.]

[8 All. 191]

CIVIL REVISIONAL.

The 18th February, 1886.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE TYRRELL.

Bandhan SinghPlaintiff

versus

Solhu and others.....Defendants.*

"Decree"—Order rejecting application under Civil Procedure Code, s. 44, Rule a, and returning plaint—Appeal—Civil Procedure Code, ss 2, 44.

No appeal lies under any of the provisions of s. 588 of the Civil Procedure Code from an order under s. 44, Rule a, rejecting an application for leave to join another cause of action with a suit for the recovery of immoveable property.

[192] In a plaint filed in the Court of a Subordinate Judge, the plaintiff claimed to recover possession of a house, together with some grain which was stored in it. The plaintiff applied to the Subordinate Judge for leave, under s. 44, Rule a, of the Civil Procedure Code, to join the claim for grain with the claim for possession of the house. The Subordinate Judge refused leave, and returned the plaint, with directions that the plaintiff should institute two suits for recovery of the house and the grain, respectively, in the Court of the Munsif.

Held that the Subordinate Judge's order was substantially an order rejecting the plaint, on the ground that the plaintiff had joined a cause of action with a suit for recovery of immoveable property; that, although this might have been a misapplication of s. 44, Rule a, of the Code, its effect was to reject the plaint; that such an order was a decree, with reference to the definition in s. 2, and was appealable as such to the District Judge; and that therefore a second appeal lay in the case to the High Court, and that Court was not competent to interfere in revision under s. 622.

THIS was an application to the High Court to exercise its powers under s. 622 of the Civil Procedure Code. It appeared that a plaint was presented in the Court of the Subordinate Judge of Meerut, in which the plaintiff claimed possession of certain houses, and also certain grain, which it was alleged was in the houses. At the same time the plaintiff presented an application, under s. 44 (a) of the Civil Procedure Code, in which he asked the leave of the Court to join the claim for the grain with the claim for the houses. The plaint was registered. On the 3rd August 1885, the Subordinate Judge rejected the application, and on the same day made the following order on the plaint:—"This plaint was registered by a mistake of the office, and should not have been registered until the application of plaintiff for permission to join two causes of action was disposed of by the Court. The application for permission to join the causes of action in the same suit has been disallowed

* Application No. 6 of 1886, for revision under s. 622 of the Civil Procedure Code of an order of H. A. Harrison, Esq., District Judge of Meerut, dated the 2nd October 1886, affirming an order of Babu Mrittonjoy Mukarji, Subordinate Judge of Meerut, dated the 3rd August 1885.

to-day. This plaint is therefore returned to the plaintiff, in order that he may file two separate suits in the Court of the Munsif of Ghaziabad."

The plaintiff appealed to the District Judge of Meerut from the order refusing his application. The District Judge dismissed the appeal, holding that the order was not appealable.

The plaintiff preferred the present application on the grounds (i) that the claims for the houses and the grain had been properly joined, (ii) that if permission under s. 44 of the Civil Procedure [193] Code was necessary, the Subordinate Judge had improperly refused such permission; and (iii) that the plaint had been erroneously returned for amendment.

Lala Juala Prasad, for the Plaintiff.

Pandit Sundar Lal, for the Defendant.

Oldfield and Tyrrell, JJ.—This is an application under s. 622 of the Civil Procedure Code. The petitioner instituted a suit by filing a plaint in the Subordinate Judge's Court, in which he claimed to recover possession of a house, together with some grain which was stored in it. The plaint was registered. Subsequently to its registration, it appears to have been considered that the claim for grain could not be joined in the same suit with the claim for possession of the house under the terms of s. 44 (a), by which no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property.

Accordingly the plaintiff filed an application to the Subordinate Judge for leave to join the cause of action. The Subordinate Judge refused leave, and returned the plaint with directions that the petitioner should institute two separate suits for the recovery of the house and the grain in the Court of the Munsif of Ghaziabad.

The plaintiff (petitioner) appealed from the order refusing leave under s. 44 (a) to the Judge, and the Judge dismissed it on the ground that no appeal lay from the order to him.

The plaintiff has now appealed to this Court to revise the orders of the Courts below under s. 622 of the Civil Procedure Code.

There was no appeal to the Judge from the order of the Subordinate Judge under any of the provisions in s. 588 of the Civil Procedure Code. He therefore rightly dismissed the appeal, which had been instituted as an appeal from an order, and this Court cannot interfere in revision with his order. Nor, however irregular the Subordinate Judge's order may be, is this Court empowered to interfere with it under s. 622.

The order of the Subordinate Judge is substantially an order rejecting the plaint. It was made on the ground that the plaintiff had joined a cause of action with a suit for recovery of immoveable [194] property. This may be a misapplication of s. 44 (a); but the effect of the order was to reject the plaint, and such an order is a decree, with reference to the definition in s. 2 and is appealable as a decree to the Judge, and in consequence an appeal lies in the case to the High Court, and that Court cannot interfere under s. 622.

On these grounds the application is dismissed with costs.

Application Dismissed.

[8 All 194]
APPELLATE CIVIL.

• The 25th February 1886.

PRESENT .

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND
MR. JUSTICE STRAIGHT.

Ganga Sahai Plaintiff

versus

Lachman Singh and another.. .. . Defendants.*

Mortgage—Usufructuary mortgage—Interest—Waiver.

By a deed of usufructuary mortgage dated in 1875 a sum of Rs 30 000, with interest at Re. 1 per cent. per mensem, was advanced on the security of certain property, for a period of ten years. The deed contained various provisions for securing the payment of interest to the mortgagee, and, among these, a provision that he should have possession of the property and take the profits on account of interest, the profit, being fixed at a certain amount yearly, leaving an agreed balance of interest to be paid yearly in cash. There was also a provision that, in the event of possession not being given, the mortgagee might treat the principal money as immediately due, and recover it at once with interest at the rate of Re. 1-6 per cent. per mensem. The mortgagee did not take possession of the mortgaged property, and took no steps to obtain such possession, or to recover the money for nine years, during which no interest was paid. In November 1884, the mortgagee brought a suit against the mortgagors to recover the mortgage-money, claiming interest from the date of the mortgage-deed to the date of the suit at Re. 1-6-0 per cent. per mensem.

Held, that the fair inference of fact from the circumstances above described was that the mortgagee waived the provisions for securing and recovering the interest, and that the transaction must be looked at as simply one of a loan for the specified period at the agreed rate, i.e., Re. 1 per cent. per mensem.

ON the 26th April 1875, the defendants in this case gave the plaintiff a usufructuary mortgage of certain shares in certain villages for a period of ten years. The principal sum secured by [195] the mortgage was Rs. 30,000, and the mortgage-deed contained the following provisions :—

“We will place the mortgagee in possession of the mortgaged property. The interest, with expenses, is agreed upon to be Re. 1 per cent. per mensem, and the profits of the mortgaged villages are fixed to be Rs 2,812 per annum, and Rs. 3,600 on account of interest will be due from us to the mortgagee. We will pay Rs. 788 in cash every year to the mortgagee. Should the profits exceed Rs. 2,812, the mortgagee will take the excess as commission for collections. We declare that the mortgagee shall remain in possession and receive the profits in lieu of interest after paying the Government revenue. Any increase effected by the mortgagee during the period of mortgage shall be his. After the expiration of the period, we will pay back the mortgage-money in a lump sum and redeem our property. Should we fail to do so, the mortgagee shall remain in possession, and we will not interfere. Should the possession of the mortgagee be interfered with, by reason of the order of any Court or the violence of the mortgagors, the mortgagee shall be competent to realize the mortgage-money, with the interest which may be found due, from our persons,

* First Appeal No. 94 of 1885, from a decree of Rai Cheda Lal, Subordinate Judge of Farukhabad, dated the 18th February 1885.

the mortgaged property and our other property, whether the term has expired or not, and the interest for the period the mortgagee is out of possession shall be charged at the rate of Re. 1-6-0 per cent. per mensem. We will get mutation of names effected by the end of Kuar. Should we fail to get mutation of names effected, or not allow the mortgagee to collect, the mortgagee shall, without regard to the period, cancel all the conditions of the deed, and shall realize all the money with interest at the rate of Re. 1-6-0 per cent. per mensem, to be charged from the date of execution of the deed, by instituting a suit. He shall also be competent to obtain proprietary possession by bringing a suit."

The plaintiff was not placed in possession of the mortgaged property, nor was he paid any interest by the defendants.

In November 1884, the plaintiff brought this suit against the defendants to recover the mortgage-money. He claimed interest from the date of the mortgage-deed to the date of suit at Re. 1-6-0 per cent. per mensem.

[196] With reference to the interest claimed the defendants stated in their written statement as follows:—"The plaintiff, though repeatedly told by the mortgagors, intentionally did not take possession of the mortgaged property, nor did he get mutation of names effected under s. 97, Act XIX of 1873. The plaintiff committed this omission with the particular object, and under the misapprehension, that he might be considered entitled to get interest at Re. 1-6-0 per cent. per mensem. Under these circumstances the plaintiff is not entitled to receive Rs 2,812 per annum on account of interest and costs, which was stipulated to be recovered from the profits of the estate, because no breach of contract took place on the defendants' part."

The Court of First Instance framed the following issue on the question as to the amount of interest to be awarded:—"Whether the interest should be allowed at Re. 1-6-0 per cent. on account of the defendants' failure to deliver possession: or whether the delivery of possession did not take place on account of the plaintiff's negligence and laches, and therefore it is unfair to charge interest at a higher rate, and whether this rate being penal should be amended or not?"

Upon this issue the Court held as follows:—

"The actual rate of interest entered in the document is Re. 1 and the agreement for payment of interest at Re. 1-6-0 per cent., under special circumstances, is entered in the document in these words:—"If we shall fail to have mutation of names effected or deliver possession at the time of collection, then the mortgagees shall, by rendering null and void all the conditions entered in this document, recover the mortgage-money with interest at Re. 1-6-0 from the date of the execution of this document, before the expiration of the term, by means of a suit.' This rate of interest, viz., Re. 1-6-0 per cent., was to be allowed in case of the defendants' failure to have the mutation of names effected or deliver possession of the mortgaged property, after the mortgage had been made, and the plaintiff's filing a suit for the recovery of the mortgage-money with interest. Then an excessive amount of interest would have been allowed for a short period by way of penalty. According to this condition, the plaintiff is not justified in not suing for nine years [197] to recover his mortgage-money, after he had not received possession of the property, in order to charge interest for the whole period at the rate of Re. 1-6-0 per cent. per mensem instead of Re. 1 per cent., which was agreed upon to be paid partly in cash and partly from the income of the estate. Under these circumstances it is not necessary to inquire now whether the delivery of possession was not made owing to the defendant's default or the plaintiff's negligence. But this conclusion should certainly be deduced from the foregoing facts, that the plaintiff, through his own negligence,

failed to take possession, with the object of realizing interest at a higher rate, and therefore, according to the terms of the document he is not entitled to get interest at a higher rate than Re. 1 per cent."

The plaintiff appealed to the High Court, contending that the rate of interest claimed, being the contract rate, and reasonable and fair, had been improperly reduced, and that the condition in the mortgage-deed relating to the interest claimed had been misconstrued.

Pandit *Ajudhia Nath* and Pandit *Bishambar Nath*, for the Appellant.

Mr. *T. Conlan* and Mr. *W. M. Colvin*, for the Respondents.

Petheram, C. J., and Straight, J.—The only question in this appeal is, whether the creditor is to recover interest on the bond in suit at the rate of Re. 1 or Re. 1-6 per cent. *per mensem*. The facts of the case are really not disputed, and the question in our opinion turns entirely on the construction of the bond itself. By that, it appears that the plaintiffs and others in the year 1875 lent a sum of Rs. 30,000, at one per cent. *per mensem*, on the security of a certain property: the bond then contains various provisions which were inserted in the deed for securing payment of interest, all of which were for the benefit of the creditor. *Inter alia*, it was provided that the mortgagee should have possession of the security, and should take the profits on account of interest, the profits being agreed at a certain figure, leaving an agreed balance of interest to be paid yearly in cash. There was also a provision that, in the event of possession not being given, the creditor might [198] treat the money as immediately due, and recover it at once with interest at the rate of Re. 1-6 *per mensem*.

These provisions were, as we have said before, for the benefit of the creditor, and he was at liberty to waive them if he pleased. What actually happened was, that the creditor did not take possession of the security, and took no steps to obtain such possession, or to recover the money for nine years, during which period no interest has been paid. In our opinion, the fair inference of fact to draw from this state of things is, that the creditor waived the provisions for securing and recovering the interest, and that the transaction must be looked at as simply one of a loan for the specified period at the agreed rate, that is, one per cent. *per mensem*. That rate has been allowed by the Judge, and for these reasons we think that the appeal should, and it is, dismissed with costs.

Appeal dismissed.

[8 All. 198]

The 15th March, 1886.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE TYRRELL.

Khayali.....Defendant

versus

Husain Bakhsh and another.....Plaintiffs.*

Lease—Lease for one year—Lease exceeding one year—Act III of 1877 (Registration Act), ss. 17 (d), 18, (c).

A kabuliyat dated the 6th May 1880, and executed by the lessee of a house in favour of the lessors set forth that the house was let to the former at an annual rent of Rs. 3, for a term of one year. It also contained this stipulation :—" I (the lessee) do declare that I shall continue to pay the annual rent every year, and that if I should fail to pay the rent in any year, the owners of the house shall be at liberty to recover the rent through the Court." The lease was not registered. In a suit by the lessors against the lessee for possession of the house and for Rs. 7-8 arrears of rent, the defendant pleaded that, according to the right construction of the lease, he was entitled to occupy the house and the lessors were not entitled to eject him therefrom, so long as he paid the annual rent of Rs. 3; that he had duly paid rent at the agreed rate from the 6th May, 1880, to the 6th May 1884; and that, under these circumstances, the plaintiffs were not entitled to either of the reliefs claimed.

Held, that the lease was for one year only, and, thus falling under s. 18 of the Registration Act (III of 1877), it was admissible in evidence without registration; that the defendant had been a mere tenant-at-will since the expiry of the year [199] 1880-81; and that the plaintiffs were therefore entitled to possession of the house. *Hand v. Hall*, L. R., 2 Ex. D., 355, referred to.

THE plaintiffs in this case sued the defendant for possession of a house and for Rs. 7-8-0 arrears of rent in respect thereof. The defendant was in possession under a kabuliyat executed by him in favour of the plaintiff and dated the 6th May 1880. It was set forth in this document that the house was let to the defendant at an annual rent of Rs. 3, for a term of one year. Then followed these words :—" I (the defendant) do declare that I shall continue to pay the annual rent every year, and that if I should fail to pay the rent in any year, the owners of the house shall be at liberty to recover the rent through the Court."

The defendant, in answer to the suit, pleaded that according to the right construction of the lease, he was entitled to occupy the house, and the lessors were not entitled to eject him therefrom so long as he paid the annual rent of Rs. 3; that he had duly paid rent at the agreed rate from the 6th May 1880, to the 6th May 1884; that the time for payment of rent for the year 1884-85 had not arrived; and that, under these circumstances, the plaintiffs were not entitled to either of the reliefs claimed.

The Court of First Instance (Munsif of Kanauj) construed the lease in the following manner :—" The lease is for one year, but it contains a provision that it shall remain in force so long as the lessee or tenant continues to pay the stipulated rent. In other words, it is a kabuliyat for one year, containing a provision extending the term to more than one year." The Court, upon this

* Second Appeal No. 766 of 1885, from a decree of Rai Cheda Lal, Subordinate Judge of Farukhabad, dated the 6th February 1885, modifying a decree of Babu Prag Das, Munsif of Kanauj, dated 6th December 1884.

view of the lease, held that it was an instrument of which the registration was compulsory under s. 17 (d) of the Registration Act of 1877, and that, not having been registered, it was inadmissible in evidence by reason of the provisions of s. 49. The Court accordingly dismissed the suit.

On appeal by the plaintiffs, the Subordinate Judge disagreed with the Munsif upon the construction and effect of the lease, and was of opinion that it was not compulsorily registrable, and therefore inadmissible in evidence because not registered. The Court, after referring to the terms of the instrument, observed :—"It can-[200] not be considered from these words that a provision has been made in the lease that, so long as the rent continues to be paid, the plaintiffs shall not be at liberty to eject the tenant, or that the lease has become for such a longer period than one year that its registration is compulsory. It is evident that the lease in question in this case is for a term of one year. The case of *Apu Budgavda v. Narhari Annajee*, I. L. R., 3 Bom., 21, has a bearing upon this case. It is held therein that if, in a document for which the term of one year is specially prescribed, any subsequent words are used for the continuance of possession, they are considered to appertain to the future consent of the parties, and cannot in any way affect the actual fixed term or create a fresh right, as based on contract, in favour of any party. Hence the registration of the lease in question cannot be considered to be compulsory, and it cannot be inferred from the lease that there is a mutual contract to the effect that, subject to the condition of paying the annual rent, the defendant has a right to hold possession for ever against the plaintiffs' consent. The lease was for a term of one year, which has expired. The defendant does not deny the fact of his being a tenant. Hence I hold that the plaintiffs are entitled to a decree for possession of the house by ejectment of the defendant, the tenant."

From this decision the defendant appealed to the High Court.

Munshi *Kashi Prasad*, for the Appellant.

Pandit *Nand Lal*, for the Respondents.

Oldfield and Tyrrell, JJ.—The Lower Appellate Court has taken a right view of the lease executed in May of 1880 between the parties.

It was a lease for one year only, and, thus falling under s. 18 of the Registration Act, it was admissible in evidence without registration. The principle laid down in *Hand v. Hall*, L. R., 2 Ex. D., 355, by the Court of Appeal is applicable, and the case cited by the Court below is in point. The appellant therefore has been a mere tenant-at-will since the expiry of the year 1880-81, and the respondents are entitled to the relief accorded to them by the Lower Appellate Court. The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[See also (1390) 17 Cal., 548.]

[201] APPELLATE CRIMINAL.*The 5th February, 1886.*

PRESENT :

MR. JUSTICE STRAIGHT.

Queen-Empress

versus

Parmeshar Dat

Act XLV of 1860 (Penal Code), s. 21—Public servant.

Any person, whether receiving pay or not, who chooses to take upon himself duties and responsibilities belonging to the position of a public servant, and performs those duties, and accepts those responsibilities, and is recognised as filling the position of a public servant, must be regarded as one, and it does not lie in his mouth to say subsequently that, notwithstanding his performance of public duties and the recognition by others of such performance, he is not a "public servant," within the definition contained in s. 21 of the Penal Code.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Mr. J. Simeon, for the Appellant.

The Public Prosecutor (Mr. C. H. Hill), for the Crown.

Straight, J.—This is an appeal from a decision of the Sessions Judge of Gorakhpur, Mr. R. J. Leeds, dated the 26th September 1885, convicting the appellant of three offences under s. 420 of the Penal Code of cheating. These offences relate to three aggregate sums of Rs. 455-4-11, Rs. 297-14 3, and Rs. 323-15-4, constituting a very considerable amount of money, which was improperly paid to other persons in consequence of misrepresentations made by the accused. The appellant has also been convicted under s. 167 of the Penal Code, but no sentence has been passed upon him in respect of that section. This latter conviction involves the question whether the accused was a public servant, and subject to the responsibilities attaching to that character. It appears that his duties were as follows:—He was, and had been for several years, attached to the tahsildar's office at Gorakhpur,—i.e., he was employed at the office without receiving any pay, and was learning the duties performed there by the officials, in the hope and expectation of eventually being taken on the staff, and paid like the other persons employed in the office. It seems to me that it is now too late for the contention to be raised on his behalf that he was not a "public servant," within the definition contained in s. 21 of the Penal Code. I am of opinion that any person, whether receiving pay or not, who chooses to **[202]** take upon himself duties and responsibilities belonging to the position of a public servant, and performs those duties, and accepts those responsibilities, and is recognised as filling the position of a public servant, must be regarded as one, and that it does not lie in his mouth to say subsequently that, notwithstanding his performance of public duties and the recognition by others of such performance, he is not a public servant. If such a contention were allowed, and the question whether a man was a public servant were to

depend wholly upon the test of his receiving or not receiving a salary, very great mischief and difficulty might arise in a country like this, where numerous persons are engaged in the performance of public duties without pay. I am therefore of opinion that the appellant must be regarded as coming within the definition of "public servant." This disposes of the first objection which has been taken on the appellant's behalf. I will now briefly state the circumstances under which the accused has been convicted. It appears that the military authorities, for purposes of convenience, made an arrangement with the Collector of Gorakhpur, by which the latter should ascertain every month, through the tahsildar's office, what were the current rates in the bazar for grain and other articles of food; and in the ordinary course of business it was the accused's duty to prepare an average list of such rates in Persian, which he had to take to Mr. Augustin, in the Collector's Office, and to read out to him from the Persian list the figures of the rates. From this Mr. Augustin made a list in English for the Collector, who forwarded it to the commanding officer of the regiment, who, upon the basis of the list so prepared, directed payment from time to time to the banias supplying the articles of food required. So that, if by any arrangement with any persons in the bazar the accused chose to make incorrect statements as to the amount of the rates of food to Mr. Augustin, the list prepared by Mr. Augustin upon such statements would necessarily be incorrect also, and this would result in larger sums being paid to the banias than they were entitled to receive. I cannot conceive circumstances more clearly within the meaning of s. 420 of the Penal Code. It has been proved that the Persian list of averages prepared by the accused was correct, and Mr. Augustin has shown that his English list was prepared with reference to the [203] translation of the Persian list given to him by the accused. A comparison of the two documents makes it obvious that the appellant misrepresented the contents of the Persian list, because in Mr. Augustin's list there was a large excess in the alleged prices. The case is overwhelming, and I must dismiss the appeal.

Conviction affirmed.

[8 All. 203]
FULL BENCH.

The 13th February, 1886.

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE STRAIGHT,
MR. JUSTICE OLDFIELD, MR. JUSTICE BRODHURST, AND
MR. JUSTICE TYRRELL.

Jiwan Ali Beg.....Applicant

versus

Basa Mal and others.....Opposite parties.*

*Civil Procedure Code, s. 549—Practice—Appeal—
Security for costs—Poverty of appellant.*

Held, by the Full Bench (TYRRELL, J., *dubitante*), without laying down any general rule by which the exercise of the discretion conferred by s. 549† of the Civil Procedure Code should be governed, that the mere fact of the poverty of an appellant, standing by itself, and without reference to any general facts of the case under appeal, ought not to be considered sufficient alone to warrant his being required to furnish security for costs.

THIS was an application by the respondent in First Appeal No. 133 of 1885 for security for costs which came on for hearing before STRAIGHT, J., who made the following order of reference to the Full Bench :—

“This is an application by the respondent in an appeal to this Court, that the appellant, who was unsuccessful in the Court below, be ordered to give security for the costs incurred, not only in that Court, but in this appeal. The allegation of the respondent in his petition, and vouched by affidavits, is that the appellant is a person without means, and indeed I understand the appellant’s counsel to admit that, so far as he is aware, except the property which is the subject-matter of the present suit, and which was hypothecated in the bond sued upon, the appellant possesses no property whatever. Under these circumstances, the respondent urges that the appellant be required to furnish security. It has been ruled on three occasions in this Court—twice by myself ‡ [204] and once by Mr. Justice MAHMOOD, *Lakhmi Chand v. Gatto Bai*, I. L. R., 7 All., 542,—that mere poverty alone is not a sufficient ground for requiring security for costs from an appellant, and I have certainly been under the impression that that was the recognised rule in the English Courts, which also has been followed by the Bombay High Court in *Maneckji Limji Mancherji v.*

* Miscellaneous Application in F. A. No. 133 of 1885.

Appellate Court may require appellant to give security for costs.

original suit, or of both :

Provided that the Court shall demand such security in all cases in which the appellant

When appellant resides out of British India.

† [Sec. 549 :—The Appellate Court may at its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the

is residing out of British India, and is not possessed of any sufficient immoveable property within British India independent of the property (if any) to which the appeal relates.

If such security be not furnished within such time as the Court orders, the Court shall reject the appeal.]

‡ *Dalip Singh v. Azim Ali Khan and Bachman v. Bachman*, Weekly Notes, 1884, pp. 99 and 103, respectively.

Goolbai, I. L. R., 3 Bom., 241. Mr. *Hill* has, however, called my attention to two rulings of the Court of Appeal in England, which seem at least to modify the old decisions, and to show that poverty or insolvency is a good ground for requiring security for costs from the appellant. As the question is one of practice, and of considerable importance to those engaged in appeals in this Court, I refer it to the Full Bench for determination."

Mr. *C. H. Hill*, for the Petitioner, referred to *Harlock v. Ashberry*, L. R., 19 Ch. D., 84, and *Farrer v. Lacy, Hartland & Co.*, L. R., 28 Ch. D., 482.

Mr. *T. Conlin* and Pandit *Ajudhia Nath*, for the Opposite Parties.

Straight, J.—We are unable to lay down any general rule by which the exercise of the discretion conferred by s. 549 of the Civil Procedure Code should be governed; but we may go so far as to say that the mere fact of the poverty of an appellant, standing by itself, and without reference to any of the general facts of the case under appeal, ought not to be considered sufficient alone to warrant his being required to furnish security for costs.

Petheram, C.J., and **Oldfield** and **Brodhurst, JJ.**, concurred.

Tyrrell, J.—Section 549 of the Code prescribes no conditions which absolutely entitle a respondent to an order under the terms of that section requiring the appellant to furnish security for the costs of the appeal; and I should hesitate to import into the provisions of the section any rule either way upon the question whether or not the poverty of an appellant by itself justifies an order requiring him to furnish security for costs.

[205] APPELLATE CIVIL.

The 8th March, 1886.

PRESENT :

SIR COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE STRAIGHT.

Basa Mal and another.....Defendants

versus

Maharaj Singh, Minor, by his next friend, Sarup Kuar.....Plaintiff.*

Hindu law—Joint Hindu family—Sale of ancestral estate in execution of decree against father—Effect of sale on son's rights and interests.

When a decree has been made against the father and manager of a joint Hindu family in reference to a transaction by which he has professed to charge or sell the joint ancestral property, and a sale has taken place in execution of such decree of the joint ancestral property without any limitation as to the rights and interests sold, the rights and interests of all the co-parceners are to be assumed to have passed to the purchaser, and they are bound by the sale, unless and until they establish that the debt incurred by the father, and in respect of

* First Appeal No. 66 of 1884, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 23rd November 1883.

which the decree was obtained against him, was a debt incurred for immoral purposes of the kind mentioned by *Yajnavalkya*, Chapter II, s. 48, and *Manu*, Chapter VIII, sloka 159, and one which it would not be their pious duty as sons to discharge.

If, however, the decree, from the form of the suit, the character of the debt recovered by it, and its terms, is to be interpreted as a decree against the father alone and personal to himself, and all that is put up and sold thereunder in execution is his right and interest in the joint ancestral estate, then the auction-purchaser acquires no more than that right and interest, i.e., the right to demand partition to the extent of the father's share. In this last mentioned case, the co-parceners can successfully resist any attempt on the part of the auction-purchaser to obtain possession of the whole of the joint ancestral estate, or, if he obtains possession, may maintain a suit for ejectment to the extent of their shares upon the basis of the terms of the decree obtained against the father, and the limited nature of the rights passed by the sale thereunder.

Girdharee Lall v. Kantoo Lall, 14 B. L. R., 187 : 22 W. R., 56 ; L. R. Ind. Ap., 321 ; *Deendyal Lall v. Sugdeep Narain Singh*, I. L. R., 3 Cal., 198 : L. R., 4 Ind. Ap., 247 ; *Suraj Bunsli Koer v. Sheo Persad Singh*, I. L. R., 5 Cal., 148 : L. R., 6 Ind. Ap., 88 ; *Bissessur Lall Sahoo v. Maharajah Luchmessur Singh*, 5 Cal. L. R., 477 : L. R., 6 Ind. Ap., 238 ; *Muttayan Chetti v. Sanqili Vira Pandia Chinnatambiar*, I. L. R., 6 Mad., 1 : L. R., 9 Ind. Ap., 128 ; *Hurdey Narain Sahu v. Rooder Perakash Misser*, I. L. R., 10 Cal., 626 : L. R., 11 Ind. Ap., 26 ; *Nanomi Babuasin v. Modun Mohun*, Decided by the Privy Council on the 18th December 1885 ; *Ram Narain Lal v. Bhawani Prasad*, I. L. R., 3 All., 443 ; *Gaura v. Nanak Chund*, Weekly Notes, 1883, p. 194 ; and Weekly Notes, 1884, p. 23 ; *Appovier v. Rama Subba Aiyar* 11 Moo. I. A., 75 ; *Phul Chand v. Man Singh*, I. L. R., 4 All., 309 ; *Channali Kuar v. Ram Prasad*, I. L. R., 2 All., 267 ; and *Rama Nand Singh v. Gobind Singh*, I. L. R., 5 All., 384, referred to.

[206] THIS was an appeal from a decree of the Subordinate Judge of Moradabad, dated the 23rd November 1883, which came before PETHERAM, C.J., and STRAIGHT, J., and was referred by them to the Full Bench. The ORDER OF REFERENCE, in which the facts are fully stated, was in the following terms :—

"In this suit the minor plaintiff, by his mother and guardian, sued for a declaration of his right to possession of 2½ biswas shares in two mahals of Kasba Mughalpur, and for the cancelment of a miscellaneous order of the 2nd of February 1883, under the following circumstances:—The plaintiff alleges that his father, Chaudhri Sheoraj Singh, upon the death of his grandfather, Chaudhri Bhan Partab Singh, inherited certain valuable properties, among which were the mahals in suit ; that subsequently his said father, having, by his 'immoral and licentious life,' wasted and squandered the income derivable from the ancestral properties, was, on the 9th of July 1878, obliged to borrow Rs. 3,000 from the defendants, and mortgaged in their favour the shares in Mughalpur already mentioned ; that the said defendants, in the year 1879, instituted a suit on their bond against the said Sheoraj Singh ; that the plaintiff, by his guardian, prayed the Court in which such suit was pending to make him a party thereto under s. 32 of the Code ; that his application was rejected and a decree was given in favour of the defendants against Sheoraj Singh on the 20th June 1879 ; that the shares in Mughalpur were first brought to sale in execution of that decree in May 1880 ; that subsequently to such sale the plaintiff filed an application to have it set aside, but it was refused, though the sale was ultimately set aside at the instance of the judgment-debtor ; that the defendant Basa Mal and one Ganeshi Mal, representative of Sita Mal, the other decree-holder, having brought the mortgaged property to sale a second time, on the 21st November 1881, purchased it for Rs. 2,000 ; that the plaintiff thereupon urged objections to possession being given to the

said auction-purchasers and opposed it, and the latter then filed an application to the Court under s. 335 of the Code, and on the 2nd February 1883, such application was decided in favour of the auction-purchasers, Basa Mal and Ganeshi Mal, and they were ordered to be put in possession; that this order gave the plaintiff the cause of action on which he now sues; and that Sheoraj Singh, being joint with the [207] plaintiff, had no power to charge the joint property, and such charge was void and of no effect as to the whole. The defence set up was, in substance, that the property was not ancestral, that the bond was executed for necessary purposes, and that Sheoraj Singh, as guardian of and manager for his minor son, the plaintiff, was competent to make the charge.

"The Subordinate Judge, finding that the debt to the defendants under the bond was incurred for immoral purposes, and that the property was ancestral, gave a decree in the plaintiff's favour for half his claim. From that decision the defendants have appealed to this Court, and the plaintiff has filed one objection. The pleas before us were, that the debt to the defendants was incurred for legitimate purposes; that the plaintiff failed to establish, as he was bound to do, that the amount borrowed from the defendants was used for immoral purposes; that the facts show that the present suit is instituted with the connivance and at the instigation of Sheoraj Singh. The plaintiff's objection, on the other hand, is to the effect that the Subordinate Judge should have decreed his claim in whole and not in part. As the case is one involving considerations akin to those that have arisen in another case referred to the Full Bench, we think this should also go. In making the reference we find, as a fact, that the property was ancestral; that the plaintiff is in possession of it; that there is evidence to show that, though a considerable portion of the bond-money advanced on the bond of the 9th July 1878, to Sheoraj Singh was required for a necessary purpose, namely, the payment of revenue, he had got himself into the position of having to take a loan by reason of his imprudent and extravagant proceedings, and that the defendants purchased with notice of the plaintiff's claim. Upon these findings we refer the appeal to the Full Bench for disposal."

The Full Bench, however, did not dispose of the appeal, but, without expressing any opinion in regard to it, returned it to the Divisional Bench for determination. The appeal was then heard by the Divisional Bench.

Pandit *Bishambar Nath*, for the Appellants.

Lala Juala Prasad, for the Respondent.

[208] **Petheram, C.J.**, and **Straight, J.**—The circumstances of this case are set out at length in the order by which the appeal was originally referred to the Full Bench for decision, and they need not be recapitulated. The matter now has come back to us for decision, for reasons that need not be detailed, and before disposing of it, we think it desirable briefly to refer to certain decisions of their Lordships of the Privy Council, which were commented upon in the course of the arguments, as also some rulings of this Court, with a view to ascertain what are the clear and intelligible rules to be applied in the determination of these cases of a Hindu son seeking to avoid an alienation of joint ancestral property by his father. At the outset, and by way of introduction to the consideration of the subject, the description given by Lord WESTBURY of the characteristics of the joint Hindu family may be usefully quoted:—"According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he (that particular member) has a certain definite share. No individual member of an undivided family could go to the place of receipt

of rent and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the mode of enjoyment by the members of an undivided family"—*Appovier v. Rama Subba Aryan*, 11 Moo. I.A., 75. In this connection it will be convenient to refer to the principle laid down in *Phul Chand v. Man Singh*, I.L.R., 4 All., 309, by STRAIGHT and TYRRELL, JJ., "that every son born to the father of a joint Hindu family in possession of ancestral property acquires a positive, though undefined, share in the joint estate co-extensive with and as large as that of all the other members of the joint family, including his father, and that it is competent for each and every member of a joint family at any time to demand partition of the ancestral property." It has further been the rule of decision in this Court [see OLDFIELD, J., in *Chamaili Kuar v. Ram Prasad*, I. L. R., 2 All., 267, and STRAIGHT and BRODHURST, JJ. in *Rama Nand Singh v. Gobind Singh*, I. L. R., 5 All., 384] that one member of a joint and undivided Hindu family cannot mortgage or sell his share of the joint property without the [209] consent, express or implied, of his co-parceners. These rulings may be said to state the most important incidents that mark the relations of the members of the joint Hindu family *inter se*; and we now proceed to ascertain how far those relations have been touched or modified in reference to transactions between the father of the joint family, its natural head and manager, and third parties by which the joint ancestral property has been mortgaged or sold.

The first important decision of the Privy Council on the question of the power of the father of such a family to deal with the joint ancestral estate is to be found in the case of *Girdharee Lall v. Kantoo Lall*, 14 B. L. R., 187; 22 W. R., 56; L. R., 1 Ind. Ap., 321. This was an action by a son in the lifetime of his father and uncle to set aside a sale of ancestral property made by them, on the ground that a sale by one member of an undivided property passes no interest in it whatever, and that any other member of the family can set it aside and bring the property back into the family. The Privy Council dismissed the suit, on the ground that ancestral property, which descends to a father under the Mitakshara law, is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property in which the son, as the son of his father, acquires an interest by birth, is liable to the father's debts. The next case is that of *Deendyal Lall v. Jugdeep Narain Singh*, I. L. R., 3 Cal., 198; L. R., 4 Ind. Ap., 247. That was a suit by a son to recover possession of ancestral property which had been taken possession of by an auction-purchaser of "the rights and proprietary and mokurrari title and share of Tufani Singh, the judgment-debtor," who was the father of the plaintiff. The Privy Council decreed the claim, on the ground that possession of the undivided property could not be taken under a sale of one undivided share, but gave the defendant a declaration that he was entitled to stand in the shoes of Tufani Singh, and to obtain a share of the property by bringing a suit for partition. The judgment contains an expression of opinion that only the undivided share of the father can be sold in a suit to which he only is made a defendant; but inasmuch as the defendant in that suit had only bought the [210] interest of the father, the point was not necessary for the decision of the case. The next case is that of *Suraj Bunsu Koer v. Sheo Persad Singh*, I. L. R., 5 Cal., 148; L. R., 6 Ind. Ap., 88. A family, consisting of a father and his minor sons, was in possession of an ancestral estate, and the father mortgaged the estate to secure a sum of Rs. 13,000 and interest, which he had himself borrowed for and spent in

immoral purposes. The Privy Council held, on the authority of the case of *Deendyal Lall*, I. L. R., 3 Cal., 198 : L. R., 4 Ind. Ap., 247, that the purchases under a decree on the mortgage security after the death of the father were cancelled as against the surviving sons, who had a right to have the estate partitioned and to obtain possession of the share of the father, and that the mortgage and the decree upon it would not affect the undivided share of the other members of the family *because the money was borrowed and spent for immoral purposes*. In the course of the judgment, they affirmed the following propositions as being established by the case of *Kantoo Lall*, 14 B. L. R., 187 : 22 W. R., 56 : L. R., 1 Ind. Ap., 321 : "first, that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and secondly, that the purchasers at an execution sale, being strangers to the suit, if they have not had notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceeding."

The case of *Bissessur Lall Sahu v. Maharajah Luchmessur Singh*, 5 Cal. L. R., 477 : L. R., 6 Ind. Ap., 233, has been referred to, but on examination does not appear to have any bearing on the questions. In that case, an undivided family acquired, in 1847, the property which was in question, and afterwards decrees were obtained against various members of the family for debts which were undoubtedly debts for which the whole family was liable, and for which they might have been sued, and the family property been sold, had proper proceedings been [211] taken. The Privy Council held in that case that the Court might look behind the decrees to ascertain whether the defendant was sued in his individual character or as the representative of the entire family, and that the execution should be in accordance with the real facts, and not necessarily against the property of the apparent defendant only. The next case in order is that of *Muttayan Chetti v. Sangili Vira Pandia Chinнатambiar*, I. L. R., 6 Mad., 1 : L. R., 9 Ind. Ap., 128. The facts of that case are complicated, and it is not easy to gather from the report exactly what they were; but it is clear that the main question was, whether a property (that at the time of the mortgage was in the possession of a family which consisted of a father and son) mortgaged by the father alone could be sold after the death of the father under a decree obtained against him alone upon the mortgage. The Privy Council held that it could, the reasons given being that the whole zamindari, or at least the interest which the defendant, the son, took therein by heritage, was liable as assets by descent in the hands of the defendant as the heir of his father for the payment of his father's debts, and the Committee re-affirmed the doctrine laid down in *Girdharee Lall's Case*. The next and last decision of the Privy Council on the subject is contained in the case of *Hurdey Narain Sahu v. Itooder Perakash Misser*, I. L. R., 10 Cal., 626 : L. R., 11 Ind. Ap., 26. In that case an ancestral property was in the possession of a family which consisted of a father and son. It appeared that the father was indebted to the defendant in the suit of Hurdey Narain, partly on account of a mortgage and partly for further advances, and that Hurdey Narain brought a suit against him in order to recover the debt, and on the 4th of March 1873, obtained a common money-decree against him, and that the ancestral property was afterwards attached and sold under the decree, and purchased by Hurdey Narain, the judgment-creditor.

Under these circumstances the Privy Council say that the question which arises is, what was the right or interest in the ancestral property which Hurdey Narain acquired by his purchase at the sale in execution of the decree, and upon the authority of *Deendyal's Case* they held that as the decree was against the father alone, [212] and was a money-decree only, such interest was confined to that of the judgment-debtor, the father, only and did not transfer the entire property to the purchaser. There is yet one more case recently decided by their Lordships, and not yet reported, namely, *Nanomi Babuasin v. Modun Mohun*, decided the 18th December 1885, on appeal from Calcutta. There two sons sued to avoid a sale of the ancestral property held in execution of a decree against their father. The Subordinate Judge in whose Court the suit was tried found that all that had passed at the auction-sale to the purchaser was the right, title, and interest of the father, and he therefore gave the plaintiffs a decree for the ancestral property minus the father's share. On appeal the High Court reversed the decision of the Subordinate Judge, holding that the auction-purchaser bought the whole property, including the interests of the plaintiffs. The latter then appealed to the Privy Council, and their Lordships, after referring to *Deendyal Lall's Case*, observed:—"If the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's co-parcenary interest alone, the absence of the sons from the proceeding may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings." In the result, their Lordships held that, as the purchaser had succeeded in showing that he bought the entirety of the estate, the suit of the plaintiffs had been rightly held to have failed.

We now come to the cases which have been considered in the High Court of these Provinces. That of *Ram Narain Lal v. Bhawani Prasad*, I. L. R., 3 All. 443, was decided by the Full Bench of this Court on the 24th January 1881, that is to say, after that of *Bissessur Lall Sahu* and before that of *Hurdey Narain Samu v. Rooder Perkash Misser*, I. L. R., 10 Cal., 626; L.R., 11 Ind. Ap., 26. In that case the facts were, that an ancestral estate was in the possession of an undivided family which consisted of a father and four sons. The father borrowed a sum of money, and as security gave a bond by which he hypothecated a [213] portion of the ancestral estate, describing it as his own. The lender afterwards sued the father on the bond and obtained a decree against him personally and for the sale of the mortgaged property. A sale took place under the decree, and the question was what passed to the purchaser. The majority of the Court (STUART, C. J., PEARSON, SPANKIE, and OLDFIELD, JJ.) held on the authority of *Bissessur Lall Sahu's Case*, that it was competent for the Court to go behind the decree, and to ascertain whether the money was borrowed for family purposes, and, upon its appearing that such was the case, to sell the family property under it. STRAIGHT, J., thought that as the decree was against the father alone, his share only could be sold under it. Another case is that of *Gaura v. Nanak Chand*, Weekly Notes, 1883, p. 194, and Weekly Notes, 1884, p. 23. The only question in that case was on whom the burden of proof rested, when it was alleged that the property had been parted with by the father for unauthorized purposes, and the Court held that the burden of proving the assertion was on the person who made it; in other words, that the transaction would be presumed to be a legal and proper one until the contrary appeared.

It seems to us that two broad rules are deducible from the foregoing authorities, and they are these:—First, that when a decree has been made

against the father and manager of a joint Hindu family in reference to a transaction by which he has professed to charge or sell the joint ancestral property, and a sale has taken place in execution of such decree of the joint ancestral property without any limitation as to the rights and interests sold, the rights and interests of all the co-parceners are to be assumed to have passed to the purchaser, and they are bound by the sale, unless and until they establish that the debt incurred by the father, and in respect of which the decree was obtained against him, was a debt incurred for immoral purposes of the kind mentioned by *Yajnavalkya*, Chapter I, s. 48, and *Manu*, Chapter VIII, sloka 159, and one which it would not be their pious duty as sons to discharge. Next, that if, however, the decree, from the form of the suit, the character of the debt recovered by it, and its terms, is to be interpreted as a decree against the father alone and personal to himself, and all that is put up and sold thereunder in execution [214] is his right and interest in the joint ancestral estate, then the auction-purchaser acquires no more than that right and interest, *i.e.*, the right to demand partition to the extent of the father's share. In this last mentioned case, the co-parceners can successfully resist any attempt on the part of the auction-purchaser to obtain possession of the whole of the joint ancestral estate, or, if he obtains possession, may maintain a suit for ejectment to the extent of their shares upon the basis of the terms of the decree obtained against the father and the limited nature of the rights passed by the sale thereunder.

Applying these rules to this appeal, we are of opinion that it must succeed, and that the decree of the Subordinate Judge cannot stand. That the 2½ biswas share of Mughalpur was sold at the execution-sale under the decree obtained against Sheoraj Singh and purchased by the defendants is clear from the terms of the decree and of the sale-certificate, and there can be no doubt that the entirety of the interest passed to them. The plaintiff has failed to show that the debt for which the bond was executed was an immoral one; indeed, a considerable proportion of the money borrowed was used for the purpose of paying arrears of revenue. We decree the appeal and dismiss the cross-objection, and, reversing the decree of the Subordinate Judge, we dismiss the suit with costs in all Courts.

Appeal allowed.

NOTES.

[See also (1886) 9 All., 142; (1887) 11 Mad., 64; (1889) 12 All., 99; (1891) 13 All., 216.]

[8 All. 214]

The 12th March, 1886.

PRESENT :

SIR COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE STRAIGHT.

Dhum Singh.....Defendant

versus

Ganga Ram and others.....Plaintiffs.*

Vendor and purchaser—Failure of consideration—Suit for money had and received for plaintiff's use—Debt—Limitation.

Prior to September 1879, pecuniary dealings took place between *D* and *B*, resulting in a debt due by the former to the latter of Rs. 33,000 for money lent. Negotiations were carried on between the parties as to the mode in which the debt should be liquidated; and, on the 1st September 1879, it was arranged that *D* should execute a sale-deed conveying to *B* certain immoveable property for Rs. 55,000, and that *B* should pay this amount by giving *D* credit to the extent of the debt and paying the balance in cash. In August 1880, *D* sued *B* for specific performance of the contract, which, he alleged, had been settled and executed, for the sale of the property. *B* in defence alleged that although certain [215] terms and conditions as to the sale had been definitely settled for embodiment in a formal sale-deed, it was only subject to these terms and conditions that he had been prepared to complete the transaction, and that, as they had been omitted from the document executed by *D* on the 1st September 1879, he had never accepted that document. In March 1884, the High Court, on appeal, dismissed the suit, holding that the parties had never been *ad idem* with reference to the contract alleged by *D*, and that the document of the 1st September 1879, had never been finally accepted so as to be binding and enforceable by law. In September 1884, *B* sued *D* for recovery of the sum of Rs. 33,000 with interest. He contended that, under the terms of the arrangement made on the 1st September 1879, the debt of Rs. 33,000 then owing to him changed its character; that it was no longer merely the old balance due by the defendant, but, having been credited in the latter's books, should be treated as a payment by him (the plaintiff) as a deposit on account of the sale; that the suit was therefore one for money had and received by the defendant to the use of the plaintiff; and that the cause of action did not arise until the contract failed, by reason of the decree of the High Court on 14th March 1884, dismissing the suit for specific performance.

Held, that this contention must fail, and the debt must be treated as the old balance due by the defendant to the plaintiff, inasmuch as by the terms of the agreement itself which the plaintiff set up, no deposit was payable, and the price was not to be paid till the completion of the contract, and inasmuch as the plaintiff, in demanding payment, after the negotiations had failed, demanded it simply as for the balance of the old debt, and not as for the return of a deposit.

Held, further, that the 1st September 1879, upon which the contract set up by the plaintiff was alleged to have been completed, was the latest possible date upon which the debt could be said to have become due, and that, inasmuch as the present suit was not brought until the 18th September 1884, it was barred by limitation.

THE facts of this case were as follows :—On the 1st September 1879, Dhum Singh, defendant, was indebted to one Baru Mal in the sum of Rs. 33,359-3-6 for money lent. On the same date Dhum Singh executed a deed of sale whereby he conveyed to Musammat Basu, the wife of Baru Mal, a village called Taili-pura and certain shares in nine other villages, in consideration of the payment

* First Appeal No. 62 of 1885, from a decree of Maulvi Muhammad Maksud Ali Khan, Subordinate Judge of Saharanpur, dated the 26th March 1885.

of Rs. 55,000. On the same day the deed was delivered to Baru Mal, and at the time of its delivery he gave Dhum Singh a letter in the following terms :—

“Baru Mal begs to send his compliments to Dhum Singh. I have for the present kept with me the sale-deed of māḥza Tailipura, etc., in all ten villages, for Rs. 55,000. It will be registered to-morrow. Rs. 21,640-12-6, due to you on account of this sale-deed, after setting off Rs. 33,359-3-6, will be paid as follows :—Rs. 10,000 at the time of registration, and Rs. 11,640-12-6 after mutation of names has been effected.”

[216] The sum of Rs. 33,359-3-6 mentioned in this letter as set-off against the purchase-money was the amount mentioned above as due to Baru Mal from Dhum Singh for money lent.

On the same day Dhum Singh credited and debited in his account-books to Baru Mal the sum of Rs. 33,359-3-6, the entries being in these terms :—

“Credited to Sah Baru Mal Rs. 33,359-3-6. Rs. 33,359-3-6 were due to Sah Baru Mal on account of the balance under the account-books. In the sale-deed for Rs. 55,000 credit was allowed for the same amount with reference to your letter.

Debited to Sah Baru Mal Rs. 33,359-3-6. Rs. 33,359-3-6 were due to you on account of balance under the account-books. The same have been paid off and credited to Sah Baru Mal in respect of the sale-deed amounting to Rs. 55,000.”

Dhum Singh also balanced his account with Baru Mal, and debited him with Rs. 21,640 12-6, being the balance of the purchase-money. This entry continued to be made in his account-books from year to year, and was existing at the time of the institution of the suit out of which this appeal arose. In the account-books of Baru Mal the sum of Rs. 33,359-3-6 continued to be debited, with interest, to Dhum Singh, and was so debited at that time.

On the 29th September 1879, Baru Mal, having in the meantime refused to accept the sale-deed, sent a letter to Dhum Singh in these terms :—

“As you have not yet replied to my several oral messages, I am obliged to give you notice hereby, that instead of the sale-deed of the 1st September, which your manager, with intention to cause loss to me, has executed in my favour, altering the wording of the rough draft and omitting the conditions necessary to the sale, and which is, on account of this defect, useless and a piece of waste paper, you will execute, within four days, a correct and faultless sale-deed in respect of Tailipura, etc., the sold villages, on another stamped paper, specifying all the conditions agreed upon between us, in accordance with my rough draft, to a letter, and after due registration cause mutation of names to be effected in my favour respecting the property sold. If you will not do so, I will, after the expiry of the said term, be entitled to recover, according to the banking usage, the custom of the country, the Court practice, and justice, besides Rs. 33,359-3-6, the balance in my favour, on the account-books, a further sum of Rs. 1,500 as damages for the loss sustained by me on account of your fraudulent proceedings mentioned above. This is written to you by way of information. You are at liberty either to act as above and deal fairly, or let the term expire and choose to pay Rs. 1,500 as damages, besides the above-mentioned debt. Please send a reply, as you desire, by return of post. If you will not send a reply within the term, I will [217] assume you have accepted to pay Rs. 1,500 as damages in addition to the debt due to me.”

The dispute between the parties was referred to arbitration, but no arbitration took place, and on the 3rd August 1880, Dhum Singh sued Baru Mal and his wife Basu for specific performance of the contract represented by the sale-deed executed by him. The principal relief which he sought in that suit was as follows :—

“That after declaring the sale transaction and sale-deed in respect of the aforesaid villages to have been established and completed, the defendant be ordered to have the said deed registered within a reasonable date from the date of the order, and after deduction of

Rs. 33,359-3-6, the amount of debt due to him (defendant), to pay Rs. 10,000 at the time of registration, and Rs. 11,640-12-6 at the time of mutation of names, to the plaintiff, and in case defendant No. 1 fails to comply with the aforesaid order for having the registration and mutation of names effected within the term granted by the Court, he may be ordered to pay Rs. 21,640-12-6 in a lump sum to the plaintiff."

The case of Dhum Singh was that the sale-deed executed by him on the 1st September 1879, had been accepted by Baru Mal on that day.

The defence of Baru Mal was that it had been agreed between the parties that the sale-deed should be drawn in the terms of a draft prepared by his karinda; that he had not accepted the sale-deed executed by Dhum Singh on the 1st September 1879, but had received it in order that he might compare it with the rough draft, and satisfy himself that the deed corresponded with the draft before he accepted the deed; that as the deed did not correspond with the draft, he had refused to accept it; and that under the circumstances he was not bound to accept it.

The Subordinate Judge of Saharanpur (Maulvi Muhammad Maksud Ali Khan), by whom the suit was tried, on the 24th February 1881, holding that the sale-deed executed by Dhum Singh on the 1st September 1879, represented the contract of sale, gave him a decree as claimed.

Baru Mal appealed to the High Court, which, on the 14th March 1884, reversed the decree of the lower Court and dismissed the suit. The judgment of the High Court (STRAIGHT and TYRRELL, JJ.) was in these terms:—

"This is an appeal from a decision of the Subordinate Judge of Saharanpur, passed on the 24th of February 1881, decreeing [218] the plaintiff-respondent's suit for specific performance of an alleged contract of the 1st September 1879, relating to the sale to, and purchase by, the defendant-appellant Baru Mal of certain shares of villages in the Saharanpur district. The plaintiff Dhum Singh and the defendant Baru Mal are Mahajans (Saragis) carrying on their business at Saharanpur, and Musammat Basu, the 2nd defendant, is the wife of defendant No. 1. Dhum Singh and Baru Mal are related by marriage and down to the time of the transaction, out of which the present litigation has arisen, would seem to have been on friendly terms. It appears that prior to the month of August 1879, there had been considerable pecuniary dealings between the plaintiff and Baru Mal, whom we shall for the future call *the defendant*, which at that date had resulted in an indebtedness from the former to the latter, in round numbers, of some Rs. 33,000. According to the defendant's own account, his son, Ajit Singh, objected to so large a debt remaining outstanding, and, in consequence of this, negotiations were commenced with a view to effecting some settlement, upon the basis that, among other incidents of the arrangement to be come to, the plaintiff should transfer his proprietary interests in certain villages to the defendant's wife. We are not for the moment concerned to inquire into the details of what passed in the course of these preliminaries; it is enough for immediate purposes to say that on the 1st of September 1879, a deed was executed by the plaintiff, purporting, in lieu of a debt due from him of Rs. 33,359-3-6, which was to be written off as satisfied, and for a cash payment of Rs. 21,640-12-6, to convey all his rights in ten mauzas therein specified to Musammat Basu, wife of Baru Mal. This is the instrument specific performance whereof is sought by the suit now before us in appeal, which was instituted on the 3rd of August 1880. The main plea set up by the defendant in the Court below was to the effect that, in the course of the negotiations above adverted to, certain terms and conditions, which for the moment need not be more particularly mentioned, had been arranged between the parties for embodiment in a formal sale-deed;

that it was only upon these terms and conditions that the defendant was prepared to complete the transaction; that those terms and conditions were intentionally and fraudulently omitted from the document [219] executed by the defendant on the 1st September 1879; and that the defendant never finally accepted that document as then drawn up so as to make it a valid and binding contract and enforceable in law. There were other pleas relating to certain arbitration proceedings, which were commenced under agreement between the parties, and to a demand made by the plaintiff for damages, with which we need not concern ourselves.

"The Subordinate Judge decreed the plaintiff's claim for specific performance, but dismissed it as to the damages; and the defendants appeal.

"Four contentions were urged before us on their behalf. First, that looking to the prayer of the plaint and the fact that the sale-deed of the 1st of September 1879, was made in the favour of the defendant Musammatt Basu, no decree could legally be passed against the defendant Baru Mal specifically to perform the same; second, that the parties having referred their differences to arbitration by an agreement of the 15th December 1879, the suit was barred by the latter part of the proviso to s. 21 of the Specific Relief Act; third, that there never was any completed and final contract between the parties binding on the defendant, of which specific performance could properly be granted; fourth, that even if there was a valid contract, it was so vague and indefinite in its terms as not to warrant the Court below in exercising the discretionary powers conferred by Act I of 1877.

"In the view we take of the case, it will be more convenient at once to discuss and deal with the third of the above grounds taken by the appellants, as it virtually comprehends and directly affects all the material questions in difference between the parties. It goes without saying that, if there was no absolute and unqualified acceptance of the terms of the contract of September 1879, by the defendant, there was no contract which can be specifically enforced. Was there then such an acceptance in fact? Before entering, however, upon an examination of the evidence, we feel ourselves constrained to remark, as we did at the hearing, that it is matter for regret to find that a dispute between two native gentlemen of position and related to one another, which might easily have been amicably arranged, should have developed into such an embittered controversy. [220] It is to our minds most unfortunate that our consideration of what otherwise would have been a simple question of fact is complicated and embarrassed by recriminatory charges of bad faith, deceit, misrepresentation and fraud, and we cannot but regret that the efforts we felt ourselves justified in making to induce them to abandon their several imputations, and to compromise the dispute should have proved unsuccessful. With this much by way of parenthesis we now revert to a consideration of the question of whether the defendant gave such an unqualified and absolute acceptance to the terms of the instrument of the 1st of September 1879, as to constitute it a contract enforceable against him. After going very carefully into the whole of the evidence, on the one side and the other, and with the strongest indisposition to differ with so experienced and intelligent a judicial officer as the Subordinate Judge upon matters of fact, we find ourselves unable to agree in the conclusions he has arrived at upon this part of the case. The story told by the plaintiff and his witnesses as to what occurred on the 1st of September prior to, at the time of, and after, the execution of the sale-deed seems to us to present many improbabilities. For example, it is scarcely credible that a wealthy gentleman in the position of the defendant, with karindas and agents to attend to such matters for him,

would have subjected himself to the trouble and labour of reading out the draft "word by word" to the copyist of the sale-deed, and again when the copy had been completed of comparing it with the original draft. The plaintiff would have us believe that the sale transaction was of the most ordinary and simple description. What necessity then was there for the plaintiff to adopt such very unusual and exceptional precautions? and, as far as we can see, it is not pretended that down to the time of the defendant's going to the house of the plaintiff, on the 1st of September, there had been any serious hitch or difficulty over the arrangement of the preliminaries, and we may we think fairly assume that, when he went there, it was with the full intention of completing the transaction. We cannot believe that his presence on the occasion in question was a cunning pretence and deceit on his part, resorted to for the purpose of getting out of his moral obligations towards the plaintiff's purchase on the conditions already settled. It comes to this, therefore, that the defendant was then ready and willing to close with the [221] plaintiff. But did he do so? The answer must we think be unhesitatingly in the negative. It is admitted that the defendant was allowed to take the sale-deed away with him; in fact, it has been produced in the suit from his custody. That there was something exceptional in this mode of proceeding is clearly indicated by the fact that the letter to be found on page 1 of the respondent's book was required by the plaintiff and given by the defendant. Under ordinary circumstances, the instrument would have remained with the vendor at any rate until the transaction had been perfected to the extent of registration, and the receipt of the Rs. 10,000 in cash to be paid thereon. What cause then was there for so unusual a course to be pursued as that which we find to have been adopted in the present case? For while, on the one hand, no reason of any sort is assigned by the plaintiff for this departure from ordinary practice, on the other, the defendant says that, before according his final assent to the sale-deed, he wished to have it compared with the draft in the hands of his karinda Partab Singh and took it away with him for that purpose. We confess that this appears to us to be a rational and natural explanation. For it must be remembered that, at that time, the plaintiff and defendant were upon perfectly amicable terms, and while, as a matter of business, the latter might, without offence, have wished, for his own protection, that his agent should examine the document by the rough draft, his saying so would have been a breach of manners, of which one native gentleman would hardly have been likely to be guilty towards another. If, as the plaintiff asks us to believe, the contract had been finally and irrevocably concluded by the defendant, it is difficult to understand why the former should have allowed the document embodying it to go out of his possession, still more why the latter should have wanted it at such a late hour of the night, when it was understood that the parties were to meet at the registration office on the following day. It does not seem to be suggested that the defendant then had it in his mind to wriggle out of the transaction; on the contrary, as we understand the plaintiff's allegation, it was not till after this that the defendant's sons brought pressure to bear upon their father to repudiate the contract. If the defendant had given the absolute and unqualified assent which is now alleged, we should not, in the ordinary nature of things, have found him [222] carrying off the instrument with him and giving by way of acknowledgment such a letter as that of the 1st September. It was pressed upon us by the counsel for the plaintiff, that it was in the highest degree improbable that the defendant would have allowed a Rs. 500 stamp to be wasted, and that he must have assured himself as to the terms of the contract before it was committed to stamp paper. It is enough to say, in answer to this, that the plaintiff himself states that he had

agreed to find the stamp, and there was therefore no reason for the defendant to concern himself on that score. With regard to the evidence of the defendant and Bahal Singh as to the conduct of the scribe Shaikh Bakhsha, we cannot adopt the Subordinate Judge's view that it has been invented for the purposes of this case; nor do we think that the statements of Kishen Lal, Khushi Ram, and Karta Kishen, which go to corroborate their account of the matter, should be summarily discredited simply because these persons are intimate friends of the defendant and his sons. Shaikh Bakhsha is unfortunately dead, and we have no materials to hand which would justify us in forming any presumptions as to whether, if he had been called, he would or would not have corroborated the plaintiff's story. So again we have not before us the draft from which the sale-deed is said to have been faired out, and its absence is accounted for by an assertion on the part of the plaintiff and his witnesses that it was destroyed on the 1st of September at the instance of the defendant. We find it hard to believe this statement, which credits the plaintiff with a want of the most ordinary prudence and caution, not to be expected from a man of business. Nor is it intelligible why the defendant, who, according to the plaintiff, was then perfectly satisfied with the contract, should have concerned himself about the draft. We confess that we view this part of the evidence for the plaintiff as gravely suspicious, and the impression it leaves upon our minds is unfavourable. If then the draft, which was admittedly supplied by the defendant to the plaintiff, was not destroyed, which we seriously doubt, what has become of it, and why is it not produced? The answer is so obvious that we need not pursue the matter further.

"So far we have been dealing with the circumstances more directly relating to what transpired on the 1st of September, and, [223] regarding them as a whole, we think that all the probabilities point in favour of the version which is given by the defendant and his witnesses. We now pass to the consideration of the conduct of the parties subsequently to that date. It is said by the plaintiff that the motive of the defendant's repudiation of the contract was that his sons objected to the sale-deed being in their mother's name, and in consequence brought pressure to bear upon their father. Except a very vague statement on the part of the tahsildar Narain Singh, which of itself is insufficient to justify any such inference, we have no material to warrant our concluding that such was the case.

"The negotiation had been going on during the month of August, and both of the defendant's sons were apparently familiar with the mode in which it was proposed the sale transaction should be carried out. If their influence with the defendant was as great as is suggested, they could as readily have brought it to bear before the 1st of September as afterwards, and if, as seems to be hinted, the defendant thought he had made such a good bargain, it is scarcely probable that he would at the last moment have thrown it up at the instance of his sons. While on the one hand the plaintiff's allegations in this respect appear to us to have no substantial foundation, in reason or fact, the defendant's explanation on the other seems perfectly rational and probable. Before attending at the registration of the sale-deed, and paying over hard cash to the amount of Rs. 10,000, he wished to assure himself that the terms of the document were in harmony with the rough draft that had been retained by his karinda, Partab Singh. What could be more natural? It was not likely he should say to the plaintiff in terms: 'Your scribe Bakhsha is well known to be a cunning person, and I should like to make sure that he has not played me any tricks, for to have done so would, according to our knowledge of native habits, have been a grave breach of politeness. But

he might well have wished, as he says he did, to take away the sale-deed with him for the purpose of ascertaining whether all the conditions agreed upon had been entered. The Subordinate Judge, in reference to this part of the defendant's case, rejects the rough draft-deed produced by Partab Singh as fabricated and fictitious, and thus virtually convicts the witnesses Partab Singh [224] and Khushi Ram of deliberate perjury and the defendant of abetting the fabrication of false evidence. We cannot agree in his conclusions, nor do we regard the reason given for them as sufficient. In his letter to the plaintiff of the 27th of September 1879, the defendant speaks of 'the wordings of the rough draft having been altered.' If we understand the Subordinate Judge aright—at any rate the learned counsel for the plaintiff was very explicit on the point—the suggestion is that the draft now produced was manufactured long after the arbitration proceedings had proved infructuous. But how is this consistent with the passage in the letter noticed immediately above, unless, which we cannot believe, the defendant, having already caused one false draft to be concocted, was at the risk and pains to get a second forged for the purposes of his defence to the present suit. It is not out of place to remark here that the wholesale perjury and forgery of papers with which the Subordinate Judge credits the defendant is somewhat irreconcilable with his description of that gentleman as 'a respectable and extensive landholder' of the Saharanpur district. We do not concur in the Subordinate Judge's view either that the draft produced is fictitious, or that the statements now made by the defendant about the omissions from the sale-deed, as to the reasons which led him not to conclude the contract, have been concocted since the arbitration was withdrawn. Upon the face of the sale-deed it is to be observed that though the 'area' ('*rakba*'), which would ordinarily be understood to mean area in actual bighas, 'and revenue' are mentioned as 'set forth below,' no detail of the kind is to be found at the foot of the instrument, and no explanation worth a moment's serious attention is offered upon this point by the plaintiff or his witnesses. The notion that because the defendant, having land contiguous to that of the plaintiff, could satisfy himself upon the question of area, there was no particular necessity for his requiring it to be entered in the sale-deed, seems to us an absurd one. For he might have a very good general idea as to the extent of the property and its value, and nevertheless wish for particulars to be specified in black and white, so as to bind his vendor. There is nothing in the conditions set forth in the rough draft which it was unreasonable for the defendant to require before completing [225] the purchase, or, and this to our minds is very important, that the plaintiff, if he was disposed to deal fairly, could have objected to give. Far from agreeing with the Subordinate Judge that the 3 *parchas* and the rough draft are fictitious and fabricated documents, we, on the contrary, think there is every ground for believing them genuine, while his criticisms on the defendant's letters of the 29th of September and the 15th and 23rd of October strike us as strained and ill-founded. True, these letters are written in view of the possibility of legal proceedings, but they are couched in language which, in our judgment, indicates a genuine desire and readiness on the part of the defendant to bring the matters in difference with the plaintiff to an amicable settlement. Regarding the letter purporting to be signed by the defendant, and dated the 3rd of September, we entertain very serious suspicions. It does not fit in with the other facts in the case, and what makes us most doubtful about it is that not a word of reference is made to its receipt or to the matters with which it is concerned in the plaintiff's letter to the defendant of the 3rd October. There is only one further point upon which we feel called upon to touch, and that is the plaintiff's startling allegation that the defendant, on the morning

of the 2nd September, got the signatures of Sant Lal and Kundan Lal affixed to the sale-deed. Why he did so, or what particular virtue was to attach to the addition of these two names, we are not told, nor is his conduct, as described by the plaintiff, explicable on any intelligible grounds. Looking at the evidence as a whole, and giving it our best and most anxious consideration, we have come to the conclusion that the balance of proof is in favour of the defendant, and that the plaintiff has not made out to our satisfaction that the sale-deed ever became a contract binding on the defendant and enforceable against him in law. In this view of the matter the 3rd ground of appeal taken for the defendant succeeds, and it follows as a necessary consequence that the plaintiff's suit must fail. It therefore becomes unnecessary to consider the other questions raised, and it only remains for us to decree the appeal with costs, and to order that the decree of the Subordinate Judge be reversed, and that the plaintiff's suit do stand dismissed with costs in the lower Court."

[226] On the 18th September 1884, Baru Mal and Basu Kuar instituted the suit out of which this appeal arose against Dhum Singh. The plaintiffs stated in their plaint as follows :—

" 1. That on the 1st September 1879, Lala Dhum Singh, defendant, executed a sale deed in respect of his interest in ten villages, Talipura, etc., in favour of Musammat Basu Kuar, plaintiff No. 1, and wife of Baru Mal, with the permission and under the management of the said Baru Mal, plaintiff No. 2, and out of Rs. 55,000, being the amount of the sale consideration entered in the sale-deed, the defendant gave credit for Rs. 33,359-3-6, being the amount of the debt due by the defendant to Baru Mal, plaintiff, on account-books, and thus settled the account of the debt, and gave credit for it as part of the sale-consideration.

" 2. That on the defendant having taken several steps contrary to the engagement in the preparation and execution of the sale-deed, a dispute arose between the plaintiffs and the defendant, whereupon the defendant unjustly brought a claim against the plaintiffs for completion and enforcement of the contract of sale which (claim) was decreed by the Subordinate Judge of this district on the 24th February 1881, against these plaintiffs. At last, on an appeal by the plaintiffs, that claim was absolutely dismissed by the High Court, who held the contract to be invalid on the 14th March 1884.

" 3. That notwithstanding the rescission and annulment of the contract of sale, the said defendant objects and refuses to refund the amount of Rs. 33,359-3-6 for which he had given a set-off in the sale-consideration, although, seeing that the plaintiffs did not obtain the property sold according to the engagement, and that, in consequence of the defendant's own illegal acts, the contract of sale was declared to be no longer enforceable as mentioned above, the amount for which the defendant had given credit to the plaintiffs on account of the sale-consideration ought to be refunded both in law and justice.

" 4. That accordingly the amount in question was repeatedly demanded from the defendant, who at first made excuses from day to day, but ultimately refused to pay it.

" 5. That in consequence of this series of illegal acts of the defendant, the plaintiffs suffered a loss to the extent of Rs. 20,015-8-0, which would have been acquired by them by way of usual interest on the sum of Rs. 33,359-3-6.

" 6. That the cause of action accrued on the 14th March 1884, the date on which the contract of sale was declared invalid, and on the 31st August 1884, the date of the defendant's refusal.

" The plaintiffs seek the following reliefs.—

" (a) That a decree for recovery of Rs. 33,359-3-6, principal amount, and Rs. 20,015-8-0, being the amount of damages on account of interest, in all Rs. 53,374-11-6, as well as future

interest, may be passed in favour of the plaintiffs against the defendant, by enforcement of the lien which a purchaser legally has on the subject of the sale in the event of annulment of that sale."

[227] Baru Mal having died after the institution of the suit, his sons were made plaintiffs in his stead. The defendant stated in his written statement of defence as follows :—

"1. That in the former suit between the parties to this suit it has been held by the High Court that no contract regarding the sale of the zamindari interest of the defendant in mauzas Tailipura, etc., in favour of the plaintiffs, had been entered into between the defendant and Musammatt Basu Kuar or Baru Mal, deceased, father of the other plaintiffs.

"2. That neither Baru Mal, deceased, nor the plaintiffs paid any amount to the defendant, in any way, on account of the consideration of the sale alleged by the plaintiffs respecting the property in question.

"3. That the amount of Rs. 33,359-3-6, alluded to in the 3rd para. of the plaintiff's petition of plaint, was found due from the defendant to Baru Mal, deceased, on account of debt; and in reference to the said amount of debt, Baru Mal, deceased, never did an act which might have the effect of taking away from it the properties of a debt, or in consequence of which the said amount might be deemed to have been paid out of, or credit given for it in favour of the defendant, on the consideration of the sale alleged by the plaintiffs in respect of the abovementioned property.

"4. That notwithstanding any proceedings that may have been taken regarding the sale of the property, as alleged by the plaintiffs, Baru Mal and others, plaintiffs, continued to deny, from the very beginning, the existence of a contract between the two parties respecting the sale of the property alleged by the plaintiffs, and they all along admitted the aforesaid amount of Rs. 33,359-3-6, as a debt due by the defendant.

"5. That the plaintiffs' claim in respect of the said amount of Rs. 33,359-3-6 is barred by limitation, and that on the dates mentioned in the petition of plaint on which the cause of action is alleged to have accrued, nothing has happened such as might furnish the plaintiffs, or any of them, with a cause of action for recovery of the said amount.

"6. That the rest of the amount claimed by the plaintiffs, or any portion of it, has never been due to the plaintiffs, or any of them, from the defendant; and apart from the fact that the amount in question may be regarded as interest accruing on the aforesaid sum of Rs. 33,359-3-6, or in any other light, that part of the claim is also now barred by limitation, if it be even assumed that the defendant was ever liable to pay that amount, which is moreover unreasonable.

"7. That Baru Mal or the plaintiffs never purchased the property in question as held by the High Court, nor are they entitled to any sort of lien on the property in question, on account of any portion of the amount claimed in this suit."

The Court of First Instance (Subordinate Judge of Saharanpur), treating the suit as one for the recovery of a debt of **[228]** Rs. 33,359-3-6, held that the suit was within time. It observed as follows :—

"This is a case in which the two parties rely upon the very statements and evidence referred to in the former suit, contrary to the former contention; that is, the plaintiffs refer the Court to defendant's statements and evidence, and say that he struck off Rs. 33,359-3-6 from the head of balance of debt and admitted the same to be part of the sale-consideration of the immoveable property, and made entries in his account-books accordingly, and that, therefore, it no longer remained a simple debt. The defendant, on the other hand, relies on the fact that the plaintiffs all along contended in the former suit that the sale was not an absolute one, and that the contract of sale was void; that accordingly they hitherto retained the aforesaid item in their account-books as one of debt, and that, therefore, with regard to the expiry of the term of limitation, they cannot now recover the amount in question. I am of opinion that the amount claimed is of the nature of a debt on account-books. The sale-deed

which was executed was, in consequence of the fact that it was not executed in accordance with the contract admitted by the two parties, declared to be defective, and the plaintiff's right of revoking the contract was admitted by the High Court, and the defendant's claim to have the sale completed and the sale-deed completely executed was dismissed. Hence the disputed amount of debt reverted to its original condition. The plaintiffs are not right in stating that, according to ss. 64 and 65 of the Contract Act, this part of the consideration of the sale-deed was recoverable by the plaintiffs. As to the plea of limitation, it may be observed that it is wrong. The defendant, on the 3rd August 1880, instituted a suit for having this amount of debt set off against the consideration of the sale-deed: on the 14th March 1884, that claim was dismissed by the High Court on appeal. The plaintiffs were, under s. 12 of the Code of Civil Procedure, not competent to seek determination of this debt by means of a separate suit during the pendency of the above-mentioned suit, nor could the Court determine it separately. Therefore, for the period in which the plaintiffs were taking proper steps against the setting-off of the amount in question, an allowance should be made to the plaintiffs in computing the term of the suit, and the benefit of exclusion (of time) provided in s. 15, Act XV of 1877, should, by reason of bar, under s. 12, Civil Procedure Code, be given to the plaintiffs."

As to the lien claimed, the Court held that the amount claimed being of the nature of a debt, the plaintiffs had no lien on the property specified in the sale-deed; and as to interest it held that the plaintiffs should be allowed interest at the rate of 7 annas and 9 pies per cent. per mensem. It accordingly gave the plaintiffs a decree for Rs. 33,359-3-6, with interest at the rate above-mentioned, and dismissed the rest of the claim.

The defendant appealed to the High Court.

Mr. C. H. Hill and Pandit Sundar Lal, for the Appellant.

[229] Mr. T. Conlan, Mr. G. T. Spankie, and Pandit Bishambar Nath for the Respondents.

Mr. Hill contended that the lower Court had erroneously applied the provisions of s. 15 of the Limitation Act, and the suit, being one for a debt, was barred by limitation.

Mr. Conlan.—The suit is not one to recover a debt, but one for money had and received by the defendant for the plaintiff's use, and is governed by art. 62 of the Limitation Act. The money was received by the defendant when he treated it as received by him, by crediting it in his books, and it must be taken to have been received for the plaintiff's use when the High Court dismissed the former suit. When that happened, there was a total failure of consideration, because the defendant had already repudiated the contract which the plaintiff set up.

Mr. Hill was not called on to reply.

Petheram, C J.—This was an action to recover a sum of Rs. 33,359-3-6, which was admittedly due by the defendant to the plaintiff, and if the defendant were an honest man he would pay the debt. He has, however, set up the plea of limitation, and the law says that he may set up that plea, and that, even if he does not, the Court is bound to give effect to it. The Judge before whom the case was tried gave judgment for the plaintiff upon grounds which it is not necessary to notice, because they have not been insisted on before us by the plaintiff's counsel, who has urged other reasons for the contention that the Limitation Act is not applicable. It is contended by him that the debt had become due by the defendant to the plaintiff within the prescribed period of limitation, and the only question therefore which we have to determine is, at what time did the debt become due.

Prior to September 1879, there had been various transactions between the parties, and these transactions resulted in a debt due by the defendant to the

plaintiff of Rs. 33,359-3-6, that being the identical amount which is claimed in the present suit. In September 1879, the parties entered into negotiations as to the mode in which this debt should be liquidated. The defendant apparently was not in a position at that time to pay in money, but he had certain landed property, and negotiations took place for [230] the sale of this property to the plaintiff, and the extinguishment of the old debt thereby. These negotiations proceeded so far that the purchase-money was fixed at Rs. 55,000, and it was agreed that the plaintiff should pay this amount by giving credit to the defendant to the extent of the debt due by him, and paying the balance in cash. So far the negotiations were completed, except apparently a few minor points. In the end, however, a dispute arose as to what had been settled as to the actual terms of the bargain which were to be reduced into writing. The defendant brought a suit against the plaintiff for specific performance of the contract which he alleged had been settled and executed for the sale to the latter of the property in dispute. That suit was tried by the Subordinate Judge, who decreed the claim. In appeal, the High Court reversed the Subordinate Judge's decree, as it appeared that the parties were never *ad idem* with reference to the contract set up by the then plaintiff. It is said now that this Court found that the true contract was not the contract set up by the then plaintiff, but was in fact the contract set up by the then defendant, who is now plaintiff. From the judgment of the Court, however, it appears that this is not what was then decided. All that the judgment shows is, that the contract set up in that suit was not proved, because there was no evidence that the parties had come to any agreement that that was to be the contract. That is all that was necessary for the decision of that case. The judgment in effect decided that there had been no contract, and the parties were therefore relegated to their original position. In other words, the negotiations failed, because they resulted in no agreement; and the original debt due by the present defendant to the present plaintiff always remained due and is so still.

It is alleged that the contract was completed on the 1st September 1879, and that is therefore the latest possible date we can look to in considering when the money became due. The whole amount had in fact become due before that date, by reason of prior transactions; but, upon the view most favourable to the plaintiff, and assuming that an account was stated on that day, giving rise to a new period from which limitation would begin to run, it is impossible to assign the debt to a later date than that. The present suit was brought on the 18th September 1884, that is to say, much [231] more than three years from the latest possible date upon which the debt can be said to have become due. Under these circumstances, the suit is barred by limitation. The plaintiff's contention is that the contract which he set up was found to have been completed; and under its terms this money, having been credited in the present defendant's books, was to be treated as a payment by the present plaintiff as a deposit on account of the sale; and the present suit is therefore a suit for money had and received, upon a cause of action which did not arise until the contract had gone off, *i.e.*, when this Court decided that the contract set up by the present defendant was not, but that set up by the plaintiff was, binding. I am of opinion that this contention must fail. In the first place, by the terms of the contract itself which is now set up by the plaintiff, no deposit was payable, and the price was not to be paid till the completion of the contract. Secondly, in the present plaintiff's letter to the defendant demanding payment of the money, and dated the 29th September 1879, the plaintiff did not demand the money of the defendant or ask him to return it as a deposit, but demanded it simply as the balance of the old demand. Under these circumstances it is impossible to say that the money was anything but the

old balance due from the defendant to the plaintiff, and as that debt was barred by limitation at the time when this suit was brought, I am of opinion that the Subordinate Judge should have given the defendant a decree. The appeal must be decreed with costs.

Straight, J., concurred.

[8 All. 231]

The 16th March, 1886.

PRESENT :

SIR COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE TYRRELL.

Sita Ram.....Plaintiff

versus

Zalim Singh and another.....Defendants.*

Hindu Law—Joint Hindu family—Liability of ancestral estate for satisfaction of father's debt, when not incurred for immoral purposes.

A suit was brought against *G*, the head of a joint Hindu family, by *S*, to whom he had mortgaged ten biswas of ancestral estate as security for a loan, to recover the amount of the loan by enforcement of the mortgage against the entire ten biswas. During the pendency of the suit *G* died, and his son *Z* and his widow *B* were brought on the record as his legal representatives. In support of his claim to enforce the mortgage against the entire ten biswas, and not merely against the share therein which *G* during his lifetime might have got separated, [232] the plaintiff pleaded that the debt incurred by *G* was of such a character that, according to the Hindu law, his son *Z* was under a pious duty to discharge it out of his own estate. It was found that, although the father was grossly extravagant and selfish in his expenditure, there was no evidence that the proceeds of the particular loan in question were applied to any special licentious purposes, but that the money was not borrowed to meet any family necessity or laid out in necessary expenses, but used in *G*'s personal expenses.

Held that this evidence did not justify the lower Court in decreeing that the debt should be charged on the share of the father alone in the ten biswas mortgaged, as it did not establish that he had wasted the money on immoral purposes, or that the debt was such that a pious son would be free to repudiate it. *Nanomi Babuasin v. Modun Mohun*, decided by the Privy Council on the 18th December 1885, followed.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Pandit Ajudhia Nath and **Babu Dwarka Nath Banarji**, for the Appellant.

Munshi Hanuman Prasad and **Munshi Sukh Ram**, for the Respondents.

Petheram, C.J., and **Tyrrell, J.**—Sita Ram, a money-lender, brought this suit on a mortgage bond dated the 9th June 1880, and two revenue receipts with

* First Appeal No. 118 of 1884, from a decree of Maulvi Muhammad Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 19th April 1884.

a promissory note, against his debtor, Thakur Gotam Singh, the head of a joint undivided Hindu family. He claimed his money with interest by enforcement of his mortgage on ten biswas of ancestral estate in Kunwara, pledged to him as security by Gotam Singh. While the suit was in progress Gotam Singh died, and the right to sue being deemed to survive, the defendant's son, Zalim Singh, and his widow, Bhawani Kuar, were brought on the record, as his legal representatives, in his place, under the provisions of s. 368 of the Civil Procedure Code. As the suit was first brought in the lifetime of Gotam Singh, the sole question was whether the debt was due and the hypothecation valid. But his death changed the aspect of the case, and new issues arose for decision. It is an unquestioned fact that the property hypothecated is part of a joint undivided ancestral estate, and it is no less certain that, on the death of Gotam Singh, the entire estate passed to his son, Zalim Singh, by survivorship. The plaintiff's right therefore to maintain his suit against Gotam Singh's heirs and his estate in their [233] hands after Gotam Singh's death, did not survive on the same ground or in the same way as it would in the similar suit brought against heirs and estates *not* governed by the Hindu law, and subject to devolution by survivorship as distinguished from inheritance; in other words, the son of Gotam Singh, who, immediately on his death, took, and now represents, the whole ancestral estate, is not a person holding any property of Gotam Singh which the latter's creditors can follow as assets of the paternal estate into the hands of the son as heir. But under the law affecting Hindu joint ancestral estate, every member of the family is a potential owner of a separable portion of his share of the estate; and as such he is competent to charge his debts on the undivided estate to the extent of his own partible, though unseparated, share. It is this right to sue which has survived to the plaintiff after the death of Gotam Singh—the right to seek for a decision that, his debt being proved, the share in the estate which Gotam Singh might have got separated as his own in his lifetime stands charged with this debt under the mortgage-deed on which the claim is based, and, being made the subject of partition, may now be sold or otherwise dealt with in satisfaction of the debt. But the plaintiff wants something more. It is conceivable, and perhaps probable, that Gotam Singh's share in the family ten biswas of Kunwara may not suffice to pay the debt, and the plaintiff consequently asks for a decree against the whole ten biswas now in Zalim Singh's possession which Gotam Singh affected to deal with in his bond of June 1880.

There are two ways in which a Hindu son might be saddled with the responsibility of a paternal debt in connection with property like this ten biswas of Kunwara. The father, as head of the family and manager of its estate, might have raised the loan in this express capacity for family purposes, the money borrowed being thus applied, so as to make the son a party to the contract by procuration of his father, and by participation on his own part in the benefit of the loan. Or the plaintiff might have pleaded that the debt incurred was of such a character that the Hindu law imposed upon a pious son the duty of discharging it from his own estate. In the present case, the latter line was adopted by the creditor, and accordingly we find that the main issue propounded by the Court below was,—“What was the necessity under [234] which the money was borrowed by Gotam Singh? and was it such that the ancestral estate should be held liable for the debt?”

The Court found on the evidence, which is practically uncontradicted, in this respect, that while the father was grossly extravagant and selfish in his expenditure, still there is no evidence that the proceeds of this particular loan

were applied to any special "licentious acts;" but finding that "the money in question was neither borrowed to meet any family necessity, nor laid out in necessary expenses, but was used in the personal expenses of Gotam Singh," the Court below decreed that the debt should be charged on the share of Gotam Singh alone. This decree is challenged here on the ground that the evidence does not warrant this finding of fact, as it does not establish that Gotam Singh "wasted the money on immoral purposes," or that the debt is such that a pious son is free to repudiate it.

It is now settled law that "sons cannot set up their rights against their fathers' alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of joint estate there is now, as their Lordships think, no conflict of authority."—*Nanomi Babuasin v. Modun Mohun*, decided on the 18th December 1885.

The Court below was therefore wrong in exempting half of the whole property mortgaged for his debt by the father Gotam Singh; and, allowing the pleas of the appellant in this respect, we must modify the decree so as to make it a decree enforceable against the entire joint ten biswas share in Kunwara, with costs. The plea in respect of the disallowed claim for Rs. 299-0-3 is without force, and is disallowed with proportionate costs.

Appeal allowed.

NOTES.

[See the Full Bench case in (1909) 31 All , 176, F.B. where all the cases are collected and disoussed.]

[8 All. 233]

The 22nd March, 1886.

PRESENT

SIR COMER PETHERAM, KT, CHIEF JUSTICE,
AND MR. JUSTICE BRODHURST

Muhammad Allahdad Khan and another.....Plaintiffs
versus

Muhammad Ismail Khan and others.....Defendants.*

Muhammadian law—Legitimacy—Effect of acknowledgment of sonship.

Held by PETHERAM, C. J., that, according to the Muhammadian law, the effect of an acknowledgment by a Muhammadian that a particular person, born of [235] the acknowledger's wife before marriage, is his son in fact, though the acknowledger may never have treated him as a legitimate son or intended to give him the *status* of legitimacy, is to confer upon such person the *status* of a son capable of inheriting as legitimate, unless conditions exist which make it impossible that such person can have been the acknowledger's son in fact. *Ashruf-ood-Dowlah Ahmed Hossein Khan v Hyder Hossein Khan*, 11 Moo I A. 94; *Muhammad Asmat Ali Khan v. Lalli Begum*, I. L. R. , 8 Cal. 422, L. R. , 9 Ind. Ap. 8, and *Sadakati Hossein v. Mahomed Yesuf*, I. L. R. , 10 Cal. 668, L. R. , 11 Ind. Ap. 31, referred to.

* First Appeal No. 83 of 1885, from a decree of Babu Mirtonjoy Mukerji, Subordinate Judge of Meerut, dated the 3rd March 1885.

In a suit for possession, by right of inheritance, of a share of the property of a deceased Muhammadan by a person alleging himself to be a son of the deceased, the defendants pleaded that the plaintiff was not a son, but a step-son, having been born of the deceased's wife before her marriage. The plaintiff filed certain letters and other documents in which the deceased in express terms referred to him as his son; and he contended that these references amounted to acknowledgments of him as a son made by the deceased, which, under the Muhammadan law, entitled him to inherit as a legitimate son.

Held by PETHERAM, C. J., (BRODHURST, J., dissenting) that the acknowledgment by the deceased of the plaintiff as his son in fact conferred upon the latter the status of a legitimate son capable of inheriting the deceased's estate, although the evidence showed that the deceased never treated him as a legitimate son, or intended to give him the status of legitimacy.

Held by BRODHURST, J., *contra*, that the documents above referred to did not show more than that the deceased regarded the plaintiff as his step son; that the plaintiff was never called his son except by courtesy and in the sense in which a European would ordinarily describe his step-son as his son; and that there was no sufficient evidence of the acknowledgment from which an inference was fairly to be deduced that the deceased ever intended to recognise the plaintiff and give him the status of a son capable of inheriting. *Sadat Hossein v. Mahomed Yesuf*, I. L. R., 10 Cal. 663: L. R., 11 Ind. Ap. 31, referred to.

THE plaint in this case stated that one Ghulam Ghaus Khan died on the 6th November 1879, leaving by his lawful wife, Moti Begam, two sons, the plaintiff Muhammad Allahdad Khan and Ismail Khan, defendant, and three daughters, Fidayat-un-nissa, Karamat-un-nissa, and Barkat-un-nissa, defendants; that the property left by Ghulam Ghaus Khan was divisible, under Muhammadan law, into 7 sihams or shares, of which 2 shares devolved upon each of the sons and 1 share upon each of the daughters; and that in order to raise money for the purposes of this suit the plaintiff Allahdad Khan had sold one of his shares to the other plaintiff; and the plaintiffs claimed possession of 2 shares out of 7 shares in certain villages left by Ghulam Ghaus Khan; a [236] declaration of their right to redeem 2 shares out of 7 shares in certain other villages left by him, the setting aside of certain alienations made by the daughters; and mesne profits.

The defendants, Ismail Khan and the three daughters, set up as a defence to the suit, that the plaintiff Allahdad Khan was not the son of Ghulam Ghaus Khan, but his step-son, having been born of Moti Begam before she married Ghulam Ghaus Khan.

The case of the plaintiffs was that Allahdad Khan was the eldest son of Ghulam Ghaus Khan by Moti Begam, and that even if they failed to prove that Allahdad Khan were the son of Ghulam Ghaus Khan, yet Ghulam Ghaus Khan had acknowledged him to be his son, and therefore, under Muhammadan law, Allahdad Khan was entitled to inherit as the son of Ghulam Ghaus Khan.

The question which the lower Court considered was, "Did Ghulam Ghaus Khan acknowledge Allahdad Khan as a son of his body, or is he really a son of his loins?"

The lower Court held that the plaintiffs had failed to prove that Ghulam Ghaus Khan had acknowledged Allahdad Khan to be the son of his body, or that Allahdad Khan was the son of his body, and dismissed the suit.

The plaintiffs appealed to the High Court.

In support of their case the plaintiffs relied on, amongst other evidence, the following documentary evidence:—

- (a) A letter dated the 15th April 1861, from Ghulam Ghaus Khan to Allahdad Khan. This letter was addressed as follows:—"Barkhurdar

Mian Allahdad Khan, the solace of my life,"—"barkhurdar" being a form of address to a son. In this letter Ghulam Ghaus Khan asked Allahdad Khan to send him a power of attorney authorizing him to sue on certain bonds of which Allahdad Khan was the obligee. On the back of the letter he wrote a draft of the power. The material portion of the draft was as follows:—"I, Allahdad Khan, do declare that I hold certain bonds, but in consequence of my being in service I am unable to go to Bulandshahr and file suits thereon. I have therefore [237] appointed my father, Muhammad Ghulam Ghaus, my general attorney for suing on those bonds, etc."

- (b) A plaint in a suit instituted by Ghulam Ghaus Khan on one of the bonds mentioned above as attorney of Allahdad Khan. This plaint was entitled:—"Ghulam Ghaus Khan, Mukhtar (Attorney) of Muhammad Allahdad Khan, his son, etc.," and was signed by Ghulam Ghaus Khan.
- (c) A deposition of Ghulam Ghaus Khan, taken in the suit above-mentioned and signed by him, dated in June 1862, in which he spoke of Allahdad Khan as "his son."
- (d) A general power-of-attorney, dated in October 1877, executed by Fidayat-un-nissa, defendant, daughter of Ghulam Ghaus Khan, appointing "her own brother," Allahdad Khan, her general attorney.
- (e) A letter from Ghulam Ghaus Khan to Allahdad Khan, dated in 1861, addressed as follows:—"To my Barkhurdar, light of my eyes and comfort of my soul, Muhammad Allahdad Khan. May he live in peace."
- (f) Certain other letters from Ismail Khan, defendant, to Allahdad Khan, which, it was contended, showed that the writer treated Allahdad Khan as his elder brother.

The defendants relied on a copy of paragraph 5 of the *wajib-ul-arz*, dated the 17th December 1870, of one of the villages in suit. This, it was alleged, was a declaration by Ghulam Ghaus Khan. It was signed by the Deputy Collector and by "Fazal Husain, mukhtar of the zemindar." The paragraph was in these terms:—

"No property is transferred by mortgage, but in future I have every power to transfer it to any person I like: my eldest son, Muhammad Ismail Khan, is major, and intelligent and clever; and the two other sons are minors: after me my eldest son Muhammad Ismail Khan shall be the owner and manager of the whole estate, and both his younger brothers shall, during their minority and after attaining majority, remain under his control and live joint with him; their elder brother shall attend [238] to their necessary expenses and render every kind of assistance on the occasion of their marriages, etc."

Mr. W. M. Colvin, Mr. Abdul Majid, Lala Lalta Prasad, and Shah Asad Ali, for the Appellants.

Mr. T. Conlan, Lala Juala Prasad, and Babu Jogindro Nath Chaudhri, for the Respondents.

Brodhurst, J.—One Ghulam Ghaus Khan resided at Jhajhar, zila Bulandshahr, and owned zemindari and other property in that district. According to evidence on the record, he was twice married, and he also had a concubine. The latter survived him, whilst both of his wives pre-deceased him. He died on the 6th November 1879, and left several legitimate and illegitimate children, the former being by his second wife, Moti Begam, and the latter by the concubine Musammatt Nanhi.

Almost immediately after the death of Ghulam Ghaus, proceedings for mutation of names were taken in the Revenue Court. All the persons then claiming to be the heirs of Ghulam Ghaus took part in those proceedings, and on the 15th March 1880, the Deputy Collector, Lachman Singh, decided the case in favour of Ismail Khan, son of Ghulam Ghaus Khan, and directed that his name should be substituted for that of his father in the register of mutations. In consequence of this order a suit was, on the 4th May 1880, brought in the Court of the Judge of Meerut against Ismail Khan, who alleged that he was, and was admitted to be, the legitimate and eldest son of Ghulam Ghaus and Moti Begam.

The plaintiffs were eight persons—namely, the three full sisters of Ismail Khan, Nanhi, styling herself Nanhi Begam, widow of Ghulam Ghaus, and her three sons and one daughter, calling themselves the lawful issue of Ghulam Ghaus Khan. These plaintiffs claimed their respective shares in the property of Ghulam Ghaus, deceased. The case was tried by the Subordinate Judge of Meerut. The defendant, as is reported on page 724, I. L. R., 3 All., “set up as a defence to this suit that Nanhi Begam was not the lawful wife of Ghulam Ghaus Khan, and her children by him were illegitimate, and therefore her claim and that of such children to inherit Ghulam Ghaus Khan’s estate was not maintainable; and that by the custom of the family, which the will of Ghulam Ghaus [239] Khan recognised and affirmed, the eldest son succeeded, and females were excluded from succession, and therefore the claim of the other plaintiffs, the daughters of Ghulam Ghaus Khan, was not maintainable. The Court of First Instance fixed the following issues, amongst others, for trial:—“Is Nanhi Begam the married wife of Ghulam Ghaus Khan or his mistress? Is she, and are her children, entitled to inherit? Are the daughters of Ghulam Ghaus Khan entitled to inherit, or are females in the family of Ghulam Ghaus Khan not entitled to inherit, and the eldest son alone succeeds and other members of the family are excluded from inheritance? How far can the will be acted on? The Court found on the evidence in the case that the children of Nanhi Begam by Ghulam Ghaus Khan had been uniformly treated by their father and his lawful daughters and son as legitimate, and held, relying on *Khajooroonissa v. Rowshan Jehan*, I. L. R., 2 Cal., 184; L. R., 3 Ind. Ap., 291, and the Privy Council decision therein cited; that it must be presumed that Nanhi Begam was the lawful wife of Ghulam Ghaus Khan, and her children by him legitimate. It also found that there was no such custom of succession in the family of Ghulam Ghaus Khan as was set up by the defendant; and it held, relying on *Khajooroonissa v. Rowshan Jehan*, that, according to Muhammadan law, a devise of property could not be made to one heir to the exclusion of the other heirs without their consent; and that therefore the plaintiffs could not be excluded from inheriting by the will of Ghulam Ghaus Khan in the defendant’s favour. It accordingly gave the plaintiffs a decree for their legal shares of the estate of Ghulam Ghaus Khan. The defendant appealed to the High Court. On his behalf it was contended on the evidence that Nanhi Begam had not been treated by Ghulam Ghaus Khan and the members of the family as his wife, or her children by him as legitimate, and that the custom of succession in the family set up by him was proved.”

A Bench of this Court (SPANKIE and STRAIGHT, JJ.), after referring to the evidence on the record and certain rulings of the Privy Council, observed:—“We therefore cannot but conclude that Nanhi was not the wife of Ghulam Ghaus Khan, and that the children were born illegitimate, and have never been legitimated by treatment in the house of their father as legitimate, [240] and on this ground the suit of Nanhi and her children must fail.” The

learned Judges also held that the custom alleged by the defendant-appellant of primogeniture, and the exclusion of the females and other heirs from inheritance, was established against the defendant; that this plea failing, "the heirship of the three legitimate daughters of Ghulam Ghaus Khan cannot be disputed;" and the learned Judges consequently modified the decree of the first Court, dismissing the claim of Nanhi Begam and her children, and giving the remaining three plaintiffs, the full sisters of the defendant, a decree for the shares to which they were entitled under the Muhammadan law.

The original suit was instituted on the 4th May 1880, and was decided on the 14th July 1880. The appeal was filed on the 13th August 1880, and was disposed of on the 21st April 1881. During the whole time that the above-mentioned proceedings lasted, Allahdad Khan never applied to be made a party, and he did not bring his present suit until the 18th May 1884, i.e. not until after the expiration of three years from the disposal of the above-mentioned appeal, and of four and a half years from the date of the death of Ghulam Ghaus Khan.

He now alleges that he and the defendants Ismail, Musammat Fidayat-un-nissa, Karamat-un-nissa, and Barkat-un-nissa, "are the children of Ghulam Ghaus Khan by Musammat Moti Begam, his lawful wife;" that cases and proceedings which he alludes to have taken place in his absence and without his knowledge, and therefore he and the other plaintiff also, as explained in para. 7 of the plaint, sue for his share of the property left by Ghulam Ghaus Khan. The defendants replied that the plaintiff was not the son of Ghulam Ghaus Khan; that he was not born in wedlock; that he came with Moti Begam to Ghulam Ghaus Khan's house; that under the Muhammadan law he did not possess any right in the estate left by Ghulam Ghaus Khan; that his allegations were entirely false; that "all the proceedings taken in the revenue, the criminal, and the civil cases by the defendants Nos. 2, 3, and 4 against defendant No. 1, were taken with the knowledge and information of the plaintiff and in his presence, and he conducted the proceedings in the said cases as a karinda (agent) of defendant No. 1, against defendants Nos. 2, 3, and 4, without [241] advancing his own right against the defendants in any Court, that had plaintiff been the eldest son of Ghulam Ghaus Khan, his name would surely have been recorded in the village administration paper, verified by Ghulam Ghaus Khan, that, as a general rule, any son or daughter brought by a wife with her to the house of her second husband is called by the latter his son or daughter: therefore if Ghulam Ghaus Khan has on some occasion called plaintiff No. 1 his son, it shall not make the said plaintiff actually his son." The Subordinate Judge appears to have fully considered the evidence that has been adduced on either side, as also the law and the rulings referred to, and he has found that Allahdad Khan is not a son of Ghulam Ghaus Khan; that Ghulam Ghaus never really acknowledged him to be his son, that Allahdad consequently has no right to inherit any portion of the estate of Ghulam Ghaus; and the Subordinate Judge has dismissed the suit with costs.

The plaintiffs have taken numerous grounds of appeal against this decision. They still contend that Allahdad is the eldest and legitimate son of Ghulam Ghaus and Moti Begam, having been born in wedlock, and that even if he was not born in wedlock, he has been legitimated by Ghulam Ghaus Khan's admission and treatment of him, and that the judgment of the lower Court is opposed to the evidence, the law, and the rulings of the Privy Council and of every High Court. I concur generally in the opinion that the Subordinate Judge has expressed with regard to the evidence for the plaintiffs.

I agree with him in thinking that Mr. Young, who was examined by commission, has, to the best of his belief, deposed with entire truthfulness, but

nevertheless I consider that Mr. Young's evidence is of very little, if any, value. Mr. Young's evidence relates to matters that occurred about 24 years previously, and amounts to this,—that when he was at Bulandshahr in 1860, Ghulam Ghaus Khan brought Allahdad Khan, who was then a young man of 20 years of age, to see him, and brought him, so far as Mr. Young remembers, "as his son," and afterwards, in 1861 or 1862, sent him to Banda, where Mr. Young was Superintendent of Police, and Mr. Young deposes:—"I gave him [242] the appointment of head constable of police on the strength of his being the son of the above (Ghulam Ghaus Khan). I have always considered Allahdad Khan to be his son, being sent to me as such, as far as I can remember." Mr. Young is apparently by far the most credible of the plaintiff's witnesses, and great stress has been laid upon what he has stated; but from his evidence it is not clear that Ghulam Ghaus Khan informed Mr. Young that Allahdad Khan was his own son; and that Mr. Young's knowledge with respect to Ghulam Ghaus Khan's family was extremely limited is apparent from his evidence in cross-examination. Moreover, as Ghulam Ghaus Khan had in 1857 saved the life of Mr. Young, it is natural to suppose that on his application, Mr. Young would gladly have conferred the appointment of head constable upon Allahdad Khan, provided that the young man was qualified for the post, and it is not probable that Mr. Young would, under such circumstances, have hesitated to comply with Ghulam Ghaus Khan's request, even if he was then aware that Allahdad was not Ghulam Ghaus Khan's own son, but his step-son. From the evidence on the record, I am satisfied that Allahdad Khan was the son of Moti Begam, and that he was born a year or two before Moti Begam was married to Ghulam Ghaus Khan. Prior to that marriage Moti was a prostitute, and there is no proof who was the father of Allahdad. There is no evidence that Moti cohabited with Ghulam Ghaus Khan before their marriage. Had she done so and borne a child to him, it is improbable that the marriage would have been so long delayed, and if Ghulam Ghaus believed Allahdad to be his son, he surely, after he had married that son's mother, would have taken effective steps to legitimate his son, and to make it widely known that Allahdad was his eldest son and an heir to his property. He did not do so. Allahdad was from about his second year at Jhajhar, and he apparently lived sometimes with his maternal grandmother and uncle, but more frequently at the house of his mother and her husband. He was thus brought up with his half-brothers and sisters, the legitimate children of Ghulam Ghaus Khan and Moti Begam; and as his own father's name was unknown, as he came to Ghulam Ghaus Khan's house in his infancy, was the son of Ghulam Ghaus Khan's wife, and the brother of Ghulam Ghaus [243] Khan's children, he doubtless came to be regarded by Ghulam Ghaus as a step-son, and to be called his son, much in the same way as a European, who marries a widow with young children, will ordinarily call those children his children, and be termed by them their father. If Ghulam Ghaus did, under the circumstances above mentioned, speak of Allahdad as his son, he apparently did not thereby act contrary to the custom prevailing amongst Muhammadans.

The few letters and other documents that have been filed by the plaintiffs, and are specially relied upon by them, bear dates corresponding with the years 1861 and 1862. In none of them is Allahdad called the eldest son of Ghulam Ghaus or his own son and heir. They were written at a time when Allahdad Khan was employed as a head constable in the district of Banda, and the power-of-attorney was executed with the special object of enabling Ghulam Ghaus to sue for money due to Allahdad, and which the latter, owing to his being in Government service in a distant district, would not otherwise have been able to realize.

In accordance with the practice, a man in executing documents or making his deposition states the name of his father. Had Allahdad, in the general power-of-attorney executed by him in favour of Ghulam Ghaus Khan, or in the evidence of the latter person, been described as the son of an unknown father, it would have reflected upon Moti Begam, the lately-deceased mother of Allahdad and wife of Ghulam Ghaus Khan; it would have revived a scandal that had perhaps been forgotten after many years of married life, and would have been highly unpleasant to both men, and for these reasons Ghulam Ghaus Khan was probably in the document, as in ordinary conversation, styled the father of Allahdad Khan. Allahdad was apparently 30 years of age when Ghulam Ghaus Khan died: but with the exception of the few papers written 17 or 18 years before his death, and under the special circumstances mentioned above, there is no documentary evidence to support the plaintiff's allegations. On the other hand, if the *wajib-ul-arz*, dated the 17th December 1870, is, as I think, admissible in evidence, it furnishes the strongest proof against Allahdad's pretensions. The extract from the *wajib-ul-arz*, which has been admitted [244] by the lower Court, was admitted in evidence by another Subordinate Judge in the suit of 1880, and was considered by a Bench of this Court in the first appeal above referred to as having been disposed of on the 21st April 1891. The *wajib-ul-arz* appears to have been duly attested and signed by Raja Lachman Singh, a Deputy Collector in charge of the settlement office at Bulandshahr, under Rule 49 of rules issued with the sanction of the Governor-General in Council under s. 257 of Act XIX of 1873. The *wajib-ul-arz* was produced before Raja Lachman Singh, in the presence of the mukhtar of Ghulam Ghaus Khan, of the patwari of his village, and of the kanungo, and I see no reason whatever to doubt that its contents were in accordance with the wishes and instructions of Ghulam Ghaus Khan; and this being the case, it is obvious that in September 1870, that is at a time when there was not alleged to have been any difference between Ghulam Ghaus and Allahdad, Ghulam Ghaus Khan caused an entry to be made in the settlement record that Muhammad Ismail Khan was his eldest son; that he would be the owner and manager of the whole estate; that the two other sons of Ghulam Ghaus were minors; and that they both would, during their minority and after attaining majority, live jointly with Ismail Khan and under his control.

Allahdad was at that time 30 years of age, but he is neither mentioned as a son nor referred to in any way whatever. This *wajib-ul-arz* was prepared, attested, and signed nine years before Ghulam Ghaus died; its contents, if Allahdad was the eldest son, were very startling, untrue, and unjust. They must have been well known to many persons, and could not well be concealed from the eldest son, who had been disinherited and ignored without any apparent reason. But this document was never disputed during the nine years that Ghulam Ghaus lived after its execution.

There has been no consecutive course of treatment of Allahdad by Ghulam Ghaus during a number of years, tending to show that Ghulam Ghaus considered him the son of his loins and an heir of his estate; on the contrary, the acts of Ghulam Ghaus, from the time of his marriage with Moti Begam up to the date of his death, seem to me to prove that Ghulam Ghaus did not regard Allahdad as a son who was eventually to succeed to a [245] share of the ancestral estate. Allahdad, if the son of Ghulam Ghaus Khan, was his eldest son. The *Rais* of Jhajhar, with a property valued at two lakhs of rupees, would not be likely to allow his own eldest son and heir to take the post of head constable of police and go away to a distant district; but it is intelligible that he would be glad to obtain an appointment of that kind for

his wife's illegitimate son, and consider it a suitable provision for the young man. The following appears to be established facts:— that Allahdad was not born in wedlock; that he was the son of Moti by an unknown father; that his mother was at the time of his birth, and up to the time that she married Ghulam Ghaus, a prostitute; that Allahdad did not go to Ghulam Ghaus Khan's village to reside there until he was one or two years of age or more; and that when there he lived sometimes with his maternal grandmother and uncle, who apparently were persons of low position, and sometimes with his mother and her husband; that in 1861, when he was about 21 years of age, Ghulam Ghaus Khan obtained for him the post of head constable of police in the district of Banda, and he was thus sent to a considerable distance from the town of Jhajhar; that in the course of about eighteen months he was dismissed from his appointment; that he subsequently for several years tried to obtain his reinstatement, but without success; that he returned to Jhajhar and constantly resided there with his wife and family; that he admittedly was there in October 1879, that is, only a few days before Ghulam Ghaus Khan died; and that he and his wife did not finally leave that town until towards the end of 1883; that Ghulam Ghaus Khan made no allusion to him in the *wajib-ul-arz* of 1870, and styled Ismail Khan his eldest son; and although there was no variance between Ghulam Ghaus and Allahdad prior to 1879, Ghulam Ghaus had, for at least two years previous to 1879, made over the management of his estate to Ismail Khan, who admittedly was his legitimate son, had never taken service, and always remained at home.

It is conceded that there was not any ill-feeling between Allahdad and Ghulam Ghaus prior to 1879. The former deposed:—"At the beginning of 1879 there was some variance between myself and Ghulam Ghaus Khan. He died on the 6th November [246] 1879. The matter of difference was, that my sister Fidayat-un-nissa, who was a widow, was about marrying a second time, to which Ghulam Ghaus and Ismail Khan had consented, but I had not been consulted. There was no difference before then." There is no reliable evidence that there was, even in 1879, any difference between Ghulam Ghaus and Allahdad, and if the latter was the eldest son and was on good terms with his father, there is no apparent reason why his consent to his sister's re-marriage should not have been asked for equally with that of Ismail, his younger brother. His admission that he was not consulted tells against the position he sets up for himself.

Were Allahdad either the legitimate or legitimated son of Ghulam Ghaus Khan, it is most highly improbable that Ghulam Ghaus Khan and his other sons and daughters, legitimate and illegitimate, should all, without any sufficient reason, have acted towards him in the way they are shown to have done. It is proved that Allahdad not only knew about the mutation proceedings in the Revenue Court and the suit of 1880 in the Civil Court, but that he also used to attend upon Ismail Khan's pleader on behalf of Ismail Khan during the pendency of those cases, and his acts and omissions for many years past tend to support the allegations of the defendants-respondents and to prove the falseness of his claim. From the evidence and the whole circumstances of the case it is, I think, palpable that Allahdad was not the son of Ghulam Ghaus Khan; that he was not legitimated by Ghulam Ghaus, and that he well knew that he was, at the highest, nothing more than Ghulam Ghaus Khan's step-son, had never been called his son except by courtesy, and had no right to any share in his (Ghulam Ghaus Khan's) property. This case is, in my opinion, very different to the cases referred to by the learned counsel for the appellants, and is not governed by any of the Privy Council rulings.

The most recent judgment of their Lordships of the Privy Council on this branch of the Muhammadan law that has come to my notice was delivered in December 1883, in the case of *Sadukat Hossein v. Mahomed Yusuf*, I. L. R., 10 Cal., 663; L. R., 11 Ind. Ap., 31. In that judgment, on page 36, the following passage occurs:—"The Judge of the primary Court who saw and who heard the witnesses and the Judges of the Supreme [247] Court who examined into the evidence, afterwards concur in opinion that there was sufficient evidence of the acknowledgment by *Amir Hossein* of *Selim* as his son, from which an inference is fairly to be deduced that the father intended to recognise him and give him the *status* of a son capable of inheriting. Upon that point both the Courts come to one conclusion, and that conclusion their Lordships adopt. They think that the *status* of *Selim* as son has been sufficiently established by recognition so as to enable him to claim as heir."

I see nothing to lead me to believe that Ghulam Ghaus Khan ever regarded Allahdad in any other light than that of a step-son; and applying the principle contained in the above remarks of their Lordships of the Privy Council to the present case, I find that there is no sufficient evidence of the acknowledgment by Ghulam Ghaus Khan of Allahdad Khan as his son, from which an inference is fairly to be deduced that Ghulam Ghaus Khan ever intended to recognise him and give him the *status* of a son capable of inheriting, and I would therefore dismiss the appeal with costs.

Petheram, C.J.—The evidence in this case proves, in my opinion, that the plaintiff-appellant, Allahdad Khan, was the illegitimate son of Ghulam Ghaus Khan. I also think, upon the evidence, that he was born before the marriage of Ghulam Ghaus Khan with Moti Begam, and therefore it has been established that he was in the inception, at all events, an illegitimate son of his father. Then there is the material circumstance that it is proved by evidence, the truth of which is beyond doubt, that upon several occasions, in 1862, Ghulam Ghaus Khan did at that time acknowledge the plaintiff Allahdad Khan to be his son in fact. I refer in particular to the letter from Ghulam Ghaus Khan to Allahdad Khan, dated the 15th April 1861, in which the latter is directed to prepare a general power-of-attorney, describing the former as his father. I take it as proved, therefore, first, that Allahdad Khan was, in fact, Ghulam Ghaus Khan's illegitimate son, and secondly, Ghulam Ghaus Khan acknowledged him as such on many occasions after his marriage with Moti Begam. The case thus resolves itself into a pure question of law, namely:—What, [248] according to the Muhammadan law, is the effect of an acknowledgment by a Muhammadan that a particular person, born of the acknowledged wife before marriage, is his son? How does such an acknowledgment affect the *status* of the person in reference to whom it is made? The answer to this question appears to me to depend upon the effect of several decisions of the Privy Council, and if the decisions were precisely in unison, there would be no difficulty in the matter. At first sight, however, they appear to be contradictory, and I have found it far from easy to arrive at a definite conclusion as to the rule of law which they were intended to express. The first of the rulings I refer to is in the case of *Ashrufud Dowlah Ahmed Hossein Khan v. Hyder Hossein Khan*, 11 Moo. I. A., 94. The parties in that case belonged to the *Shia* sect of Muhammadans. The respondent claimed to be the son of Nawab Ameenood Dowlah, but the appellants alleged that he was illegitimate. He, however, relied on a *moottah* (or irregular) marriage with his mother with the Nawab, and his consequent birth in wedlock, and insisted that the Nawab had in his life-time acknowledged him as his son; and he further

relied on a decision of the Civil Judge at Lucknow in a summary suit for the administration of goods of the Nawab, under the Acts Nos. XIX and XX of 1841 and X of 1851, by which he had obtained a certificate of joint administration and title with the appellants, subject to their right to bring a suit to prove his illegitimacy. The appellants denied the *moottah* marriage and the declaration and acknowledgment by the Nawab of the respondent as his son, and set up and relied on a deed of disclaimer and repudiation of the respondent, executed by the Nawab in his lifetime, denying that the respondent was his son, which deed was proved in the suit." In that case, therefore, the respondent was the Nawab's son, and a question arose as to his legitimacy, and whether, supposing him to be illegitimate, he had been acknowledged by his father, and the *status* of a legitimate son was conferred on him. The judgment of the Privy Council was delivered by Sir JAMES COLVILLE. He said:—"The appellants brought their suit in the Civil Court at Lucknow on the 6th June 1861. The object of the suit, as it appears from the plaint, was to be relieved [249] from the effects of the summary decree and to establish the respondent's illegitimacy, so that the proceeding went on in a somewhat inverted order, arising from a misunderstanding of the object of those Acts. The plea is not set out at length, but an abstract of it is to be found in Mr. Fraser's judgment. The issues, as also the finding, are carefully framed and evidence an accurate knowledge of the Muhammadan law as to legitimacy. The first, second, and third issues, are alone necessary to be stated here, as nothing which affects the decision of this appeal turns upon the fourth issue, which relates merely to the share, if legitimate, and a claim to maintenance, if illegitimate. The first, second, and third issues are as follows:—First, did Nawab Ameenood Dowlah (deceased) contract *moottah* with defendant's mother before or after his birth? Second, has the deed of repudiation (dated 23rd *Suffar* 1272 *Hijri*) the effect of cancelling previous acknowledgment of defendant's legitimacy, if such were made? Third, if defendant be not a legitimate son, is he an illegitimate son of deceased? It was admitted on the pleadings that a *moottah* marriage at some time had been contracted between the late Vizier and the respondent's mother, but the plaintiff stated in effect that the conception and birth of the respondent preceded that marriage. The plea distinctly stated the marriage, though without assigning a date to it, and alleged the legitimacy of the respondent as a child born of that marriage. The existence of *moottah* marriage therefore, at some time, was not contested, and the first issue, which by implication admits a marriage, is framed correctly on that state of the pleadings. The second issue, it may be observed, is also very correctly framed. It substitutes for the ambiguous word 'sonship,' which might include an illegitimate son, the word 'legitimacy,' and uses the word 'acknowledgment' in its legal sense, under the Muhammadan law, of acknowledgment of antecedent right established by the acknowledgment on the acknowledgment, that is, in the sense of a recognition, not simply of sonship, but of legitimacy as a son."

From this it is obvious that in 1866, when the judgment of the Privy Council in that case was delivered, their Lordships were of opinion that an acknowledgment of mere sonship was not sufficient; that the question was not whether the person concerned was acknowledged to be the son of the acknowledgment, but whether the [250] father, by acknowledgment, had given him the *status* of a legitimate son. This is different from the question whether the father had acknowledged that the person was in fact his son, that being a preliminary matter. I gather, especially from the third issue mentioned, that the Privy Council were at that time of opinion that a Muhammadan could not make another person's son his own, but that all he could do was to give his illegitimate son the *status* of legitimacy, if he desired to do so.

Now, in the present case, it is clear from the facts proved that Ghulam Ghaus Khan, though he intended to acknowledge Allahdad Khan, *as his son in fact*, never intended to give him the *status* of a legitimate son, because he did not treat him as his legitimate son, and the young man's conduct, after his father's death, shows that he never understood his father to have meant to give him the *status* of a legitimate son, or to have done more than acknowledge the fact of his sonship.

The next decision of the Privy Council on this subject was in the case of *Muhammad Azmat Ali Khan v. Lalli Begam*, 1 L. R., 8 Cal., 422; L. R., 9 Ind. Ap. 8, decided in 1881, and it appears to me that the sole question on the determination of which the present case depends, is whether this second judgment of the Privy Council has altered the law laid down in the first, so as to establish the proposition that a mere acknowledgment of the fact of sonship confers the *status* of legitimacy. In delivering their Lordships' judgment Sir MONTAGUE SMITH said:—"The only question which remains on this part of the case is as to the effect of these acknowledgments. Both the Judges of the Chief Court, who have given learned and careful judgments, have gone very fully into the authorities upon this question. Their Lordships, however, are relieved from a discussion of those authorities, inasmuch as the rule of Muhammadan law has not been disputed at the Bar, namely, that the acknowledgment and recognition of children by a Muhammadan as his sons gives them the *status* of sons capable of inheriting as legitimate sons, unless certain conditions exist, which do not occur in this case."

Now the conditions here referred to were not such as exist in the case before us. They were conditions showing that it was [281] impossible that the person claiming the rights of a son should be, in fact, the son of the person whom he alleged to be his father. What was held was that an acknowledgment of children by a Muhammadan as his sons gave them the *status* of legitimacy. I am unable to avoid the conclusion that this is what was held by the Privy Council in that case. --

Now this decision is binding on us, unless it has been overruled by the Privy Council itself. The only other ruling of their Lordships on the subject is in *Sadat Hossein v. Mahomed Yusuf*, 1 L. R., 10 Cal., 663, L. R., 11 Ind. Ap. 31. In delivering judgment, Lord FITZGERALD quoted the observations of Sir MONTAGUE SMITH upon which I have commented to the effect that "the acknowledgment and recognition of children by a Muhammadan as his sons gives them the *status* of sons capable of inheriting as legitimate sons," and said:—"Their Lordships do not intend at all to depart from that rule, or to throw any doubt upon it." So that the proposition laid down by Sir MONTAGUE SMITH is distinctly re-affirmed. Lord FITZGERALD then continues.—"The Judge of the primary Court, who saw and who heard the witnesses, and the Judges of the Supreme Court who examined into the evidence, afterwards concur in opinion that there was sufficient evidence of the acknowledgment by *Amir Hossein* of *Selm* as his son, from which an inference is fairly to be deduced that the father intended to recognise him and give him the *status* of a son capable of inheriting. Upon that point both the Courts come to one conclusion, and that conclusion their Lordships adopt. They think that the *status* of *Selm* as son has been especially established by recognition so as to enable him to claim as heir."

This latter passage does to some extent appear to dilute the proposition stated by Sir MONTAGUE SMITH, but as the first passage distinctly and in terms affirms that proposition, I am of opinion that it carries the plaintiff before us the whole way that is necessary for the establishment of his case. Under

these circumstances I am of opinion that the judgment of the first Court should be reversed and the plaintiff's claim allowed, but as there is a difference of opinion in this Court, our decree must be in accordance [282] with that of the Court below. I must add, in reference to the question of law which I have discussed, that I have given expression to what appears to me to be the law as laid down in the books, but that the law so laid down is not, in my opinion, in accordance with the custom of the people of this country.

Appeal dismissed.

NOTES.

[Owing to the difference in opinion between PETHERAM, C. J. and BRODHURST J., this case was referred to a Full Bench and the decision of the Full Bench is reported in (1888) 10 All., 289. See the notes to that case.]

[8 All. 252]

CRIMINAL REVISIONAL.

The 5th April, 1886.

PRESENT :

MR. JUSTICE BRODHURST.

Queen-Empress

versus

Dungar and another.

Act XLV of 1860 (Penal Code), s. 201.

Section 201 of the Penal Code does not apply to the case of a criminal causing disappearance of evidence of his own crime, but only to the case of a person who screens the principal or actual offender. *Queen v. Ram Soonder Shootar*, 7 W. R., Cr. 52, *Reg. v. Kashmath Dinkar*, 8 Bom. H. C. Rep., C. C., 126, *Empress v. Krishna*, 1 L. R., 2 All., 713, *Empress v. Behala Bibi*, 1 L. R., 6 Cal. 789, and *Queen-Empress v. Lalli*, 1 L. R., 7 All., 749, referred to.

THIS was a case the record of which the High Court of its own motion called for in the exercise of its powers of revision. The facts are sufficiently stated in the order of the Court.

Brodhurst, J.—Dungar Singh and his wife Dulari were committed to the sessions under ss. 302, 109-302, and 411, of the Indian Penal Code, *i.e.*, they were committed for the offences of murder, abetment of murder, and dishonestly receiving stolen property.

The Sessions Judge apparently struck out the second charge from the charge-sheet, and in lieu of it entered a charge under s. 201 of the Penal Code, as follows :—“At Sumerwa, knowing that Thakur Singh had been murdered, concealed his body, causing evidence of the offence to disappear, with the intention of screening the murderer from legal punishment.”

The Judge, concurring with the assessors, found both of the accused not guilty of murder, but “guilty of concealing the body of Thakur Singh, knowing that he had been murdered, intending to screen the murderer from legal punishment.”

[253] The Judge, concurring with the assessors, found Dungar Singh not guilty of dishonestly receiving stolen property, and, concurring with one assessor, and differing from the other two assessors, he found Dubri guilty of the last-mentioned offence. .

The Judge sentenced Dungar Singh to five years' rigorous imprisonment under s. 201, and he sentenced Dulari to seven years' imprisonment under s. 201, and to three years' similar imprisonment under s. 411, the latter sentence to commence on the expiration of the former one.

The boy who was murdered was a distant relative of the accused. He was missed on the morning of the 17th August last. Search was made for him, and the Judge observes :—" On the morning of the 19th the body was found in the ruin of Hazari Singh, which had been previously searched without the body being found. It appears to have been buried, so the neighbouring houses were searched, and in Dungar Singh's house signs of a body being buried were found, and both accused have throughout the inquiry and trial admitted that the body was actually buried in their house. An armlet worth Rs. 3 was on the body, silver bracelets worth Rs. 25 were missing, and also gold earrings worth Rs. 5-8. Dungar Singh was *challaned* on the 19th August, and on the 21st Dulari, in the presence of the head constable and two respectable witnesses, went to her house, and putting her arm far into a pacca drain, produced the four *karras*, which are recognised as those of the boy."

Dungar Singh " declares that next morning his wife showed him the corpse in the house, and he proposed to produce it before the head constable, then in the village, but on his wife saying that she would be charged with the murder, he buried it in the house, and in the night put it into Hazari's ruin."

Dulari " in her subsequent statements to the Magistrate still states that Girwar Singh killed the boy, but that she did not see him do so, and that she found the corpse lying in her house at dawn, and told her husband, who proposed to show it to the head constable, but that she persuaded him not to do so, as the head constable would accuse her of the crime. She states that only the armlet was on the body and no other ornaments, and that she [254] alone buried the body, and subsequently threw it into the ruin. Before this Court she prays that whatever punishment be given may be inflicted on her, as if her husband is punished, he will lose his *zemindari* share. I am of opinion that the circumstantial evidence proves a murder committed by one or both of the accused persons, but that it does not conclusively prove which of them is guilty of the crime. It may have been committed by the wife in the absence of the husband, or by the husband in the absence of the wife, and hence it cannot be brought home to either of the accused persons."

With regard to the charge under s. 201 of the Penal Code that was added in the Court of Session the Judge has observed :—" It may be urged perhaps that that section does not apply to a criminal concealing the evidence of his own crime. I cannot think there is any force in this argument. Every rational system of jurisprudence is careful to distinguish and punish separately each separate step in crime in order that a criminal may have a motive for stopping short even in the midst of criminal acts. A criminal who obliterates all traces of his crime has distinctly taken one step further against public justice than a criminal who does not do so, and should be punished accordingly. I cannot imagine that any person, merely because he is a criminal, has a vested right to defeat the course of justice, which is withheld from innocent persons ; nor can I see that a criminal who has escaped conviction for a major crime, by obliterating all evidence of the crime, should be allowed to do this with impunity. I cannot see that any doctrine of merger is applicable, unless the

minor crime is distinctly included in the major, and I do not think that a person accused, *e.g.*, of illegal possession of a weapon, could claim an acquittal on the ground that he had committed a murder with that weapon. I have no doubt that the words of s. 201, Indian Penal Code, construed in the strictest manner, do cover the case of a criminal concealing his own crime. If the Legislature meant otherwise, it could and should have said so, but it has not said so, nor do I think it meant so."

I do not feel called upon to express any opinion as to the way in which s. 201 of the Indian Penal Code should have been drawn. [265] All that I conceive I have to do is to decide whether that section does or does not apply to a criminal causing disappearance of evidence of his own crime. The section is contained in Chapter XI, the heading of which is "Of false evidence and offences against public justice." The marginal note of s. 201 is "Causing disappearance of evidence of an offence committed or giving false information touching it to screen the offender." This is a correct abbreviation of the section, and from the wording of the section itself, and for the reasons given by Mr Justice LLOYD, there is not, in my opinion, any room for doubt that the section applies merely to the person who screens the principal or actual offender. There are several judgments of High Courts in India which support this opinion, and I am not aware of any that are in conflict with it. All of these judgments have not been reported, but it is quite sufficient to refer to the following five rulings—*Queen v. Ram Soonder Shootar*, 7 W. R., Cr. 52, *Reg. v. Kashinath Dinkar*, 8 Bom., H. C. Rep C C., 126, *Empress v. Krishna*, I. L R., 2 All., 713, *Empress v. Behala Bibi*, I. L R., 6 Cal., 789, *Empress v. Lalli*, I. L R., 7 All., 749. These rulings extend over a period of about nineteen years, and are by nine Judges of three of the High Courts. It is incredible that all of them can have escaped the notice of the Legislature, and it is therefore reasonable to suppose that the section would have been amended had its meaning been misinterpreted by so many Judges of at least three of the High Courts in India. As, in my opinion, the conviction of Dungar Singh and Dulari under s. 201 of the Indian Penal Code is illegal, I am constrained to annul the convictions and sentences under that section, and to direct that Dungar Singh be released.

I see no reason to interfere with the sentence that has been passed upon Dulari under s. 411 of the Indian Penal Code

[256] APPELLATE CIVIL.

The 12th April, 1886.

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, AND

MR. JUSTICE MAHMOOD.

Harjas and others.....Defendants

versus

Radha Kishan.....Plaintiff.*

Sir-land—Ex-proprietary tenancy—Act XII of 1881 (N.-W. P. Rent Act), s. 7.

The words "held by him as *sir*" in s. 7 of Act XII of 1881 (N.-W.P. Rent Act) must be construed to mean land belonging to him, or to which he was entitled, as *sir*; and as literal an interpretation should be placed upon these words as is consistent with the canons of construction.

In 1879, one of the defendants sold a one-third share of certain *sir-land* in a village to the plaintiff, who, at that time, was in cultivatory possession thereof under a deed of mortgage executed in his favour by the same defendant in 1877. The plaintiff alleged that, after the sale, he continued in possession of the *sir-land* till 1884, when he was dispossessed thereof by the defendants. He sued for recovery of possession of the land.

Held, that the defendants, being ex-proprietary tenants of the land in dispute, were entitled to hold possession thereof, by operation of law, with reference to the terms of s. 7 of the N.-W. P. Rent Act; and the plaintiff's contention that because for four or five years the defendants failed to assert their ex-proprietary tenant rights, they were debarred from doing so, could only be well founded if there had been any provision either in the Limitation Act or the Rent Act creating such a disability.

Held, also that, notwithstanding the fact that the plaintiff was in possession of the land in dispute as mortgagee at the time of the sale, and continued in possession afterwards, his vendor must be taken to have "held" the land as his *sir* at the time of the sale of his proprietary interest, within the meaning of s. 7 of the Rent Act.

THE plaintiff in this suit, on the 29th July 1879, purchased from Didari, defendant, a one-third share of 39 bighas and 10 biswas of *sir-land* situate in mauza Tawaya, which jointly belonged to Didari and his two brothers, Hazari and Harjas. These two persons were defendants in the Court of First Instance. Hazari died subsequently to the passing of the decree of that Court, as likewise Didari. It appeared that at the time of this sale the plaintiff was in cultivatory possession of the land representing Didari's share under a mortgage from the latter, dated the 3rd September 1877. The plaintiff alleged that he continued in possession till July 1884, when Didari wrongfully dispossessed him at the [257] instigation of the other defendants, and he claimed, by reason of such dispossession, to recover the land and mesne profits. The defendant Didari set up as a defence that under s. 7 of the N.-W. P. Rent Act he was entitled to possession of the land as an ex-proprietary tenant.

The Court of First Instance (Munsif of Saharanpur) held that although the plaintiff had been allowed to remain in possession after the sale, his dispossession and Didari's entry on the land was not wrongful, inasmuch as the plaintiff had not acquired possession by virtue of the sale, and as Didari was entitled to possession as an ex-proprietary tenant from the date of the sale. It found that

* Second Appeal No. 990 of 1885, from a decree of C. W. P. Watts, Esq., District Judge of Saharanpur, dated the 27th March 1885, modifying a decree of Munshi Ganga Saran, Munsif of Saharanpur, dated the 6th December 1884.

"there was nothing to show that Didari surrendered or relinquished such right"; and that it was in all probability because he was ignorant of his right, that he did not at once avail himself of it, but allowed the plaintiff to remain in possession. It therefore dismissed the suit.

On appeal by the plaintiff, the District Judge of Saharanpur held that the defendant Didari was not justified in dispossessing the plaintiff, notwithstanding that he might have acquired the right of an ex-proprietary tenant, and from the time of the sale, inasmuch as the plaintiff had remained in possession for four or five years after the sale, and that Didari's proper course was to apply to the Revenue Court to have it determined that he was an ex-proprietary tenant, and to have his rent fixed, and to recover possession. For these reasons the District Judge gave the plaintiff a decree for possession of the land.

The heirs of Didari and Hazari and the defendant Harjas appeal to the High Court.

Munshis *Hanuman Prasad* and *Madho Prasad*, for the Appellants.

Shah *Asad Ali*, for the Respondent.

Straight, Offg. C. J.—This is a suit brought by the plaintiff-respondent upon the strength of a deed of sale dated the 29th July 1879, to recover possession of one-third of a ten-biswansis share, which had been conveyed to him by the sale-deed executed by Didari, who was one of the three sharers who owned that ten bis-[258] wansis share. The defence to the suit was that the land claimed by the plaintiff was the *sir*-land of the defendant, and that at the time of the sale of the one-third biswansis share he held it as his *sir*, and that by the operation of law he became the ex-proprietary tenant of the land. Now it is conceded that the defendants are the ex-proprietary tenants of the land in suit, and apparently the only contention seriously put forward on behalf of the plaintiff is, that because for four or five years the defendant failed to assert his ex-proprietary tenant rights, he is debarred from doing so now. But such a contention could only be a well-founded one had there been any provision either in the Limitation Act or the Rent Act creating such a disability. It has also been urged for the plaintiff that, inasmuch as he was in possession of this land as mortgagee at the time of sale, and continued to hold it afterwards, Didari, his vendor, did not "*hold*" the land as his *sir* at the time of the sale of his proprietary interest within the meaning of s. 7 of Act XII of 1881. I do not concur in the construction which the learned pleader for the respondent places upon this section. I think that the words "*held by him as sir*" must be construed to mean land belonging to him, or to which he was entitled, as *sir*. In my opinion, we ought to give as liberal an interpretation as is consistent with the canons of construction to these words. Otherwise it is easy to foresee how the door may be opened to the very mischief at which the Act aimed, by sales in future being preceded by a possessory mortgage of the land subsequently conveyed, so that the purchaser should be in possession of the *sir* at the date of sale, and thus be able to say that he and not the ex-proprietor held it at that time. Thus the provisions of the statute would be easily evaded. I think that this appeal must be decreed, and the decree of the first Court restored with costs in all Courts.

Mahmood, J.—I entirely concur in the order proposed by the learned Chief Justice, but I wish to add a few words. It is admitted by the plaintiff that the defendants are in possession of the land, which is the subject-matter of the suit. It is also granted that the only title on the basis of which the plaintiff claims this land, is the sale-deed dated the 29th July 1879. It seems to me that upon this state of things much less depends upon what the defendants can show than upon the title which the plaintiff can show.

[259] The learned District Judge seems to take it for granted that Didari was an occupancy-tenant, but had ceased to be so by the operation of some rule of law, of which I am not aware, and which the learned Judge does not mention in his judgment. If we were to allow the judgment of the learned Judge to stand, we would be turning out of possession a person who is entitled to hold possession of the land sold by the operation of law. I entirely concur in, and fully accept, the interpretation placed by the learned Chief Justice upon s. 7 of Act XII of 1881. It seems to me that the plaintiff's title to the possession of the land fails, and his case must therefore fail.

Appeal allowed.

[8 All. 259]

The 14th April, 1886.

PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE TYRRELL.

Hazari and others.....Defendants

versus

Chunni Lal.....Plaintiff.*

Surety—Act IX of 1872 (Contract Act), ss. 134, 137, 139, and 141.

A decree-holder, in execution-proceedings, agreed to accept payment of the decretal amount by the judgment-debtors in annual instalments. He also accepted from certain other persons a surety-bond in the following terms:—"In case of default of paying the instalments, the whole decretal money, with costs and interest at 8 annas per cent., shall be executed after one month; and for the satisfaction of the decree-holder, we, the executants, stand as sureties of the judgment-debtors." The judgment-debtors paid five instalments and then made default. The decree holder omitted to apply for execution, and the decree became time-barred. He then sued the sureties to recover the amount of the decree.

Held, that the terms of the bond requiring the creditor to execute his decree within one month were peremptory, and imported much more than the usual agreement under such circumstances, that the decree-holder might execute his decree, if he pleased, on a default; that the legal consequence of his omission to execute the decree being the discharge of the principal debtors, the sureties would, under s. 134 of the Contract Act, stand discharged likewise; that his action was much more serious than "mere forbearance" in favour of his debtors, in the sense of s. 137; that he had done an act inconsistent with the equities of the sureties and omitted to do an act which his duty to them (under the agreement) required, whereby their eventual remedy against the principal debtors was impaired (s. 139); that he had deprived the sureties of the benefit of the security constituted by the decree; that they were therefore discharged to the extent of the value of that security (s. 141); and that the suit must consequently be dismissed.

[260] THE plaintiff in this case claimed Rs. 719-6-0. It appeared that the plaintiff, Chunni Lal, held a decree for money against certain persons and took out

* Second Appeal No. 1162 of 1885, from a decree of E. B. Thornhill, Esq., District Judge of Jaunpur, dated the 22nd May 1885, reversing a decree of Maulvi Muhammad Nasirullah Khan, Subordinate Judge of Jaunpur, dated the 15th January 1885.

execution of it. In the course of the execution-proceedings he agreed to accept payment of the decretal amount in eleven annual instalments, the defendants in the present suit giving him a bond in which they agreed to pay the debt in case of default on the part of the judgment-debtors, and mortgaged certain immoveable property as collateral security. The judgment-debtors paid five instalments and then made default. In the present suit Chunni Lal sought to recover the amount of the decree from the sureties. At the time of suit the decree had become time-barred, Chunni Lal having omitted to apply for execution. The terms of the surety-bond are stated in the High Court's judgment.

The first Court dismissed the suit. On appeal by the plaintiff the Lower Appellate Court gave him a decree.

It was contended in second appeal on behalf of the defendants, with reference to the terms of the surety-bond, that the sureties had been discharged in law by the conduct of the creditor, in allowing the decree to become time-barred.

Mr. C. H. Hill, for the Appellants.

Mr. T. Conlan and *Babu Jogindra Nath Chaudhri*, for the Respondent.

Oldfield and Tyrrell, JJ.—Having carefully examined the terms of the surety-bond, the basis of this action, we are of opinion that they amount to this, that the creditor having given his debtor time to pay Rs. 816 3-6, costs, and interest at 8 annas per cent., the amount of his judgment-debt, the debtor covenanted to pay this sum in eleven years by engaging, on the occurrence of a single default, to execute his decree for the whole sum remaining due under it, on the expiry of one month from the date of the default, and the sureties bound themselves to guarantee satisfaction of the decree debt, in the event of failure of payment, by the mode indicated above. In other words, the debtors were to have time, and to make punctual periodical payments, failure in punctuality to be necessarily followed within one month by execution of the decree on the decree-holder's part, the sureties becoming then and thereafter responsible for any eventual failure in full satisfaction [261] of the decree. The words of the deed were:—"In case of default of paying the instalments, the whole decretal money, with costs, and interest at 8 annas per cent., *shall be* executed after one month; and for the satisfaction of the decree-holder, we, the executants, stand as surety of the judgment-debtors to Rs. 816-3-6, with all the costs of the Court and interest." The first and necessary step to be taken on occurrence of a default was, within a month from its date, execution of his decree on the part of the creditor. The language of this part of the covenant is peremptory, and imports much more than the usual agreement under such circumstances, that the decree-holder may or is at liberty to execute his decree, if he pleases, on a default. Instalments were regularly paid for five years, down to the 20th April 1879; then payments ceased, and the decree-holder took no steps against his judgment-debtors to execute his decree which is now defunct by lapse of time. He sues the sureties for the unpaid balance due on the decree, with interest to the date of his suit, instituted in November 1884. Having failed in the Court of First Instance, he obtained a judgment from the District Judge in appeal; and the sureties seek in second appeal to get that decree set aside. On our reading of the peculiar terms of the agreement set out above, we are satisfied that the appeal should prevail. It must be conceded that the legal consequence of the respondent's omission to execute the decree has been the discharge of his principal debtors. The decree is dead, and they are released from all responsibility under it. The sureties, then, would, under the rule of s. 134 of the Indian Contract Act, stand discharged likewise by virtue of this omission of the creditor. But it was argued that (s. 137, *id.*) "mere forbearance on the part of the creditor to enforce his remedy

against the principal debtor does not, in the absence of any provision in the guarantee to the contrary, discharge the surety." This is doubtless true; but the action of the respondent, who omitted in this case to resort to the execution of his decree, and allowed it to become a dead letter by limitation, is, in our opinion, much more serious than "mere forbearance" in favour of his debtors. And we hold that by his failure to carry out this express part of his agreement, he did an act (s. 139, *id.*) inconsistent with the equities of the sureties, and omitted to do an act which his [262] duty to the sureties (under the agreement) required him to do, whereby the eventual remedy of the sureties themselves against the principal debtors must necessarily have been impaired. We are also of opinion that by allowing his decree to become incapable of enforcement, the respondent deprived the sureties of the benefit of the decree, which was a subsisting security in his hand at the time when the contract of suretyship was entered into, and the loss of this security, to the benefit of which the sureties were entitled through the act of the creditor, would operate to the discharge of the sureties to the extent of the value of that security (s. 141, *id.*). In this view of the facts of the agreement and of the law applicable to them, we must set aside the decree of the Lower Appellate Court, and, allowing this appeal, dismiss the respondent's suit with all costs.

Appeal allowed.

NOTES.

[This decision was followed in (1889) 11 All., 310; (1902) 24 All., 504; (1905) 2 N. L. R., 42; *contra*, sec 12 Cal., 330.]

[8 All. 262]

The 28th April, 1886

PRESENT:

MR. JUSTICE BRODHURST AND MR. JUSTICE TYRRELL.

Ram Sahai and others.....Decree-holders

versus

The Bank of Bengal.....Judgment-debtors.

*Execution of decree—Costs—Reversal of decree—Refund of costs recovered
by execution—Interest.*

A successful appellant in an appeal to the High Court applied, in execution of his decree, for a refund of a sum of money which he had paid to the respondent, by way of costs with interest thereon, in execution of the lower Court's decree. He further applied for interest on the refund claimed, at the rate of Rs. 6 per cent. per annum. The respondent objected to paying interest on the refund.

Held, that the appellant was entitled to the interest claimed on the refund of costs. *Forester v. The Secretary of State for India in Council*, 1. L. R., 3 Cal., 161, referred to.

ONE Gur Prasad sued for the sale of mortgaged property, impleading the mortgagor and the Bank of Bengal, which had purchased the mortgaged property at an execution-sale. The Subordinate Judge of Cawnpore, by whom the suit was tried, dismissed the claim for the sale of the property, awarding the

* First Appeal No. 41 of 1886, from an order of Munshi Rai Kulwant Prasad, Subordinate Judge of Cawnpore, dated 14th December 1885.

Bank its costs, with interest. The Bank recovered these costs, amounting to Rs. 642, that is, Rs. 633 principal and Rs. 9 interest, in execution of the decree. The plaintiff appealed from the decree of the [263] Subordinate Judge to the High Court, which, on the 4th May 1885, gave the plaintiff a decree for the sale of the property, and awarded him costs. The heirs of the plaintiff applied to obtain in execution of the High Court's decree the refund of the sum paid to the Bank under the decree of the Court of the Subordinate Judge on account of costs—that is to say, of the sum of Rs. 642, together with interest at the rate of Rs. 6 per cent. per annum. The Bank objected to paying interest on the refund claimed, and this objection was allowed by the lower Court. The decree-holder appealed to the High Court.

Pandit *Nand Lal* and Pandit *Moti Lal*, for the Appellants.

Pandit *Nand Lal* relied on *Jaswant Singh v. Dip Singh*, I. L. R., 7 All., 432, and *Forester v. The Secretary of State for India in Council*, I. L. R., 3 Cal., 161.

Mr. *G. T. Spankie*, for the Respondent, referred to *Rodger v. The Comptoir d'Escompte de Paris*, 7 Moo. P. C. C., N. S., 314 : L. R., 3 P. C., 465, as expressly deciding the point whether interest should be granted on refund of costs. The cases cited for the appellant are not in point. The first does not relate to costs, and in the second *Roger v. The Comptoir d'Escompte de Paris*, is distinguished.

Brodhurst and Tyrrell, JJ.—Apart from authority, which is strong and clear on the general question of restitution, we are satisfied that, in common justice and fairness, the appellants are entitled to the moderate interest they claim on their money, which has now to be refunded to them by the respondent.

This consists of a principal sum of Rs. 642, of which Rs. 9 were interest, recovered wrongfully in a former stage of the litigation by the respondent from the appellants as compensation for the respondent's costs. The Court below has not understood the rule laid down in *Forester v. The Secretary of State*, I. L. R., 3 Cal., 161. It is of course true that a Court executing a decree for costs cannot award interest on those costs not given by the decree. But the case before us is quite different. The question is not of awarding interest to the successful appellant on the costs given him by the decree under execution, such interest being not awarded on the decree. The question is, whether interest may or not be given on the sum [264] wrongly obtained, as described above, by the respondent from the appellant, restitution of which is now secured by the operation of the final decree in the case. We allow the appellant's claim and decree his appeal with costs.

Appeal allowed.

NOTES.

[This was followed in (1886) 9 Mad., 506 ; (1891) 15 Mad., 203 ; (1898) 20 All., 430.]

[8 All. 265]

The 30th April, 1886.

PRESENT :

MR. JUSTICE BRODHURST, AND MR. JUSTICE TYRRELL.

Jugal Kishore.....Plaintiff

versus

Hulasiram and another.....Defendants.

Partnership—Joint Hindu family—Suit by one member for debt due to family firm.

In a suit for money lent, brought by the father of a joint Hindu family who carried on jointly an ancestral money-lending business, the plaintiff stated, in examination, that he had ceased to take an active part in the management of the affairs of the firm, and that the control of its business was in the hands of his sons, whom he described as "*maliks*" (proprietors).

Held, that, under the circumstances, the plaintiff could not maintain the suit in his individual capacity, and without joining his sons as plaintiffs with him his sons being his partners in the ancestral business, and he not being the managing member or proprietor.

THE plaintiff in this case, Jugal Kishore, and his five sons were members of a joint Hindu family, and carried on jointly an ancestral money-lending business. The plaintiff sued the defendants for money lent by the firm to them. The plaintiff was examined, and stated that he had made his sons the owners of the firm, retaining his interest in it to profits and losses, and that by reason of increasing infirmities he had ceased to take an active part in the management of the affairs of the firm, and that the active partners were his sons. Upon this the defendants objected that the plaintiff was not competent to sue alone, and his sons should have been joined as plaintiffs, and not having been so joined, the suit should be dismissed. The Court of First Instance disallowed this objection, and trying the suit on the merits, dismissed it. The plaintiff appealed, and the defendants contended in support of the decree that the suit ought to have been dismissed, "because, on the showing of the plaintiff, the contract was made with his firm, and his partners were not parties to the litigation."

[265] The Lower Appellate Court held that, as the plaintiff was not the managing member of the family firm, "the ordinary rule which requires a suit relating to the business of a partnership to run in the names of all the partners, ought to be enforced." It therefore dismissed the appeal.

The plaintiff appealed to the High Court upon the ground, amongst others, that the plaintiff, as head of the family, was entitled to sue on its behalf.

Mr. W. M. Colvin, for the Appellant.

Pandit *Ajudhia Nath* and *Munshi Kashi Prasad*, for the Respondents.

Brodhurst and Tyrrell, JJ.—We cannot interfere. The appellant stands in this position, that he has declared the firm to which the debt is due to be ancestral, and he has asserted that the control of its business is in the hands of his sons jointly. He calls them "*maliks*" (proprietors). From either point of view, then, he cannot sustain this suit in his own individual capacity.

* Second Appeal-No. 1350 of 1885, from a decree of T. R. Redfern, Esq., District Judge of Agra, dated the 4th May 1885, affirming a decree of Maulvi Muhammad Said Khan, Subordinate Judge of Agra, dated the 24th December 1884.

His sons are his partners in the ancestral business, and he is not the managing member or proprietor.

We dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[See also (1901) 25 Bom., 606 ; (1903) 25 All., 878.]

[8 All. 265]

The 2nd April, 1886.

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE AND
MR. JUSTICE TYRRELL.

Kalian Bibi and another... ..Plaintiffs

versus

Safdar Husain Khan and others.....Defendants.*

Pardah-nashin—Civil Procedure Code, ss. 129, 136—Discovery of documents.

In a suit brought by two Muhammadan *pardah-nashin* ladies for recovery of immoveable property by right of inheritance, an order was passed under s. 129 of the Civil Procedure Code, requiring the plaintiffs to declare by affidavit " all the papers connected with the points at issue in the case which were or had been in their possession or control." After some ineffectual proceedings, the plaintiffs were peremptorily ordered to file their affidavit on a certain date. On that date an affidavit was filed on their behalf by their brother and mukhtar, with a list of their documentary evidence, but the affidavit and list was considered defective upon several grounds, one of which was that it ought to have been made by the plaintiffs personally. Further time was then given to the plaintiffs to amend these defects, and ultimately they filed an affidavit purporting to be made by them [266] personally, praying that the Court would have it verified in any manner thought proper, provided that their *pardah-nashini* were not interfered with. The Court, under s. 136 of the Code, dismissed the suit for want of prosecution, in consequence of the orders under s. 129 not having been complied with, though ample opportunity had been given to the plaintiff, and no sufficient ground for non-compliance had been shown.

Held, without going into the question of the sufficiency or non-sufficiency of the action of the plaintiffs, with regard to the orders made under s. 129 of the Code, that looking at the disabilities of the plaintiffs and the circumstances of their suit, the case was not one in which it was expedient to enforce the liability to which they might have exposed themselves under the peculiar provisions of s. 136.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Mr. *Abdul Majid*, Mr. *J. Simeon*, and Maulvi *Mehdi Hasan*, for the Appellants.

Mr. *G. E. A. Ross* and Pandit *Nand Lal*, for the Respondents.

* First Appeal No. 154 of 1885. from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 27th April 1885.

Straight, Offg. C. J., and Tyrrell, J.—The appellants, two Muhammadan *pardah* ladies, brought a suit in the District Judge's Court at Gorakhpur, on the 10th June 1881, for recovery of landed property by their right of inheritance to part of the estate of one Muhammad Wazid. The suit was dismissed as barred by limitation. But in first appeal it was remanded for re-trial under s. 562, Civil Procedure Code. When the case was restored in the Court below, and came on for trial, the Judge made an order under s. 129, Civil Procedure Code, requiring the plaintiffs-appellants to "produce with an affidavit all the papers connected with the points at issue in the case which were or had been in their possession or under their control." After some ineffectual proceedings the plaintiffs were ordered to file their affidavit peremptorily on the 1st April 1885. On that date an affidavit was filed on behalf of the plaintiffs by their mukhtar and brother Kazi Muhammad Ikiam Ali, with a list of their documentary evidence. This mukhtar appeared under a special power of attorney, executed and registered in this behalf under the hands of the two ladies on the 27th and 28th March 1885. The Judge found the affidavit and list of the 1st April defective, because (i) it was not made personally by the plaintiffs, (ii), because it disclosed only documents connected with the issues on the record, and (iii) because it disclosed only documents in possession of the ladies, and failed to disclose [267] or mention documents once, but not at present, in their possession. Therefore the Judge gave the plaintiffs further time to the 16th April 1885, to amend these defects. On the 15th April, the plaintiffs filed before the Judge an affidavit purporting to be made by them personally, praying that "the Court may have it verified in the manner it thinks proper, provided petitioners' *pardah-nashin* is not interfered with." On the 27th April the Judge disposed of that petition and of the suit by his order which is now appealed to us. It runs as follows :—"The order of this Court not having been complied with, although ample opportunity has been given to the plaintiffs, and no sufficient ground for non-compliance having been shown, I have no alternative, much as I regret the necessity, but to exercise the power given me by s. 136, Act XIV of 1882, and to direct that the suit be dismissed for want of prosecution, and I now make an order to that effect, with costs, and the usual interest thereon."

Without going into the question of the sufficiency or insufficiency of the action of the plaintiffs with regard to the orders made under s. 129 of the Code, it is enough here to say that, looking at the disabilities of the plaintiffs and the circumstances of their suit, it appears to us that the case was not one in which it was expedient to enforce the liability to which they may have exposed themselves under the peculiar provisions of s. 136 of the Code.

We therefore allow the general plea of the appellants, and, decreeing this appeal, remit the case for trial to the Court below. The costs here will be costs in the cause.

Appeal allowed.

NOTES.

[See *Kali Bakhsh Singh v. Ram Gopal Singh* (1913) 36 All., 81, which is a recent decision of the Privy Council on the subject. See also (1889) 3 C. P. L. R., 118 ; (1892) 6 C. P. L. R., 35 ; (1891) 14 All., 8 ; (1905) 2 A. L. J., 436.]

[8 All. 267]

The 16th April, 1886.

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, AND MR. JUSTICE, MAHMOOD.

Behari Lal.....Plaintiff

versus

Habiba Bibi and others.....Defendants.*

Pardah-nashin—Execution of deeds.

A suit was brought upon a bond purporting to have been executed on behalf of two Muhammadan *pardah-nashin* ladies by their husbands, and to charge their immoveable property. The bond was compulsorily registrable, and it was presented for registration by a person who professed to be authorized by a power-of-attorney in that behalf. The only proof given by the plaintiff that this power-of-[268]attorney was executed by the ladies, or with their knowledge and consent, was the evidence of a witness who deposed that he was not personally acquainted with them nor did he know their voices, that he went to their residence, that there were two women behind a *pardah* whom the executants of the bond said were their respective wives, and that these women acknowledged they had made the power-of-attorney. There was nothing to show that the ladies had ever benefited in any way from the money advanced under the bond.

Held, that, even if the ladies behind the *pardah* were in fact the two defendants, this evidence would not be enough to bind them, and that it was for the plaintiff, who sought to bring their property to sale on the strength of a transaction with them, to show that they were free agents in the matter, and, having a clear knowledge of what they were doing, accorded their consent to it.

Busloor Ruheem v. Shumsoonnissa Begum, 11 Moo. I. A., 551; 8 W. R., P. C., 3; *Ashgar Ali v. Debroos Banon Begum*, 1. L. R., 3 Cal., 324, and *Sudisht Lal v. Sheobarat Koer*, I.L.R., 7 Cal., 245; L. R., 8 Ind. Ap., 33, referred to by MAHMOOD, J.

THE plaintiff in this case claimed the amount due on a bond, dated the 16th September 1873, from Rafi-ud-din Ahmad, and his wife Habiba Bibi, and Salima Bibi, the wife of Nurul Hasan, by whom the bond purported to be executed. He also claimed the sale of certain zamindari property mortgaged in the bond. This property was property which the two female defendants, who were sisters, had inherited from their father. The bond purported to be executed by Habiba Bibi "by the pen of Rafi-ud-din Ahmad," her husband, and by Salima Bibi "by the pen of Nurul Hasan," her husband. It was registered on the 27th September 1873, by one Maula Khan, under a *mukhtar-nama*, or power-of-attorney, which purported to be executed by Rafi-ud-din Ahmad, Habiba Bibi and Salima Bibi, and was authenticated by the Sub-Registrar, who had issued a commission for the examination of the ladies as to the voluntary nature of the execution of the power by them. The defendant Rafi-ud-din Ahmad did not defend the suit. It was defended by the female defendants, who pleaded that they had not executed the *mukhtar-nama*, or the bond, and had no knowledge whatever of those deeds and had not benefited in any way from the money advanced under the bond.

The Subordinate Judge of Azamgarh, by whom the suit was tried, dismissed it in respect of the female defendants. He found that they had no knowledge of the *mukhtar-nama* or the bond, and [269] had not benefited in any

* First App. at No. 199 of 1885 from a decree of Rai Raghunath Sahai, Subordinate Judge of Azamgarh, dated the 31st July 1885.

way from the money advanced under the bond. The plaintiff appealed to the High Court.

Munshi Kashi Prasad and Munshi Hanuman Prasad, for the Appellant.

Pandit Ajudhia Nuth and Munshi Ram Prasad, for the Respondents.

Straight, Offg. C. J.—This was a suit brought by the plaintiff Behari Lal upon a bond, dated the 16th of September 1873, for Rs. 6,700, purporting to have been executed by one Rafi-ud-din, for himself and for his wife Habiba Bibi, and by one Nurul Hasan on behalf of his wife Salima Bibi. The two ladies were the daughters of Fakhr-ud-din Ahmad, and Rafi-ud-din was his nephew, and the property said to have been charged admittedly came to the hands of the obligors upon the death of Fakhr-ud-din, to whom it had belonged. The bond of the 16th of September 1873, was, as I have said, not signed by either Habiba Bibi or Salima Bibi, and it was subsequently presented for registration by one Maula Khan, who professed to be authorized in that behalf by a power-of-attorney, dated the 17th September 1873. Now the bond can only be given in evidence and held to be binding against the ladies, *qua* their immoveable property charged therein, if it was duly registered, and the question whether it was so registered turns upon whether the power-of-attorney was in fact made by them, with their conscious consent and full knowledge and comprehension of what they were authorizing Maula Khan to do. The Subordinate Judge has found that the bond to the plaintiff was not proved to have been executed with the knowledge of the ladies; that they are not shown to have benefited by it in any way; and, as I understand him, he also rejected the power-of-attorney as not binding on them.

It is upon this latter point that I am prepared to deal with the appeal and dispose of it. Now there can be no doubt—and many Privy Council rulings are to be found approving the principle—that in cases such as that before me, in which the interests of *pardah-nashin* women are concerned, those who seek to affect them with liability under an instrument of the kind sued on here, are bound to prove that they had knowledge of the nature [270] and character of the transaction into which they are said to have entered, that they had some independent and disinterested adviser in the matter, and that they put their hands to the document relied on, or authorized some other persons to execute it for them, fully understanding what they were about in doing so. In the present case all that the plaintiff has proved by one witness, Imam-ud-din, is that upon a particular day he went to the residence of the ladies, with whom he was not personally acquainted, nor did he know their voices. He says there were two women behind a *pardah* who were said by their husbands, Rafi-ud-din and Nurul Hasan, to be their respective wives, and that these persons acknowledged they had made the power-of-attorney. Now I will go the length of saying that even if the ladies behind the *pardah* were in fact the two defendant Musammats, I should not, in reference to the principles already enunciated, be prepared to hold that this is enough to bind them. I think it was for the plaintiff—who is seeking to bring their property to sale on the strength of a transaction with these two *pardah-nashin* ladies—to show that they were free agents in the matter, and, having a clear knowledge of what they were doing, accorded their consent to it. This, in my opinion, he has wholly failed to do, and, under such circumstances, I think the lower Court was right in dismissing the suit, and I therefore dismiss the appeal with costs. With regard to the application made to-day for the admission of the *mukhtar-nama*, which was rejected below, it is unnecessary to say more than that I have dealt with the case as if it were in evidence.

Mahmood, J.—I am of the same opinion. I entirely concur with the learned Chief Justice in his estimate of the evidence. It is an estimate which I, from my acquaintance with the facts of Muhammadan life to which it refers, accept as in keeping with the rulings of the Privy Council in such matters, which have done for the *pardah-nashin* women what their life requires, which is, that they should be placed, by analogy, on a footing somewhat similar to that of persons *non compotes mentis*. The doctrines of equity which relate to such persons have been stated in s. 228 of *Story's* work on *Equity Jurisprudence*, where it is laid down that "Courts of Equity deal with the subject upon the most enlightened principles, and [271] watch with the most jealous care every attempt to deal with persons *non compotes mentis*. Wherever, from the nature of the transaction, there is not evidence of entire good faith (*uberimæ fidei*), or the contract or other act is not seen to be just in itself, or for the benefit of these persons, Courts of Equity will set it aside, or make it subservient to their just rights and interests." I desire to embody this passage in my judgment for the benefit of the subordinate Courts, to which, generally speaking, such works as *Story's* are not accessible; and for the same reason I wish to read certain passages from the judgments of the Lords of the Privy Council in order to show the manner in which their Lordships have from time to time applied the doctrine of equity to *pardah-nashin* ladies. The leading case upon the subject is *Bazloor Ruheem v. Shumsoonnissa Begum*, 11 Moo. L. A., 551; 8 W. R., P. C., 3, where their Lordships made the following observations (p. 585)—"The Attorney-General, indeed, argued that a distinction is to be drawn in this respect between a Muhammadan and a Hindu woman; nay, that in all that concerns her power over her property, the former is by law more independent than an English woman of her husband. It is no doubt true that a Musulman woman, when married, retains dominion over her own property, and is free from the control of her husband in its disposition; but the Hindu law is equally indulgent in that respect to the Hindu wife. It may also be granted that in other respects the Muhammadan law is more favourable than the Hindu law to women and their rights, and does not insist so strongly on their necessary dependence upon, and subjection to, the stronger sex. But it would be unsafe to draw from the letter of a law, which, with the religion on which it is chiefly founded, is spread over a large portion of the globe, any inference as to the capacity for business of a woman of a particular race or country. In India the Musulman woman of rank, like the Hindu, is shut up in the *zanana*, and has no communication, except from behind the *pardah*, or screen, with any male persons, save a few privileged relations or dependants; the culture of the one is not, generally speaking, higher than that of the other, and they may be taken to be equally liable to the pressure and influence which a husband may be [272] presumed to be likely to exercise over a wife living in such a state of seclusion. Their Lordships must, therefore, hold that this lady is entitled to the protection which, according to the authorities, the law gives to a *pardah-nashin*, and that the burden of proving the reality and *bonâ fides* of the purchases pleaded by her husband was properly thrown on him." The principles upon which these observations proceed must not be lost sight of in connection with such cases. Again, in *Ashgar Ali v. Debroos Banoo Begum*, 1 L. R., 3 Cal., 324, which was also a case in which a Muhammadan *pardah-nashin* lady was concerned, their Lordships made observations which seem to me to be very pertinent to cases like the present. Their Lordships said (p. 327): "It is incumbent on the Court, when dealing with the disposition of her property by a *pardah-nashin* woman, to be satisfied that the transaction was explained to her, and she knew what she was doing, and especially so in a case like the present

where, for no consideration, and without any equivalent, this lady has executed a document which deprives her of all her property." There are many other cases to be found in the Reports which lay down the same doctrine, but I will cite only one more passage from the judgment of their Lordships in a recent case—*Sudisht Lal v. Sheobarat Koer*, I. L. R. 7 Cal., 245: L. R., 8 Ind. Ap., 39, in which the facts were somewhat similar to those of the present case:—"Their Lordships desire to observe that there is no satisfactory evidence that this *mukhtar-nama* was explained to the defendant in such a way as to enable her to comprehend the extent of the power she was conferring upon her husband. In the case of deeds and powers executed by *pardah-nashin* ladies, it is requisite that those who rely upon them should satisfy the Court that they had been explained to, and understood by, those who execute them. There is a want of satisfactory evidence of that kind in the present case. But their Lordships do not desire to rest their decision upon this ground.....If it had been proved that the husband had contracted loans and obtained advances on behalf of his wife, it may be that under this power-of-attorney she would be bound by his acts, as being within the scope of his authority. But it would have to be shown, not only that he borrowed the money, but that [273] it was borrowed for her." These passages seem to me to be closely applicable to the circumstances of this case.

With reference to the observations of the learned Chief Justice, I have only to add that in all these transactions, the important thing to see is what was actually done. In the present case there is nothing to show that this large sum was ever utilized for the ladies' benefit, and there is no satisfactory evidence to show that they took part in the execution of the *mukhtar-nama*, or understood its contents, or that they were aware of the existence of the bond, or that it was executed with their consent. The findings of the lower Court are satisfactory, and I would not interfere.

Appeal dismissed.

[8 All. 273]

The 17th April, 1886.

PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE TYRRELL.

Koji Ram.....Plaintiff

versus

Ishar Das and another.....Defendants.*

Suit for money paid by a pre-emptor under a decree for pre-emption which has become void—Act XV of 1877 (Limitation Act), sch. II, Nos. 62, 97, 120—Suit for money had and received for plaintiff's use—Suit for money paid upon an existing consideration which afterwards fails.

Pending an appeal from a decree for pre-emption in respect of certain property conditional upon payment of Rs 1,595, the pre-emptor decree-holder, in August 1880, applied for

* Second Appeal No. 1264 of 1885, from a decree of W. R. Barry, Esq., Additional Judge of Aligarh, dated the 30th July 1885, reversing a decree of Maulvi Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 22nd May 1884.

possession of the property in execution of the decree, alleging payment of the Rs. 1,595, to the judgment-debtors out of Court, and filing a receipt given by them for the money. This application was ultimately struck off. In April 1881, judgment was given in the appeal, increasing the amount to be paid by the decree-holder to Rs. 1,994, which was to be deposited in Court within a certain time. The decree-holder did not deposit the balance thus directed to be paid, and the decree for possession of the property accordingly became void. In 1882, the decree-holder assigned to K his right to recover from the judgment-debtors the sum of Rs. 1,595, which he had paid to them in August 1880. In December 1883, K sued the judgment-debtors for recovery of the Rs. 1,595 with interest.

Held, that No. 62* of the Limitation Act did not govern the suit, but that No. 97† and, if not, No. 120‡ would apply, and the suit was therefore not barred by limitation.

THE suit out of which this appeal arose was brought under the following circumstances:—In February 1880, one Ram Lal obtained a decree for pre-emption in respect of certain property, [274] conditional upon payment of Rs. 1,595 to the purchasers. This decree was upheld on appeal by the District Judge in April 1880, and the purchasers preferred a second appeal to the High Court. Pending this appeal, Ram Lal, in August 1880, applied for possession of the property in execution of the decree in his favour, alleging that he had paid the sum of Rs. 1,595 to the judgment-debtors out of Court, and filing a receipt given by them for the money. This application was ultimately struck off, in consequence of the applicant's failure to comply with an order directing him to file a copy of the decree. After this the High Court, in April 1881, gave judgment in the appeal, which it so far allowed as to increase the amount to be paid by the pre-emptor to Rs. 1,994-4, which sum was to be deposited in Court within one month from receipt of the decree in the lower Court. Ram Lal did not pay the balance thus directed to be paid to the purchasers, and the decree for possession accordingly became void. In February 1882, Ram Lal assigned to the plaintiff in the present suit, Koji Ram, his right to recover from the purchasers the sum of Rs. 1,595 which he had paid to them in August 1880. In March 1882, the plaintiff made an application in the execution-department for recovery of the amount; but the purchasers objected that he was not a "representative" of Ram Lal within the meaning of s. 244 of the Civil Procedure Code, and therefore could not take proceedings in the execution-department. This objection was allowed; and the plaintiff in consequence brought the present suit in December 1883, for recovery of the Rs. 1,595. with interest thereon, in the Court of the Subordinate Judge of Aligarh. That Court

* [Art. 62:—

Description of Suit.	Period of limitation.	Time from which period begins to run.
For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.	Three years.	When the money is received.]

† [Art. 97:—

For money paid upon an existing consideration which afterwards fails.	Three years.	The date of the failure.]
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‡ [Art. 120:—

Suit for which no period of limitation is provided elsewhere in this Schedule.	Six years.	When the right to sue accrues.]
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decreed the claim for Rs. 1,595, but disallowed the claim for interest. The defendants appealed to the District Judge of Aligarh. That Court held that the suit was barred by limitation, with reference to No. 62, sch. II of the Limitation Act, as a suit "for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use," the period prescribed for which was three years from the date when the money had been received by the defendants.

In second appeal by the plaintiff it was contended on his behalf that the District Judge was wrong in applying to the suit [275] the provisions of No. 62 of the Limitation Act, and that the limitation properly applicable was that provided by No. 120:

Babu Jogindro Nath Chaudhri, for the Appellant.

Pandit Ajudhia Nath and Pandit Sundar Lal, for the Respondents.

Oldfield and Tyrrell, JJ.—We are of opinion that art. 97 of the Limitation Act may be applied to this suit, and, if not, art. 120 would apply. The suit is not governed by art. 62, as the Judge considers. In the above view the suit is not barred by limitation, and we set aside the decree of the Lower Appellate Court, and remand the case for trial on the merits. Costs to follow the result.

Appeal allowed.

NOTES.

[See also 18 Mad., 437.]

[8 All. 275]

The 20th April, 1886.

PRESENT:

MR. JUSTICE TYRRELL AND MR. JUSTICE MAHMOOD.

Habib-un-nissa and another.....Plaintiffs
versus

Barkat Ali and another.....Defendants.*

Muhammadian law—Pre-emption—Acquiescence in sale—Relinquishment of right.

According to the Muhammadian law, if a pre-emptor enters into a compromise with the vendee, or allows himself to take any benefit from him in respect of the property which is the subject of pre-emption, he by so doing is taken to have acquiesced in the sale and to have relinquished his pre-emptive right.

In a suit to enforce the right of pre-emption founded on the Muhammadian law it appeared that the purchasers, by an agreement made with the plaintiffs on the same date as the sale in respect of which the suit was brought, agreed to sell the property to the plaintiffs any time within a year, and if the latter paid the price and purchased the property for themselves.

Held, that by the very fact of their taking the agreement, the plaintiffs had relinquished their right of pre-emption, and were precluded from enforcing it.

* Second Appeal No. 1905 of 1885, from a decree of H. A. Harrison, Esq., District Judge of Meerut, dated the 24th June 1885, confirming a decree of Babu Mritonjoy Mukerji, Subordinate Judge of Meerut, dated the 15th April 1885.

THE plaintiffs in this case, Muhammadans, claimed to enforce the right of pre-emption in respect of the sale of a house and certain land appertaining thereto. The right was founded on Muhammadan law. The vendor, Barkat Ali, and the vendee, defendants, were Muhammadans, and the property was sold on the 27th October 1883. On the day of the sale the vendee gave the plaintiffs an agreement in writing to sell the property to them, the terms of which were as follows:—"I have to-day purchased the house of [276] Jalal-ud-din from Barkat Ali: counting from to-day, if (plaintiffs) within one year pay me what I have paid for the house I will sell it to them, provided that they purchase for their own use and residence and not for sale to another."

The defence to the suit was that the plaintiffs had not, as required by the Muhammadan law of pre-emption, made the "*talab-i-mauwasabat*," or immediate demand, and had therefore lost their right, and that they had also lost it, according to the same law, by accepting from the vendee the agreement set out above, and thereby acquiescing in the sale to him.

The Court of First Instance dismissed the suit on the ground that the plaintiffs had not made the "immediate demand." The plaintiffs appealed, and the Lower Appellate Court affirmed the decree of the first Court on that ground, and on the further ground that they had relinquished their right, by accepting the agreement from the vendee. The plaintiffs appealed to the High Court.

Munshi *Hanuman Prasad* and Babu *Durga Charan*, for the Appellants.

Mr. *T. Conlan* and Maulvi *Abdul Majid*, for the Respondents.

Mahmood, J.—Having heard the learned pleader for the appellants, I am of opinion that the appeal should be dismissed with costs.

The suit was one for pre-emption, arising out of a sale made on the 27th October 1883, in favour of Abdul Rahim, defendant-respondent, by one Barkat Ali, the other defendant-respondent. The pre-emptors are two ladies, who claim pre-emption under the Muhammadan law. The questions of law to be considered are two, namely,—(i) whether the "*talab-i-mauwasabat*," or immediate demand, had been properly made as required by the Muhammadan law; (ii) if it was, have the plaintiffs relinquished their right by entering into the agreement, dated the 27th October 1883, with Abdul Rahim?

This agreement was made on the same date as the sale, and thereby the purchasers agreed to sell the property to the plaintiffs pre-emptors any time within a year, and if the latter paid the price and purchased it for themselves. Now, according to the Muham-[277]madan law, if the pre-emptor enters into a compromise with the vendee, or allows himself to take any benefit from him in respect of the property which is the subject of pre-emption, he by so doing is taken to have acquiesced in the sale, and to have relinquished his pre-emptive right. Mr *Baillie*, in his celebrated *Digest of Muhammadan Law*, at page 499, which reproduces a passage of the *Fatawa Alamgiri*, states the law as follows:—"The right of pre-emption is rendered void by implication, when anything is found on the part of the pre-emptor that indicates acquiescence in the sale, as, for instance, when knowing the purchase, he has omitted, without a sufficient excuse, to claim his right (either by failing to demand it on the instant, or by rising from the meeting, or taking to some other occupation, without doing so, according to the different reports of what is necessary on the occasion); or, in like manner, when he has made an offer for the house to the purchaser; or has asked him if he will give it up to him; or has taken it from him on lease, or in *moozaraut*—all this with knowledge of the purchase."

This passage is conclusive, and leaves no doubt that by the very fact of their taking the agreement referred to above, the plaintiffs have relinquished their right of pre-emption and are precluded from enforcing it.

In this view of the question it is unnecessary to consider the first question. I would dismiss the appeal with costs.

Tyrrell, J.—I am quite of the same opinion.

Appeal dismissed.

NOTES.

[In (1897) 19 All., 334 it was held that there was neither acquiescence nor waiver where the pre-emptor as such offered to take the property by paying the sale-price with a view to avoid litigation.]

[8 All. 277]

The 27th April, 1886.

PRESENT :

MR. JUSTICE BRODHURST AND MR. JUSTICE TYRRELL.

Zainab Begam.....Plaintiff

versus

Manawar Husain Khan and another.....Defendants.*

Civil Procedure Code, ss. 556, 558—Non-attendance of appellant at hearing of appeal—Dismissal of appeal on the merits—Application for re-admission.

In an appeal before an Appellate Court, the appellant did not attend in person or by pleader, and the Court, instead of dismissing the appeal for default, tried and dismissed it upon the merits. Subsequently, the appellant applied to the Court, under s. 558 of the Civil Procedure Code, to re-admit the appeal, explaining her absence [278] when the appeal was called on for hearing. The Court rejected the application, on the ground that the appeal had been decided on the merits, and reasons had been recorded for its dismissal which there were no apparent grounds for setting aside.

Held, that the Court should have dismissed the appeal for default, and it was illegal to try it on the merits, and the judgment was consequently a nullity, the existence of which was no bar to the re-admission of the appeal.

THIS was a first appeal from an order passed by the Subordinate Judge of Moradabad, under s. 558 of the Civil Procedure Code, refusing to re-admit an appeal. The appellant, Musammat Zainab, was plaintiff in the suit which was dismissed by the Court of First Instance (Munsif of Amroha). She appealed from the Munsif's decree to the District Judge of Moradabad, who transferred the appeal to the Subordinate Judge. The appellant failed to appear either on the day fixed by the Subordinate Judge for the hearing of the appeal, or on the subsequent days to which the hearing was adjourned. Instead, however, of dismissing the appeal for default under s. 556 of the Civil Procedure Code, the Subordinate Judge tried it and dismissed it upon the merits. Subsequently the appellant applied to the Subordinate Judge, under s. 558, to re-admit the appeal, explaining her absence when the appeal was called on for hearing. This application the Subordinate Judge rejected, on the ground that the appeal had been decided on the merits, and reasons had been recorded for its dismissal which there were no apparent grounds for setting aside.

* First Appeal No. '89 of 1886, from an order of Maulvi Zain-ul-Abdin, Subordinate Judge of Moradabad, dated the 19th September 1885.

On this appeal it was contended for the appellant that the Subordinate Judge was not justified in rejecting her application, without inquiry into the truth or otherwise of the allegations made therein regarding the cause of her absence at the hearing of the appeal.

Babu Ratan Chand, for the Appellant.

Mr. Abdul Majid, for the Respondents.

Brodhurst and Tyrrell, JJ.—The Subordinate Judge, as a first appellate Court, had the appellant's appeal before him. On the day fixed for hearing, and on adjourned dates, the appellant did not attend in person or by pleader. The Subordinate Judge then had but one legal course open to him—to dismiss the appeal in default (s. 556). It was illegal to try the appeal on the merits. [279] The judgment given in this way is a nullity, and must be cancelled: its existence therefore was and is no bar to the re-admission of the appellant's appeal (s. 558), if it was not barred by limitation or otherwise inadmissible. We must allow this appeal, and direct the restoration to the file of the application for re-admission under s. 558 on the merits, the costs of this appeal being costs in the cause.

Appeal allowed.

NOTES

[In the C. P. C. (1908), O. 41, r. 17, the words, 'the Court may make an order that the appeal be dismissed' are substituted for the words 'shall be dismissed' in the previous Code. See also (1912) 22 M. L. J., 284 at 296, 297; (1895) 15 A. W. N., 140; (1907) P. R., 121.]

[8 All. 279]

The 28th April, 1886.

PRESENT:

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, AND MR. JUSTICE TYRRELL.

Lal Singh and another..... Defendants

versus

Deo Narain Singh and others.....Plaintiffs.*

Hindu Law—Joint Hindu family—Alienation by father—Suit by sons to set aside alienation—Duty of sons to pay father's debts—Burden of proof.

The rule enunciated by the Privy Council in *Muddun Thakoor v. Kantoo Lall*, 14 B. L. R., 187; L. R., 1 Ind. Ap., 333, and *Suraj Bansi Koer v. Sheo Persad Singh*, I. L. R., 8 Cal., 148. "that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes to the knowledge of the vendee or mortgagee," is limited to antecedent debts, i. e., to debts contracted before the sale or mortgage sought to be impeached by the sons; and it does not cover cases in which a sum in ready money has been paid over to the father by the vendee or mortgagee. The authorities seem to come to this, that in those cases where a person buys ancestral estate, or takes a mortgage of it from the father, whom he knows to have only a limited interest in it, for a sum of ready money paid down at the time of the transaction, such person, in a suit,

* Second Appeal No. 286 of 1885, from a decree of E. B. Thornhill, Esq., District Judge of Jaunpur, dated the 30th January 1885, reversing a decree of Mahli Muhammad Nasir-ulah Khan, Subordinate Judge of Jaunpur, dated the 22nd December 1883.

by the sons to avoid it, must establish that he made all reasonable and fair inquiry before effecting the sale or mortgage, and that he was satisfied by such inquiry, and believed, in paying his money, that it was required for the legal necessities of the joint family, in respect of which the father, as head and managing member, could deal with and bind the joint ancestral estate.

THE three plaintiffs in this case were the sons of Ram Dihal, the first defendant, and on the 3rd October 1883, when the suit was instituted, they were, so it was stated, aged respectively as follows:—Deo Narain Singh, 23; Ram Narain Singh, 18 years and 2 months; Jagat Narain Singh, 15 years and 2 months. On the 12th December 1864, Deo Narain alone having been born, Ram [280] Dihal made a conditional sale of two annas out of a four annas ancestral zemindari share in favour of one Naipal Singh for Rs. 1,200. The consideration given by the conditional vendee was that he paid off some prior incumbrances created by Ram Dihal, and also gave him a sum in cash. The two annas were to be held to be sold if the Rs. 1,200, were not re-paid by the 25th June 1877. On the 28th November 1871, Ram Narain Singh and Jagat Narain Singh then having been born, Ram Dihal sold to the other defendants in this suit the entire four annas share, the consideration being Rs. 1,200, left with the vendees to pay off the conditional sale of 1864, Rs. 232 due to the vendees under a mortgage, and Rs. 1,500 in cash. The plaintiffs sued to set aside this sale to the extent of three annas, upon the ground that it was made without legal necessity and for immoral purposes, and that Ram Dihal had no power to sell the whole property. The defendants pleaded, among other matters, that they gave good consideration for the sale, and that, as regards the sum in cash handed over to Ram Dihal, it was taken for the necessary expenses of the family. The Court of First Instance (Subordinate Judge of Jaunpur), holding that the *onus* lay on the plaintiffs to prove that the sale was made for improper purposes, and that the money had been taken for necessary purposes of the family, dismissed the suit. On appeal by the plaintiffs the District Judge of Jaunpur, holding that it lay with the defendants to establish the necessity for the sale, reversed the first Court's decree and decreed the claim of the plaintiffs.

The defendants appealed to the High Court, contending that the District Judge was wrong in placing the burden of proof on them, and that it was for the plaintiffs to acquit themselves of their obligation under the Hindu law to pay their father's debts, by showing that they were contracted for purposes which, under that law, were not binding upon them.

Mr. T. Conlan, Munshi Hanuman Prasad and Munshi Kashi Prasad, for the Appellants.

Pandit Ajudhia Nath and Pandit Sundar Lal, for the Respondents.

Straight, Offg C.J., and Tyrrell, J. (After stating the facts, the judgment continued):—It seems to us that the principle enun-[281]ciated by their Lordships of the Privy Council in *Surai Bansi Koer's, Case*. I. L. R., 3 Cal., 148, as to the effect of an earlier decision of that tribunal in *Muddun Thakoor v. Kantoo Lall*, 14 B.L. R., 187; L. R., 1 Ind. Ap., 333, must be our guide in the present instance. It is as follows:—“That where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted.” It will be seen from this passage that where an antecedent debt is the consideration for a sale by the father of the ancestral property, or it is charged by him

to raise money to pay off an antecedent debt, it rests with the sons to show that such debt was contracted for immoral purposes to the knowledge of the vendee or mortgagee. But it is to be observed that this rule is limited to antecedent debts, that is to say, debts contracted before the sale or mortgage sought to be impeached by the sons; and it does not cover cases in which a sum in ready money has been paid over to the father by the vendee or mortgagee. As we understand it, the distinction drawn by their Lordships is founded on the view that while in the one instance the vendee or mortgagee is not to "be expected to know or to come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate," on the other hand, "he may reasonably be expected to prove the circumstances of his own particular loan"—*Hunooman Pershad Panday's Case*, 6 Moo. I. A., 419. The authorities therefore seem to come to this, that in those cases where a person buys ancestral estate or takes a mortgage of it from the father, whom he knows to have only a limited interest in it, for a sum of ready money paid down at the time of the transaction, such person, in a suit by the sons to avoid it, must establish that he made all reasonable and fair inquiry before effecting the sale or mortgage, and that he was satisfied by such inquiry, and believed, in paying his money, that it was required for the legal [282] necessities of the joint family, in respect of which the father, as head and managing member, could deal with and bind the joint ancestral estate.

Adopting this rule and applying it to the present case, it is obvious that the Judge below in dealing with it did not appreciate the distinction to be drawn as indicated above, and that his decision does not meet the difficulties of the position. It seems to us therefore that the proper course for us to adopt is to remand the following issues under s. 566 of the Code for determination:—

1. As to the Rs. 1,200, and Rs. 232 antecedent debts, part of the consideration for the sale to the defendants, have the plaintiffs established that those debts were contracted for immoral purposes, and that at the time the sale was impeached the defendants had notice they were so contracted?

2. As to the Rs. 1,500 paid in cash to Ram Dihal by the defendants, have they proved that they made reasonable and proper inquiries before handing it over, and that they did it believing it was required for the legal necessities of the joint family of which the plaintiffs were members, and that Ram Dihal, as managing member and head, required it for purposes of the joint family?

The findings, when recorded, will be returned into this Court, with ten days for objections from a date to be fixed by the Registrar.

NOTES.

[The Full Bench decision in (1909) 31 All., 175 draws a distinction in the matter of onus of proof in cases of alienation of joint property by the father, according as it is supported by justifying circumstances or not. The following were previous decisions on the subject:—(1887) 9 All., 498; (1889) 9 A. W. N., 142; (1891) 13 All., 216; (1902) 4 Bom. L. R., 587; (1903) 16 C. P. L. R., 169.]

[8 All 282]

The 28th April, 1886.

PRESENT:

MR. JUSTICE MAHMOOD AND MR. JUSTICE OLDFIELD.

Muhammad Salim.....Plaintiff

versus

Nabian Bibi and others.....Defendants.*

Civil Procedure Code, s. 13—Res judicata—Dismissal of suit under s. 10, cl. ii, Act VII of 1870 (Court Fees Act)—Dismissal of suit for misjoinder—Dismissal of suit “in its present form.”

The purchaser of certain immoveable property in execution of a decree sued for possession of the same. The suit was dismissed “in its present form” (*ba haisiyat maujuda*), upon two grounds: first, with reference to s. 10 of the Court Fees Act (VII of 1870), that the suit was undervalued and the plaintiff had failed to pay, within the time fixed, additional court-fees required by the Court, and, secondly, for misjoinder. The purchaser subsequently brought a second suit.

[283] *Held*, that the dismissal of the former suit was not, under the circumstances, a decision within the meaning of s. 13 of the Civil Procedure Code such as could bar the second suit by way of *res judicata*.

Per MAHMOOD, J.—The object of s. 10, and indeed of the whole of the Court-Fees Act, is to lay down rules for the collection of one form of taxation, and the rule that statutes which impose pecuniary burdens or encroach upon, or qualify the rights of, the subject, must be strictly construed, applies with special force to such provisions of the Act as provide a penalty, whatever its nature may be. Section 10 is simply a penal clause to enforce the collection of the court fees, and dismissal of a suit under its provisions cannot operate as *res judicata*.

Also *per MAHMOOD, J.*—The condition in s. 13 of the Civil Procedure Code, that the former suit must have been “heard and finally decided,” means that a former judgment proceeding wholly on a technical defect or irregularity, and not upon the merits, is not a bar to a subsequent suit for the same cause of action. It is not every decree or judgment which will operate as *res judicata*, and every dismissal of a suit does not necessarily bar a fresh action. It is necessary also to show that there was a decision finally granting or withholding the relief sought. *Ramnath Roy Chowdhry v. Bhaqbut Mohauptter*, 3 W. R., Act X Rul. 140; *Shokhee Bewah v. Mehdee Mundul*, 11 W. R., 327; *Dullabh Jogi v. Narayan Lakhur*, 4 Bom. H. C. Rep., A. C., 110; *Rungraw Ravji v. Sidhi Mahomed Ebrahim*, I. L. R., 6 Bom., 482; *Fateh Singh v. Lachmi Koor*, 13 B. L. R., Ap., 37; *Roghoonath Mundul v. Jugrut Bundhoo Bose*, I. L. R. 7 Cal., 214, and *Saikappa Chetti v. Rani Kulandapuri Nachiyar*, 3 Mad., H. C. Rep., 84 referred to.

Also *per MAHMOOD, J.*—The words *ba haisiyat maujuda* must be taken as amounting to a permission to the plaintiff to bring a fresh suit, within the meaning of s. 373 of the Civil Procedure Code, and could only mean that the Judge using them in his decree had no intention to decide the case finally, so as to bar the adjudication upon the merits of the rights of the parties in a future litigation between them. The procedure provided by chapter XXII of the Code is not the only manner in which a plaintiff can come into Court for the second time to ask for adjudication upon the merits of his rights, which were not adjudicated upon on the former occasion owing to some technical defect which proved fatal to the former suit. *Ganesh Rai v. Kalka Prasad*, I. L. R., 5 All., 595, dissented from. *Watson v. The Collector of Rajshahye*, 13 Moo. I. A., 160, and *Saliq Ram v. Tirbhawan*, Weekly Notes, 1885, p. 171, referred to.

* Second Appeal No. 1866 of 1885, from a decree of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 2nd June 1885, confirming a decree of Maulvi Ahmad-ullah, Subordinate Judge of Azamgarh, dated the 23rd December 1884.

THE facts of this case are stated in the judgment of MAHMOOD, J.

Mr. C. H. Hill and Mr. Abdul Majid, for the Appellant.

Maulvi Mehdi Hasan and Lala Jokhu Lal, for the Respondents.

Mahmood, J.—I accept the argument addressed to us by Mr. Abdul Majid on behalf of the appellant, and I would decree this appeal, and, setting aside the decisions of both the lower Courts, remand the case to the Court of First Instance for trial on the [284] merits. I will state my reasons for coming to this conclusion. The facts of the case, so far as they are necessary for the disposal of this appeal, are these

Muhammad Salim, the plaintiff-appellant, purchased the property in suit from Muhammad Nabian, under a deed of sale executed on the 4th September 1871; but being probably unable to secure possession of the property, he brought a suit against the vendor and others, who are included as defendants in this suit. On the 9th November 1872, that suit was dismissed on the ground of misjoinder, and also because the suit was under-valued, and the plaintiff had failed to pay, within the time fixed, additional court-fees required by the Court. In the order of dismissal there is no reference to s. 10 of the Court-Fees Act (VII of 1870). The words used are:—"The claim of the plaintiff in its present form is dismissed with costs;" and I think the learned pleader for the respondent has rightly argued that the order must be taken to have been passed under the section above mentioned. From this order an irregular sort of miscellaneous appeal was preferred by the plaintiff, but the appeal was dismissed on the 12th April 1873, when that litigation terminated. Matters stood thus until the 9th September 1884, when the present suit was instituted by the same plaintiff, in respect of the same property, against the same defendants, and practically with the same object as the former suit. The suit has been resisted by the defendants, who, *inter alia*, pleaded that the suit was barred *in limine*, and in support of this plea they relied mainly upon the rule of *res judicata* as enunciated in s. 13 of the Civil Procedure Code. The plea has been accepted by both the lower Courts, and they have concurred in dismissing the suit without going into the merits.

The learned counsel for the appellant contests this view of the law in the argument which he has addressed to us, and he contends, that there has been no real adjudication of the rights of the parties, and therefore neither the plea of *res judicata* nor any other plea in bar of the action applies to the case. I accept this contention. It is a fundamental rule of law that where there is a right there is a remedy—*ubi jus ibi remedium*; and the operation of this maxim cannot be defeated, unless the plaintiff has already had his remedy, or [285] the remedy is barred by some clear and positive rule of law. Here the plaintiff asserts that by his purchase of the 4th September 1871, he has become the owner of the property for which he sues, and if this assertion is true, he has his *jus*, and is entitled to his remedy, which, of course, cannot be granted without a proper adjudication of the merits of his title. There has clearly been no such adjudication in this case, and indeed the learned pleader for the respondents virtually concedes that the judgments of the lower Courts can be supported only upon the ground of the application of s. 13 of the Civil Procedure Code to this suit, though he has also attempted to rely upon other provisions of the law, and especially upon cl. ii of s. 10 of the Court-Fees Act, and contends that the expression in the Munsif's order that the suit was dismissed "*ha haisiyat manjuila*," that is, in the form in which it was brought, will not prevent the operation of the plea of *res judicata*.

It seems to me that much misapprehension prevails in the Mufassal in regard to pleas which bar an action *in limine*, and I may take this opportunity

of expressing my views upon the subject as briefly as I can, especially as they will dispose of the whole argument pressed upon us by the learned pleader for the respondents. The rule that no one ought to be harassed twice, if it be clear to the Court that it is for one and the same cause—*nemo debet bis vexari, si constat curiæ quod sit pro und eadem causâ*—is only a rule of adjective law or procedure which operates as a qualification or limitation of the maxim *ubi jus* remedium*, which I have already quoted. The maxim is the basis of the rule of *res judicata*, which was so fully considered in the celebrated case of the *Duchess of Kingston*, 2 Smith's L. C., 8th ed., p. 784, by Sir WILLIAM DE GREY, C.J., who delivered the unanimous judgment of the learned Judges in that case. The rule explained there has never been materially altered, and I look upon s. 13 of our own Civil Procedure Code as a reproduction of the old rule of law. Now the argument of the learned pleader for the respondents has left the impression upon my mind that he contended that the mere dismissal of a suit will, because it is a decree, operate as *res judicata*. This is not so. Judgments, orders or decrees which operate in bar of the action have been provided for by s. 40 of the Evidence Act (I of 1872), which makes [286] them relevant and thus admissible in evidence. But that section comprehends a vast class of such proceedings which cannot be confounded with the rule of *res judicata*. For instance, we have in the Civil Procedure Code itself the provisions in ss. 43, 103, 214, 310, 371, 373, which, though barring an action *in limine*, must not be confounded with the rule of *res judicata* as enunciated in s. 13 of the Code. On the other hand, it is not every dismissal, though incorporated in a decree, that will operate in bar of a second action; and illustrations of this are to be found in ss. 99 and 99A of the Code itself, which permit a fresh suit in express terms. I have said all this in order to show that it is not every decree or judgment which will operate as *res judicata*, and that every dismissal of a suit does not necessarily bar a fresh action.

Now the question is whether the dismissal of the plaintiff's former suit under s. 10 of the Court-Fees Act can be regarded as *res judicata* barring the present action. The next question is, whether the dismissal of a suit for misjoinder would have any such effect; and lastly, the question is whether the dismissal of the suit "*ba haisyat manjudâ*," that is, in the form in which it was brought, which occurs in the Munsif's order in the former suit dated the 9th November 1872, has any bearing upon the question. I have enumerated these points because they distinctly arise from the contention of the learned pleader for the respondents, and I will deal with them *seriatim*.

First, then, I have no doubt whatsoever that the dismissal of a suit under cl. ii, s. 10 of the Court-Fees Act can never operate as *res judicata* so as to bar a fresh action, where the plaintiff has valued his claim rightly and has paid adequate Court-fees. The section begins by laying down the rule that if a suit has not been properly valued, "the Court shall require the plaintiff to pay so much additional fee as would have been payable had the said market-value or net profits been rightly estimated." And then comes cl. ii, with which we are concerned:—"In such case the suit shall be stayed until the additional fee is paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed." Now what I wish to say in the first place is that the object of these provisions, as indeed of the whole [287] Act, is to lay down rules for the collection of one form of taxation, and this I regard to be the scope of the enactment, though it contains no preamble at all; and I hold it as a fundamental rule of construction that statutes which impose pecuniary burdens, or encroach upon the rights of the subject, or qualify those rights must be construed strictly. The rule applies with especial force to such provisions as provide a penalty, whatever its nature may be. These rules which

are applied by Courts of Justice in England to Acts of Parliament are too well recognised to require any citation of authorities, and I hold that they are in the main applicable to the interpretation of the enactments of the Indian Legislature. This being so, I am of opinion that the dismissal of a suit under s. 10 of the Court Fees Act is intended to be simply a penal clause to enforce the collection of the Court fees, and that if such dismissal is sought to operate as a plea barring a fresh action *in limine* as *res judicata*, we must look elsewhere in the statute-book. The learned pleader for the respondent points to s. 13 of the Civil Procedure Code in support of his contention. But the rule there laid down expressly renders its application subject to the all-important condition that the former suit "has been heard and finally decided." Now, it is not necessary for me to enter into an elaborate explanation as to what these words mean, for, as far back as 1865, two learned Judges of the Calcutta High Court, in *Ramnath Roy Chowdhry v. Bhagbut Mohaputter*, 3 W. R., Act X, Rul. 140, laid down the rule that a former judgment proceeding wholly on technical defect or irregularity, and not upon the merits, is not a bar to a subsequent suit for the same cause of action. Again, another Bench of the same Court, in *Shokhee Bewah v. Mehdee Mundul*, 11 W. R., 327, held that a suit on the same cause of action, and between the same parties as a former suit which was summarily dismissed without being tried on its merits, is not one on a cause of action which "has been heard and determined by a Court of competent jurisdiction in a former suit," and that the latter suit would therefore not be barred. To come closer to the point now before us, we have the judgment of COUCH, C. J., in *Dullabh Jogi v. Narayan Lakhu*, 4 Bom., H. C. Rep., A. C., 110, where the suit had been dismissed on the ground of improper valuation, and where it was [288] held that such dismissal would not operate as *res judicata*, barring a subsequent suit. It is true that these rulings were passed before either the present Civil Procedure Code or the Court-Fees Act existed; but I hold that even under the present law they are applicable to cases like the present. Indeed, the judgment of LATHAM, J., in *Rungrao Raju v. Sidhu Mahomed Ebrahim*, 1. L. R., 6 Bom., 482, is a very recent authority, and there is much in the *ratio decidendi* there adopted which supports my view, though the exact point with which I am now dealing was not decided. Then as to the question of dismissal of the former suit on the ground of misjoinder or multifariousness, I need only cite *Fateh Singh v. Lachmi Koor*, 13 B. L. R., Ap., 37, which is an authority for saying that such a dismissal does not operate as *res judicata*. I may also cite *Roghoonath Mundul v. Juggut Bundhoo Bose*, 1. L. R., 7 Cal., 214, in support of my view.

It remains for me now only to deal with the third point upon which the argument on behalf of the respondent has proceeded. It is true that in the case of *Ganesh Rai v. Kalka Prasad*, 1. L. R., 5 All., 595, two learned Judges of this Court held that the dismissal of the former suit "in the form it was brought" did not amount to permission to sue again, contemplated by s. 373 of the Civil Procedure Code, and such dismissal must be regarded as a "decision" thereof in the sense of s. 13, *Explanation III*, and therefore as a bar to the fresh suit. The words in the original decree in that case appear to have been the same as here—i.e., the claim was dismissed "*ba haisiyat maujuda*," and no doubt much would depend upon the interpretation of these words. With due deference to the learned Judges who decided that case, I confess I am unable to accept the view of the law there enunciated. The report of the case shows that the former suit had been dismissed on the ground that the plaintiff had not filed his certificate of sale with the plaint, that is to say, for a purely technical irregularity with reference to the rule contained in s. 59 of the Civil

Procedure Code. The suit had not been tried upon its merits, and the Munsif took care to qualify his decree by dismissing the suit "*ba haisiyat maujuda*," which cannot, in my opinion, be dealt with as nugatory in interpreting that decree; and if proper effect is given to such words, they can have [289] only one meaning, namely, that the Judge using them in his decree had no intention to decide the case finally, so as to bar the adjudication upon the merits of the rights of the parties in a future litigation between them. Whether such a qualified decree was right or wrong is another matter; but if it was wrong, it might have been a proper subject of complaint on the part of the defendant, against whom the suit was dismissed only as then brought, and he might possibly have taken measures, either by way of review or appeal, to make the decree final in the sense of the dismissal being upon the merits of the claim and not upon technical grounds of form; and if he did not take such measures, the decree must be taken as it stands, unless indeed the circumstances of the case showed that it was in reality a decree dismissing the suit after adjudication of the rights of the parties. But it was not so; and I cannot interpret such a decree as having the force of a final adjudication upon the merits of the issues raised between the parties, so as to operate as *res judicata* when a suit is instituted in proper form and the rights of the parties have to be adjudicated upon. Further, I am not prepared to accept the view upon which the judgment of the learned Judges in the case cited seems to proceed, to the effect that the procedure provided by Chapter XXII of the Civil Procedure Code is the only manner in which a plaintiff can come into Court for the second time to ask for adjudication upon the merits of his rights—merits which were not adjudicated upon on the former occasion owing to some technical defect which proved fatal to the former suit. Nor can I hold that *Explanation III* of s. 13, Civil Procedure Code, upon which the learned Judges in that case relied, would have any bearing upon a case such as the present. What really happened in this case was, that the Munsif in dismissing the suit "*ba haisiyat maujuda*"—in the form in which it was brought—adopted a course long known to the Mufassal Courts in this country under the somewhat inaccurate name of "*non-suit*"—a state of things to which the Lords of the Privy Council referred in *Watson v. The Collector of Rajshahye*, 13 Moo. I. A., 160, which is the leading case upon the subject, and in which the former suit was dismissed by a decree which reserved to the plaintiff the right to bring a future suit. [290] Their Lordships, after stating the law as it then stood, made the following observations with reference to the reservation contained in the former decree:—

"It has been argued that that decree, not having been appealed against by the respondents in the original suit, was, at all events, whether regularly or irregularly made, binding in the particular case, and that it was not competent to the High Court in this suit to question its propriety. Their Lordships are not disposed to take that view. Without laying down positively that in no case could such a reservation be properly made by a Judge in one of the Indian Courts, they think that it was open to the High Court, in a case in which the former decree had been pleaded as *res judicata*, and which all the circumstances under which it was made were before the Court, to consider the propriety of the reservation, and they entirely agree with the Judges of the High Court in thinking that, admitting that the Judge of the lower Court had in any case such a discretion as was exercised in making the reservation in question, that discretion was improperly exercised in the particular case."

These observations leave no doubt in my mind that we can in this litigation examine the decree of the 9th November 1872, in order to satisfy ourselves

as to whether that decree can be properly pleaded as *res judicata* barring the present suit. But, as I have already said, that decree disposed of the suit upon the ground of purely technical defects, which in a just juridical sense cannot be regarded as a final adjudication upon the rights of the parties, so as to furnish a basis for application of the plea known in the Roman law under the name of *exceptio rei judicatae*, which is the foundation of the rule incorporated in s. 13 of our own Civil Procedure Code. And interpreting that section as I do, I adopt the language used by the learned Judges of the Madras High Court in *Saikappa Chetti v Rani Kulandapuri Nachiyar*, 3 Mad., H. C. Rep., 84, when I say that to conclude a plaintiff by a plea of *res judicata*, it is not sufficient to show that there was a former suit between the same parties, for the same matter, upon the same cause of action. It is necessary also to show that there was a decision finally granting or withholding the relief sought. *Res judicata dicitur quæ finem [291] controversiarum pronuntiatione judicis accepit, quod vel condemnatione vel absolutione contingit* (Dig. XLII, Tit. I, Sect. 1). The case of *Ganesh Rai v. Kalka Prasad*, I, L. R., 5 All., 595, already referred to, ignores this fundamental principle of law; and this is not the first occasion upon which my learned brother OLDFIELD and myself have expressed our dissent from that ruling, and we did so before in a case [*Salig Ram v. Tirbhawan*, Weekly Notes, 1885, p. 171], in which the point for determination was very similar to this case.

For these reasons my order in the case is that this appeal be decreed, that the decrees of both the lower Courts be set aside, and that the case be remanded to the Court of First Instance under s. 562, Civil Procedure Code, for trial upon the merits. Costs to abide the result.

Oldfield, J.—I concur in the order of remand.

Case remanded.

NOTES.

[In (1903) 9 C.W.N., 679 the default occurred after evidence was gone into, though before it was closed, and it was held that the dismissal had the effect of *res judicata*.]

[8 All. 291] FULL BENCH.

The 3rd May, 1886.

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, MR. JUSTICE OLDFIELD,
MR. JUSTICE BRODHURST AND MR. JUSTICE TYRRELL.

Queen-Empress
versus
Madho.

*Prosecution, withdrawal from—Government Pleader—Public Prosecutor—
Criminal Procedure Code, s. 494.*

Held by the Full Bench that a person appointed by the Magistrate of the District under s. 492 of the Criminal Procedure Code, to be Public Prosecutor for the purpose of

a particular case tried in the Court of Session has not the power of a Public Prosecutor with regard to withdrawal from prosecution under s. 494.

THIS was a reference to the Full Bench. The point of law referred is stated in the order of BRODHURST, J., by whom the reference was made.

BRODHURST, J.—I called for the record of this case on perusal of the Sessions statement of the District of Cawnpore for the month of December 1885.

[292] Madho Brahman was committed for trial on a charge of murder. After the witnesses for the prosecution had been heard, the Sessions Judge recorded the following note and order:—"The Government Pleader, with the consent of the Court, withdraws from the prosecution, under s. 494, Criminal Procedure Code. Accordingly Madho is acquitted of murder under s. 302, Indian Penal Code." The Government Pleader had apparently been appointed by the Magistrate of the District, under the 2nd paragraph of s. 492 of the Criminal Procedure Code, to be Public Prosecutor merely for the purpose of this case, and as he had not been appointed to be a Public Prosecutor "by the Governor-General in Council or the Local Government," he was not, in my opinion, competent, even with the consent of the Court, to withdraw from the prosecution, and the acquittal of Madho Brahman was, I think, under the circumstances stated, illegal.

There is, however, a passage in a judgment of a Bench of this Court in the case of *Empress v. Rimanand*, Weekly Notes, 1883, p. 199, which seems to support the order of the Sessions Judge. The observations referred to were probably made in the absence of any discussion on that particular point, and it may have been supposed that, as in Bengal, so in these Provinces, all Government Pleaders had been appointed to be *ex-officio* Public Prosecutors; but as the judgment has been reported, and as the matter is one of very considerable importance, I refer the case for orders to the Full Bench.

The following opinion was given by the Full Bench:—

Straight, Offg. C.J. and Oldfield, Brodhurst, and Tyrrell, JJ.—We assume, for the purpose of answering this reference, that there was a withdrawal of the case; and we desire only to say that we are satisfied that the person charged with the prosecution had not the power of a Public Prosecutor, with regard to withdrawal, under s. 494 of the Criminal Procedure Code.

[293] CRIMINAL REVISIONAL.

The 4th May, 1886.

PRESENT :

MR JUSTICE OLDFIELD.

Queen-Empress

versus

Janki Prasad and others.

*Act XLV of 1860 (Penal Code), ss. 99, 353—Warrant of arrest in execution of a decree only initialled by proper officer—Civil Procedure Code, ss. 2, 251—
"Signed"—Right of private defence.*

A warrant issued for the arrest of a debtor under the provisions of s. 251 of the Civil Procedure Code, was initialled by the Munsarim of the Court, sealed with the seal of the Court, and delivered to the proper officer for execution. The debtor forcibly resisted the officer, and was tried and convicted, under s. 353 of the Penal Code, of assaulting a public servant in the execution of his duty as such. In revision, it was contended, with reference to the requirements of s. 251 of the Civil Procedure Code, that the warrant of arrest, having been initialled only, was bad and the officer could not legally execute it, and consequently no offence under s. 353 of the Penal Code had been committed.

Held that this contention could not be allowed, and, although it was proper that the person signing a warrant should write his name in full, it could not be said that because the signature was confined to the initials of the name, it was not the duty of the officer to execute the warrant.

Held also, with reference to s. 99* of the Penal Code, that the act of the accused did not cease to be an offence on the ground that it was done in the exercise of the right of private defence.

THIS was an application for revision of an order of Hakim Muhammad Amjad Ali, Magistrate of the first class, dated the 26th January 1886, which order had been affirmed by the Sessions Judge of Benares, Mr. C. Donovan, on appeal.

The applicants, Janki and five other persons, were convicted by the Magistrate of an offence under s. 353 of the Indian Penal Code. It appeared that

* Sec. 99 :—*First*.—There is no right of private defence against an act which does not

reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.

Second.—There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.

Third.—There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

Fourth.—The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

Explanation 1.—A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant as such, unless he knows, or has reason to believe, that the person doing the act is such public servant.

Explanation 2.—A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows or has reason to believe, that the person doing the act is acting by such direction, or unless such person states the authority under which he acts, or if he has authority in writing, unless he produces such authority if demanded.]

a warrant for the arrest of Janki in execution of a decree had been delivered by the Munsarim of the Court executing the decree to a process-server of the Court called Imam Bakhsh. This warrant was not signed by the Munsarim, but only initialled by him. When Imam Bakhsh proceeded to execute the warrant, he was assaulted by Janki and the other applicants, his friends.

It was contended for the applicants that the arrest was illegal, the warrant not being signed as required by s. 251 of the Civil Procedure Code, and therefore the resistance to the arrest did not constitute an offence under s. 353 of the Indian Penal Code.

[294] Mr. *W. M. Colvin*, for the Applicants.

The *Government Pleader* (*Munshi Ram Prasad*), for the Crown.

Oldfield, J.—This is an application for revision of a conviction under s. 353, Indian Penal Code, for assaulting a public servant in executing a warrant of arrest. The warrant was issued for the arrest of a debtor under the provisions of s. 251, Civil Procedure Code. It was signed with the initials of the Munsarim of the Court, sealed with the seal of the Court, and delivered to the proper officer for execution, who was the officer resisted.

It cannot be disputed that the warrant fulfilled the requirements of s. 251, except in one particular, to which exception is taken, namely, that it was signed with the Munsarim's initials and not his full name, and it is contended that the warrant was, in consequence, bad, and the officer could not legally execute it, and consequently there was no offence committed under s. 353.

I cannot allow this contention. Section 251 directs that the warrant shall be signed by the Judge or such officer as the Court appoints in this behalf. Section 2, referring to the word "signed," is to this effect:—"Signed" includes marked, when the person making the mark is unable to sign his name; it also includes stamped with the name of the person referred to." This paragraph is not very explicit; but assuming it means that the person signing should, if able to write, write his name in full—and certainly it is proper that this should be done in the case of a warrant—I do not hold that because the signature on the warrant is confined to the initials of the name, it was not the duty of the officer to execute it,—and referring to s. 353 of the Penal Code under which the conviction has been made, that is really the question here,—and whether the warrant was such a warrant as it was the duty of the officer receiving it to execute.

I think it was. It was in all other respects in form, and in the particular of the signature it bore what was intended to be the signature of the proper officer, and it bore the seal of the Court, and it was delivered to the proper officer to execute, who received it from the officer authorized to issue the warrant as the warrant of the Court, and I think it became the duty of the officer to whom [295] it was delivered to execute it. He would in fact have failed in his duty in not executing it; and any resistance to him will be resistance to a public servant in the execution of his duty as such. The officer was acting under s. 353 of the Indian Penal Code, in good faith, under colour of his office. I may notice as bearing on the question that the act of the accused does not cease to be an offence on the ground that the act was done in the exercise of the right of private defence, as there is no such right under s. 99, Indian Penal Code, against an act done or attempted to be done by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law. Looking to the facts of the case, I am of opinion that the option of a fine may be given, and I alter the sentence in each case to a fine of Rs. 10, or rigorous imprisonment for one month.

Conviction affirmed.

NOTES.

[See also (1902) 6 C.W.N., 845 ; (1904) 31 Cal., 424.]

[8 All. 295] *

APPELLATE CIVIL.

The 4th May, 1886.

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, AND MR. JUSTICE TYRRELL.

Nura Bibi.....Plaintiff

versus

Jagat Narain and others.....Defendants.*

Mortgage—Joint mortgage—Redemption by one mortgagor—Suit by other mortgagor for his share—Suit for redemption—Act IV of 1882 (Transfer of Property Act), ss. 95, 100—Limitation—Act XV of 1877 (Limitation Act), sch ii, Nos. 134, 148—

Burden of proof.

K and J jointly mortgaged 36 sahamas or shares of an estate to C, giving him possession. C transferred his rights as mortgagee to T and M. In execution of a decree for money against K held by M, K's rights and interests in the mortgaged property were sold, and were purchased by P, whose heirs paid the entire mortgage-debt. R, an heir of J, sued the heirs of P, to recover from them possession of J's sahamas in the mortgaged property, on payment of a proportionate amount of the mortgage-money paid by P. The plaintiff alleged that the mortgage to C had been made forty years before suit. The defendants contended that a much longer period had expired since the date of the mortgage, that forty-one years had elapsed since C transferred his rights as mortgagee, that they had redeemed the property twenty-one years ago and had been since its redemption in proprietary and adverse possession of the sahamas in suit, and that the suit was barred by limitation. Neither party was aware of the date of the mortgage, and neither adduced any proof on the point.

[296] *Held*, applying the equitable principle adopted in ss. 95† and 100 of the Transfer of Property Act (IV of 1882), that the owner of a portion of a mortgaged estate which has been redeemed by his co-mortgagor, has the right to redeem such portion from his co-mortgagor, and a suit brought for that purpose would be in the nature of a suit for redemption, and would naturally fall within the definition of No. 148, sch. ii of the Limitation Act (XV of 1877), and it was not possible for one of two mortgagors, redeeming the whole mortgaged property behind the back of the other, to change the position of that other to something less than that of a mortgagor, or to abridge the period of limitation within which he ought to come in to redeem.

* Second Appeal No. 1098 of 1885, from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 26th June 1885, reversing a decree of Rai Pandit Indar Narain, Munsif of Allahabad, dated the 2nd January 1885.

†[Sec. 95.—Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession.]

Held, therefore, that No. 148 and not No. 134 of sch. ii of the Limitation Act was applicable to the suit.

Umrunnissa v. Muhammad Yar Khan, I. L. R., 3 All., 24, distinguished. *Pancham Singh v. Ali Ahmad*, I. L. R., 4 All., 58, referred to.

Held also that the defendants being admittedly in possession, though the existence of a mortgage as the origin of their possession was conceded by them, it lay upon the plaintiff to give *prima facie* proof of the subsistence of that mortgage at the date of suit, but that assuming that notice was given to the defendants by the plaintiff to produce the mortgage-deed, and that they failed to do so, very slight evidence would have been sufficient to satisfy the obligation which lay on the plaintiff. *Kishan Dutt Ram v. Narendar Bahadoor Singh*, I. L. R. 3. Ind. Ap., 85, referred to.

THE facts of this case were as follows :—Two Muhammadan ladies, named Khubau Bibi and Jan Bibi, owned respectively 31 sahams or shares and 5 sahams or shares of a certain estate. They jointly mortgaged the 36 shares to one Chitu, giving him possession. Chitu transferred his rights as mortgagee to persons called Teja Bibi and Makhdum Bakhsh. Makhdum Bakhsh held a decree for money against Khubau Bibi, and he caused her rights and interests in the property to be put up for sale in execution of that decree, and the same were purchased by one Panna Lal, whose heirs paid the mortgage-debt. The plaintiff in this case was the heir of Ramzan, one of the heirs of Jan Bibi. She claimed to recover from the heirs of Panna Lal possession of Jan Bibi's 5 sahams, on payment of a proportionate amount of the mortgage-money paid by Panna Lal.

The plaintiff alleged that the mortgage to Chitu had been made forty years before suit.

The defendants set up as a defence that a much longer period than forty years had expired since the date of the mortgage; that [297] forty-one years had passed since Chitu had transferred his right as mortgagee; that they had redeemed the mortgage 21 years ago, and had been since its redemption in proprietary and adverse possession of the shares in suit; and that the suit was barred by limitation.

* Art. 148 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
Against a mortgagee to redeem or to recover possession of immoveable property mortgaged.	Sixty years ...	When the right to redeem or to recover possession accrues. Provided that all claims to redeem, arising under instruments of mortgage of immoveable property situate in British Burma, which have been executed before the first day of May 1863, shall be governed by the rules of limitation in force in that province immediately before the same day.]

† Art. 134 :—

To recover possession of immoveable property conveyed or bequeathed in trust, or mortgaged and afterwards purchased from the trustee, or mortgagee for a valuable consideration.	Twelve years ...	The date of the purchase.]
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The Court of First Instance (Munsif of Allahabad) gave the plaintiff a decree, applying No. 148, sch. ii of the Limitation Act, and holding as follows on the question of limitation :—

"The plea of limitation which has been set up is, in the opinion of the Court, untenable. To render a claim barred by limitation it is necessary that full sixty years should elapse after the expiry of the term of the mortgage. The defendants do not know when the mortgage was originally made to Chitu. The plaintiff also is unaware of this. The burden of proving that sixty years have elapsed, however, rests with the defendants; but they have failed to adduce any proof and therefore the plea set up by them fails. The burden of proof is thrown on the defendants for two reasons— (i) because they affirm a fact which the plaintiff denies, and (ii) because the burden of proof rests with the party which would be the loser if no evidence were given by either party. The law takes great care that mortgaged property should not pass from the hands of the original owners to the hands of strangers. The defendants try to create their proprietary title in the property, and therefore the burden of proof should be thrown on them."

The defendants appealed, contending that the suit was governed by No. 134, and not No. 148, of the Limitation Act; and that the burden of proof as to limitation was on the plaintiff, and not on them.

The Lower Appellate Court (District Judge of Allahabad) held on these points as follows :—

"With regard to the first of these two contentions, the appellants seek to show that art. 148 applies only to an original mortgagee, and not to others to whom a mortgage has been transferred, and that as the defendants-appellants, if not, as they assert, proprietors, must be held to have purchased the mortgage from the [298] mortgagees, the case comes under art. 134, and is governed by the twelve years' period of limitation. No authority has been cited in support of this contention, and I am unable to see that the plaintiff-respondent is other than the owner of an equity of redemption, suing a mortgagee to redeem or recover possession of immoveable property, or that the circumstances, as stated above, deprive the plaintiff-respondent of the longer period of limitation prescribed by art. 148.

"But on the second point I hold the lower Court's finding to have been mistaken. The *onus* lies on the plaintiff, and not on the defendants-appellants. I quite concur in the finding that the defendants cannot be said to have had proprietary possession. They purchased the equity of redemption of Khuban's shares only, not of those of Jan Bibi's; and the fact that the mortgage was executed jointly by Khuban and Jan, and that the appellants paid off the whole, does not seem to give them any better position than that of mortgagees in respect of Jan Bibi's shares. They acquired in those shares the right of the mortgagee and nothing more.

"But it is clearly the duty of the plaintiff to prove that the suit has been instituted within sixty years of the time when the right to redeem accrued. Her suit is possible only under art. 148, and she has therefore come into Court on the averment implied in its conditions: neither the fact that the averment is challenged by the defendants, or that they admit a mortgage, seems to me to shift the burden on to them.

"The point was not made the subject of a clear issue by the lower Court, though considered in its decision and presumably argued before it. The plaintiff-respondent's pleader has been offered, and has declined, further opportunity of adducing proof. It is apparent that the plaintiff-respondent is in fact unable to give such proof. She stated in her plaint that the original mortgage took place

forty years ago, but the defendants-appellants have proved that forty-one years have elapsed since the transfer by Chitu, the original mortgagee, to Teja Bibi and Makhdüm Bakhsh.

"Under these circumstances, I am of opinion that the plaintiff-respondent's suit must fail."

[299] The plaintiff appealed to the High Court.

Pandit *Sundar Lal*, for the Appellant.

Babu *Jogindro Nath Chaudhri*, for the Respondents.

Straight, Offg. C. J., and Tyrrell, J.—We think the lower Courts were right in holding that the period of limitation applicable to a suit of this nature is that provided by art. 148 of Act XV of 1877. It was so decided by *PONTIFEX, J.*, in an unreported Calcutta case mentioned on page 162 of Mr. Mittra's excellent work on Limitation; and our only difficulty is a Full Bench ruling of this Court in *Umrnunissa v. Muhammad Yar Khan*, I. L. R., 3 All., 24, which at first sight appears to be at variance with this view. Upon examination, however, it will be seen that the applicability of art. 148 to the facts of that case was never raised or considered, the arguments and *ratio decidendi* being confined to the question of whether, assuming art. 144 to supply the limitation, there had been adverse possession on the part of the defendants which would defeat the plaintiff's suit. It was held that there had not; but beyond this the decision did not and could not go, and the point now before us may therefore be regarded as *res integra*. In the ruling of *PONTIFEX, J.*, above adverted to, that learned Judge speaks of the co-mortgagor who redeems the entire mortgage as "standing in the shoes of the mortgagee" in respect of such portion of the redeemed property as belongs to the other mortgagor, and this Bench decided much to the same effect in *Pancham Singh v. Ali Ahmad*, I. L. R., 4 All., 58. The equitable principle recognised in these rulings is now embodied in s. 95 of the Transfer of Property Act, which declares that "where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors for his proportion of the expenses properly incurred in so redeeming and obtaining possession." What that charge carries with it is explained in s. 100 of the same statute, which says that, where "by operation of law the immoveable property of one person is made security for the payment of money to another, all the provisions hereinbefore contained as to a mortgagor shall, as far as may be, apply to the owner of such property, and the provisions of ss. 81 and 82 and all [300] the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property shall, so far as may be, apply to the person having such charge." We only refer to these provisions, which cannot govern the mortgage in the present case, which was long antecedent to the Transfer of Property Act, by way of analogy; but applying the equitable principle that they adopt, the effect is the same, namely, that the owner of a portion of a mortgaged estate, which has been redeemed by his co-mortgagor and in its entirety, has the right to redeem such portion from his co-mortgagor, and a suit brought for that purpose will be in the nature of a suit for redemption. Such a suit naturally falls within the definition of art. 148 of Act XV of 1877, and we fail to appreciate how it is possible for one of two mortgagors, redeeming the whole mortgaged property behind the back of the other, to change the position of that other to something less than that of a mortgagor, or to abridge the period of limitation within which he ought to come in to redeem.

The only remaining question is as to whether the learned Judge rightly held the burden of proof to be on the plaintiff. The defendant is admittedly in possession, and, in our opinion, though the existence of a mortgage as the origin

of such possession was conceded by him, it lay upon the plaintiff to give *prima facie* proof of the subsistence of that mortgage at the date of suit.—*Kishan Dutt Ram v. Narendar Bahadoor Singh*, L. R., 3 Ind. Ap., 85. We assume that notice was given to the defendants by the plaintiff to produce the mortgage-deed, and that they failed to do so, and under these circumstances very slight evidence would have been sufficient to satisfy the obligation which lay on the plaintiff. But she produced none; and though offered an opportunity to bring forward further evidence, her pleader declined to do so. Under these circumstances, we think the learned Judge below was right, and the appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[Similar decisions were given by the Allahabad High Court in (1889) 11 All., 423 ; (1892) 14 All., 1 F.B. ; see also (1892) 15 Mad., 331 ; (1912) 12 A.L.J., 674.]

[301] *The 5th May, 1886.*

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, AND MR. JUSTICE TYRRELL.

Paraga Kuar.....Judgment-debtor

versus

Bhagwan Din and another.....Decree-holders.*

Execution of decree—Civil Procedure Code, s. 230—Meaning of “granted.”

Under s. 230 of the Civil Procedure Code, after a decree is twelve years old, there is a prohibition against its being executed more than once, *i.e.*, an application for execution should not be granted if a previous application has been allowed under the provisions of that section.

The mere filing of a petition with the result that the application contained in it is subsequently struck off, is not “granting” an application within the meaning of s. 230 of the Code, and ss. 245, 248 and 249 show that there is a broad distinction between admitting an application for the purpose of issuing notice to the other side and of hearing the objections that may be urged, and a decision of the Court as provided in s. 249.

In 1865 a decree was passed for a sum of money payable by yearly instalments for a period of sixteen years. Down to March 1877, various amounts were paid on account of the decree. In that month an application was made for execution of the decree, the result being an arrangement for liquidation of the amount then due, which was confirmed by the Court. A second application for execution was made on the 9th March 1881, the decree then being more than twelve years old. All that was done with reference to this application was that notice to appear was issued to the judgment-debtor's representatives, and subsequently a petition was filed notifying that an arrangement had been effected, under which a certain sum had been paid by one of the said representatives in satisfaction of the claim against him, and that the other had agreed to pay the balance by yearly instalments. Upon this, the application for execution was struck off. On the 5th March 1883, another application for execution was made, notice to appear was issued, and after this notice a petition was put in intimating that an arrangement had been come to, and praying that execution might be postponed, whereupon the application was struck off. Again, on the 31st March 1884, the decree-holder applied once more for execution of the decree.

* First Appeal No. 192 of 1885, from an order of W. Blennerhassett, Esq., District Judge of Cawnpore, dated the 4th July 1885.

Held that neither the previous application of the 9th March 1881, nor that of the 5th March 1883, could properly be said to have been "granted" within the meaning of s. 230 of the Civil Procedure Code, and, under these circumstances, the decree, though twelve years old and upwards, was not barred by that section and the application for execution should be allowed.

THE facts of this case are sufficiently stated in the judgment of **Straight, Offg. C. J.**

Mr. *W. M. Colvin* and *Munshi Hanuman Prasad*, for the Appellant.

Pandit Bishambar Nath and *Munshi Kashi Prasad*, for the Respondents.

[302] **Straight, Offg. C. J.**—On the 26th August 1865, one *Bhagwan Din*, the respondent before us, obtained a decree against a person named *Hattu Singh*. It was an instalment decree for Rs. 3,214-14-2, payable by yearly instalments, commencing in the year 1866, and extending to the year 1882, in all a period of 16 years. In the year 1870 the judgment-debtor *Hattu Singh* died leaving behind him a widow named *Manni Kuar* and two daughters, one of whom had a son named *Jai Jodhan Singh*. He also left among his heirs a nephew named *Zalim Singh*, whose widow, named *Paraga Kuar*, is the appellant before us.

Now down to March 1877, various amounts had been paid on account of the decree, and on the 6th March of that year, an application for execution was made against *Manni Kuar*, the widow of the deceased *Hattu Singh*. The result of these proceedings was, that an arrangement was come to on the 11th May 1877, for liquidation of the amount then due, and this arrangement was confirmed by the Court on the 9th June 1877. The next application for execution, with which we have to do, was made on the 9th March 1881. At this time the decree was more than 12 years old. There was an office report made to the effect that *Manni Kuar* had died, and therefore notice was issued to *Jai Jodhan Singh* and *Paraga Kuar*, widow of *Zalim Singh* above-named, surviving heirs of the judgment-debtor. On the 6th April 1881, it was notified to the Court that another arrangement had been effected under which a certain sum had been paid by *Jai Jodhan Singh* in satisfaction and discharge of the claim against him, and that the balance of Rs. 800 had been agreed to be paid by *Paraga Kuar* by yearly instalments. On the 5th March 1883, there was another application for execution against *Paraga Kuar*, which was the last preceding application for execution to that which we have to deal with, namely that of the 31st March 1884, and what is prayed by the decree-holder is, that the execution of the decree of 1865 should be allowed by attachment and sale of the property of *Paraga Kuar*.

That application has been granted by the lower Court, and *Paraga Kuar* prefers this appeal. The only real ground on which we are asked to disturb its order is, that the original decree having [303] been more than 12 years old at the date of the two last applications for execution, it is barred by limitation. Looking at the provisions of s. 230 of the Civil Procedure Code, it would appear that, after a decree is 12 years old, there is a prohibition against its being executed more than once, that is, an application for execution should not be granted if a previous application had been allowed under the provisions of that section.

Now the test to apply to this case is, to see whether the last of those applications preceding the application the granting of which is the subject of appeal, was *granted*, because, if granted, the prohibition referred to in the section applies. The last preceding application was that of the 5th March 1883, and all that seems to have been done was, that application was made,

notice to appear was issued, and after this notice a petition was put in intimating that some arrangement had been come to, and praying that execution might be postponed, whereupon the application was struck off. It appears to me impossible to say that the mere filing of a petition with the result that the application contained in it is subsequently struck off, is granting an application within the meaning of s. 230 of the Code; and looking to the provisions contained in ss. 245, 248 and 249, it also appears to me that there is a broad distinction between admitting an application for the purpose of issuing notice to the other side and of hearing the objections that may be urged, and a decision of the Court as provided in s. 249. In other words, it is one thing to ask for execution of a decree, and another to have such application granted. I therefore think the last preceding application here was not one that can be said to have been "granted." The same may be said as to the application of the 9th March 1881; nothing more was done as to that than as to the application of the 5th March 1883. Therefore that also is not within the prohibition contained in s. 230.

Under these circumstances the decree, though twelve years old and upwards, is not barred by s. 230 of the Civil Procedure Code, and therefore the plea of limitation fails on that ground.

It has been suggested that the Judge has not tried the question whether Paraga Kuar was a party to the compromise of 1881; [304] but no such objection has been put forward by her in her grounds of appeal. Her plea was that the execution of the decree was barred by limitation, and, though this matter has been before this Court in another shape in appeal from the District Judge, and is again before us, no such allegation has ever been formally made on her part, nor has it been entered in the memorandum of appeal. Under these circumstances we should not be justified in interfering with the order of the lower Court or delaying the execution of the decree. The appeal is dismissed with costs.

Tyrrell, J.—I concur.

Appeal dismissed.

NOTES.

[The words 'and granted' have been omitted in sec. 48 C.P.C., 1908.

As regards the meaning of 'granted' in the C.P.C., 1882, sec. 230, see also (1886) 8 All., 536; (1890) 12 All., 571; (1896) 18 All., 482; (1803) 15 All., 198.]

[8 All. 304]

CRIMINAL REVISIONAL.

The 8th May, 1886.

PRESENT :

MR. JUSTICE BRODHURST.

Queen-Empress

versus

Dhundi.

Attempt to cheat—Act XLV of 1860 (Penal Code), ss. 417, 511.

In a prosecution for an attempt to cheat, under ss. 417, 511 of the Penal Code, the accused was charged and convicted of having at the central octroi office made false representations as

to the contents of certain *kuppas* (skin vessels), the object of which was to obtain a certificate entitling him to obtain a refund of octroi duty. Prior to granting the certificate, the octroi officers examined the contents of the *kuppas* and found that the representations of the accused regarding them were untrue. In consequence of this discovery no certificate was given to him, and he was charged and convicted as above-mentioned. The procedure necessary for obtaining a refund of octroi duty was that the central office, on satisfying itself that the articles produced were of the nature stated, would grant a certificate, which certificate would have to be indorsed by the outpost clerk when he passed the goods (on which refund was claimed) out of the town, and the owner would have to take back the certificate so indorsed to the central office and present it to be cashed.

Held that even assuming the accused to have falsely represented the contents of the *kuppas* as alleged, he had not completed an attempt to cheat, but had only made preparation for cheating, and that the conviction must therefore be set aside.

THIS case was reported to the High Court for orders by Mr. W. Young, Sessions Judge of Agra. The facts were set forth in the Judge's reference as follows :—"The applicant for revision, Dhundi, Ahir, is a servant of Kallu Mal, Bania, of Mathura, and the case against him is that he, at the central octroi office in Mathura, on the 16th December 1885, falsely represented three *kuppas* (skins), which were there and then produced, to contain ghi, [305] whereas only two contained ghi and the third contained oil, and that the object of this false representation was to obtain a certificate entitling him to a refund of octroi duty on three *kuppas* of ghi, which would have amounted to 30 annas, instead of the proper refund, which would have been 25 annas only. The prosecution alleges that, prior to granting the refund certificate, the octroi officers took the precaution of examining the contents of the three *kuppas*, and found that, in fact, two only contained ghi and the third oil. Whereupon Dhundi was charged with attempt to cheat, and was tried on that charge, and finally was convicted and sentenced to pay a fine of Rs. 4, or, in default, to suffer one month's rigorous imprisonment. Dhundi denies the facts, and says that he never alleged the three *kuppas* to contain ghi, and I notice that the prosecution produce no invoice in his master's writing, detailing the *kuppas* as three *kuppas* of ghi. This is a considerable defect in the proof, for it is usual to send such invoices when goods are presented for refund of octroi. I notice also that accused alleges enmity between the octroi superintendent and his (accused's) master. However, I should not refer this case if it had been solely the facts which were doubtful. I think that even supposing the fact to have been that the accused misrepresented the contents of the *kuppas* as he is said to have done, he yet had not completed an attempt to cheat, but only had made preparation for cheating. The procedure in case of a refund of octroi at Mathura is, that the central office, on satisfying itself that the articles produced are what they are said to be, grants a certificate, which certificate is indorsed by the outpost clerk when he passes the goods (on which refund is claimed) out of the town. The owner takes back the certificate so indorsed to the central office, and here these certificates are encashed once a week, viz., on Saturdays. Now, even supposing that Dhundi by false representations had succeeded in getting a refund certificate for 30 annas, yet he still had a *locus penitentiae*. He had to get it indorsed at the outpost, and had to present it on the following Saturday for encashment before he finally lost all control over it, and could no longer prevent the completion of the offence. Before that time (*i. e.*, the time of presentation on a Saturday), he might have altered his mind even from prudence, if not from penitence, and torn up the certificate, [306] and no cheating could then have happened. The definition of cheating is so comprehensive that I must add a sentence or two with reference to the argument that the mere inducing the clerk to do a thing (*viz.*, to give the

certificate), which he would not have done unless so deceived, would amount to cheating. It is to be noted that the act or omission must be one that causes, or is likely to cause, damage to such person, damage or loss, &c. But here the mere certificate by itself and until indorsed, and until further action had been taken upon it, could not possibly have caused loss or damage to any person. And further, as a matter of fact, no such certificate was delivered to Dhundi. For these reasons, I think the decision below wrong in law, and would recommend its reversal."

Brodhurst, J.—For the reasons stated by the Sessions Judge, I annul the Deputy Magistrate's finding and sentence of the 29th February 1886, and direct that the fine, if realized, be refunded.

Conviction set aside.

NOTES.

[See also (1900) 25 Bom., 90.]

[8 All. 306]

APPELLATE CRIMINAL.

The 11th November, 1886.

PRESENT :

MR. JUSTICE STRAIGHT AND MR. JUSTICE TYRRELL.

Queen-Empress

versus

Ram Saran and others.

Accomplice—Evidence—Corroboration—Act I of 1872
(*Evidence Act*), ss. 114 (b), 133.

The law in India, as expressed in s. 133 and s. 114 of the Evidence Act, and which is in no respect different from the law of England on the subject, is that a conviction based on the uncorroborated testimony of an accomplice is not *illegal*, that is, it is not *unlawful*; but experience shows that it is unsafe, and hence it is the practice of the Judges, both in England and in India, when sitting alone, to guard their minds carefully against acting upon such evidence when uncorroborated, and, when trying a case with a jury, to warn the jury that such a course is unsafe. There must be some corroboration independent of the accomplice, or of a co-confessing prisoner, to show that the party accused was actually engaged directly in the commission of the crime charged against him. A second accomplice does not improve the position of the first, and, if there are two, it is necessary that both should be corroborated. The accomplice must be corroborated not only as to one but as to all of the persons affected by the evidence, and corroboration of his evidence as to one prisoner does not entitle his evidence against another to be accepted without corroboration. *R. v. Webb*, 6 C. and P. 595, *R. v. Dyke*, 8 C. and P. 261, *R. v. Addis*, 6 C. and P. 388, and *R. v. Wilkes*, 7 C. and P. 272, referred to.

[307] The possession of property taken from a murdered person is not adequate corroboration of the evidence of an accomplice charging such person in possession with participation in the murder; thought it would no doubt be corroboration of evidence that the prisoner participated in a robbery, or that he had dishonestly received stolen property.

In the trial of *R*, *S* and *M*, upon a charge of murder, the evidence for the prosecution consisted of (i) the confession of *P*, who was jointly tried with them for the same offence, (ii) the evidence of an accomplice, (iii) the evidence of witnesses who deposed to the discovery in *R*'s house of property belonging to the deceased, and (iv) the evidence of witnesses who deposed that, on the day when the deceased was last seen alive, all the prisoners were seen together near the place where the body was afterwards found.

Held that there was no sufficient corroboration of the statements of the accomplice or of the co-confessing prisoner *P*.

THE appellants in this case, Ram Saran, Piru, Mohib Alli and Ram Ghulam were convicted by Mr. G. J. Nicholls, Sessions Judge of Ghazipur, of the murder of a boy called Gur Prasad, and were sentenced to death, the order of the Sessions Judge being dated the 18th August 1885. The facts of the case so far as they are material for the purposes of this report, are stated in the judgment of STRAIGHT, J.

The Appellants were not represented.

The *Public Prosecutor* (Mr. C. H. Hill), for the Crown.

STRAIGHT, J.—In this case four persons—Ram Saran, Piru, Mohib Ali, and Ram Ghulam—have been convicted by the Sessions Judge of Ghazipur of the murder of a boy named Gur Prasad, son of Damri, *Bania*, on the 16th June 1885. All the convicts have appealed, and the case has also come in the ordinary course before us for confirmation of the sentences of death which have been passed on the appellants. The case is one which has caused my brother TYRRELL and myself great anxiety, and has occupied much of our time, and looking to the care with which the Judge tried it, and to the circumstance that the assessors concurred with him in his verdict, we have hesitated long before arriving at the conclusion, as regards some of the appellants, that the convictions cannot be sustained.

The circumstances of the case are shortly these. On Tuesday, the 16th June, the deceased boy, Gur Prasad, was staying with his sister at Sikandarpur, and on that day he left her house, and [308] neither by her eyes nor by the eyes of any other of his relatives was he ever again seen alive. At the time he left, he was wearing certain articles of jewellery, and his sister's attention having been aroused at about noon by his non-appearance, she inquired after him, but in consequence of his father being absent at the time, no serious steps were taken to bring his disappearance to the notice of the authorities. It was not until Thursday, the 18th, that complaint was made to the police, when at the instance of the sister, they were informed that the boy was missing, and that no trace of him could be found. On the same day, Piru, one of the accused, was sent for, but he does not appear to have given any information at that time. He was warned that he had better give information or he would be sent before the Magistrate, and was then allowed to go to his home. On the 19th he was again sent for, but no serious information was then obtained from him; but on the 20th, having been again brought to the thanah, and in consequence of information then given by him, the police went to the house of the accused Ram Ghulam. There, according to the evidence of two witnesses for the prosecution, after some hesitation, Ram Ghulam produced from a hole in the corner of his room certain of the articles of jewellery which the boy was wearing when he left his sister's house on the 16th June, and which must have been taken from his body. So that, as regards Ram Ghulam we have this evidence, that upon information given by Piru, the police went to his house which was searched, and that he there dug up these ornaments. Following on Piru's statement regarding the ornaments, the house in which he himself lived was examined, and under the earthen floor a grave was discovered, and

therein undoubtedly was found the body of the unfortunate lad Gur Prasad. At this stage it appears that Ram Ghulam and Piru were taken into custody, and so remained during all the subsequent proceedings.

Now it seems that all the four appellants, together with one Sukhai, Teli, were intimate friends and acquaintances; that with the exception of Ram Saran they all belonged to a disreputable class known as "Mokhs;" and that they were in the habit of dancing and frequenting public places together. On the 30th June Sukhai made a long statement to the Deputy Magistrate, not the Magistrate who was subsequently engaged in the inquiry—**[309]** by which he implicated not only himself and Piru, but also Ram Ghulam, Ram Saran and Mohib Ali, the other appellants, already mentioned as having been concerned in the boy's murder. On the 1st July, Piru also made a statement bearing a singularly close resemblance to that made by Sukhai, and for the purpose of this judgment, it may be at once remarked here that the two accounts circumstantially coincide in representing that Sukhai and Piru and the other three appellants were engaged in the murder of Gur Prasad on the night of Tuesday, the 16th June. In addition to these materials for arriving at a conclusion in the matter, there is also the evidence of two men, one Ishri, Mali, and the other Rang Lal, to the effect that Rang Lal, about noon on the 16th, saw Piru, Sukhai, and Mohib Ali, with the boy at Sukhai's door, and that Ishri, on the evening of the 16th instant, before sunset, saw the four prisoners, with Sukhai, sitting in Shamshera's *dalan*, i.e., near the place where the body was afterwards found. Now these circumstances, so far as my memory serves me, exhaust the matters proved on behalf of the prosecution, and upon these materials the Judge has convicted all the four appellants. I may, in passing, observe that Piru, who pleaded guilty in the Sessions Court, was nevertheless tried jointly with the other accused, and therefore his confession made before the Deputy Magistrate on the 1st July, and subsequently repeated before the Judge, might be taken into consideration as against the other prisoners.

With regard to Piru, his case may be dismissed at once. The Judge, upon the materials before him, very properly convicted Piru of murder; and that he took part in the commission of the crime there cannot be a moment's doubt. While the evidence as to the cause of death is not strictly proved as regards the other accused, Piru's own admission as to the mode in which death was caused is clear against himself, so that he cannot take advantage of the fact that there is no scientific proof of the cause of death. With regard to the other three appellants the matter stands thus. As to Ram Ghulam, the case for the prosecution is supported by the confession of Piru, by the evidence of Sukhai, who received a pardon and was called as a witness, by the circumstance that on the 20th June, some ornaments belonging to Gur Prasad were **[310]** discovered at his house, and by the evidence of one of the two witnesses to whom I have referred, who says that he saw Ram Ghulam with the other prisoners on the evening of the 16th instant before sunset. That is the whole of the case against him; and, with the exception of the digging up the ornaments, it is the same against Ram Saran and Mohib Ali and it raises crisply and clearly the question as to whether, upon the materials which I have described, we can sustain the convictions and direct that the capital sentences be carried out.

Now I cannot help saying that there is a great deal of loose talk in Courts of Justice regarding the precise position of an accomplice witness, and the legal effect of a conviction based upon such a witness's evidence. The law in this country, as expressed in ss. 133 and 114 of the Evidence Act, is in no respect

different from the law of England. It simply reproduces a rule of practice which the English Courts have recognized, time out of mind, and which, I may add, their tendency of late years has been to apply with great strictness. The rule is this. A conviction based on the uncorroborated testimony of an accomplice is not *illegal*, that is, it is not *unlawful*. But experience teaches that it is not safe to rely upon the evidence of an accomplice unless it is corroborated, and hence it is the practice of the Judges, both in England and in India, when sitting alone, to guard their minds carefully against acting upon such evidence when uncorroborated; and, when trying a case with a jury, to warn a jury that such a course is unsafe. Further, not only is it necessary that the evidence should be corroborated in material particulars, but the corroboration must extend to the identity of the accused person; and in this connection I may refer to the case of *R. v. Webb*, 6 C. and P., 595, in which WILLIAMS, J., said:—"You must show something that goes to bring home the matter to the prisoners. Proving by other witnesses that the robbery was committed in the way described by the accomplice is not such confirmation as will entitle his evidence to credit, so as to affect other persons. Indeed, I think it is really no confirmation at all, as every one will give credit to a man who avows himself a principal felon, for at least knowing how the felony was committed. It has been always [311] my opinion that confirmation of this kind is of no use whatsoever." Then again, in the well-known case of *R. v. Dyke*, 8 C. and P., 261, GURNEY, B., said:—"Although in some instances it has been so held, you will find that in the majority of recent cases it is laid down that the confirmation should be as to some matter which goes to connect the prisoner with the charge. I think that it would be highly dangerous to convict any person of such a crime on the evidence of an accomplice unconfirmed with respect to the party accused." So in the case of *R. v. Addis*, 6 C. and P., 388, PATERSON, J., expressed a similar view. Again the *dicta* of Lord ABINGER have frequently been referred to in cases of this kind, and are cited in Taylor's work on Evidence as crisply and fully representing the latest principles which the Courts in England have applied in dealing with this question. Upon the opening of the case he said:—"I am clearly and decidedly of opinion, and always have been, and always shall be, that there must be a corroboration as to the particular prisoner;" and when he came to sum up the case to the jury, he said:—"I am strongly inclined to think that you will not consider the corroboration in this case sufficient. No one can hear the case without entertaining a suspicion of the prisoner's guilt, but the rules of law must be applied to all men alike. It is a practice which deserves all the reverence of law, that Judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance. Now, in my opinion, that corroboration ought to consist in some circumstance that affects the identity of the party accused." He then goes on to make a remark which is most thoroughly applicable to cases of the kind which occur in this country:—"A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only of the truth of that history, without identifying the persons, that is really no corroboration at all. If a man were to break open a house, and put a knife to your throat, and steal your property, it would be no corroboration that he had stated all the facts correctly; that he had described how the person did put the knife to the throat, and did steal the property; it would not at all tend to show that the [312] party accused participated in it. Here you find that the prisoner and the accomplice are seen together at the public-house. If they were found together under circumstances that were extraordinary, and where the prisoner was

not likely to be unless there were concert, it might be something. But he lives within one hundred and fifty yards, and there is nothing extraordinary in his being there, and he left when they were shutting up the house. It is perfectly natural that he should have been there, and have left when he did. The single circumstance is, that the prisoner was seen in a house which he frequents, where he may be seen once or twice a week, and there the case ends against him: all the rest depends on the evidence of the accomplice. The danger is, that when a man is fixed, and knows that his own guilt is detected, he purchases impunity by falsely accusing others. I would suggest to you that the circumstances are too slight to justify you in acting on this evidence." The same view was expressed in *R. v. Wilkes*, 7 C. and P., 272, by ALDERSON, B., and in many other rulings.

So that, as I understand the rule, there must be some corroboration independent of the accomplice or, as in the present case, of the accomplice and the co-confessing prisoner, to show that the party accused was actually engaged directly in the commission of the crime charged against him. I may add that it is of no value and makes no difference if there are two accomplices. A second accomplice does not improve the position of the first, nor does the fact that there are two make it unnecessary that both should be corroborated. Again, the accomplice must be corroborated, not only as to one, but as to all, of the persons affected by the evidence, and because he may be corroborated in his evidence as to one prisoner, it does not justify his evidence against another being accepted without corroboration.

These principles seem to me to be embodied in the Evidence Act in force in this country, and in applying them to the case before us, the question is—what is the corroboration here, and is there any independent evidence corroborating the statements of Piru and Sukhai in such a manner as to prove satisfactorily that [313] the other three appellants were actually engaged in the murder of Gur Prasad?

First with reference to Ram Ghulam there is the evidence of Ishri, *Mali*, and of him alone, who says that in the evening, about an hour before sunset on the 16th June, he saw the four prisoners in Shamshera's *dalan*. If that is corroboration of the kind that is necessary, it does corroborate the statements of Piru and Sukhai, both of whom say that shortly before sunset the prisoners were sitting with the boy Gur Prasad in Shamshera's *dalan*. But is it sufficient corroboration? It is conceded that the prisoners were in the habit of going about together. There is nothing remarkable in this; it was an occurrence which might have been observed any day: and I may remark that it renders the witness's evidence liable to some suspicion; for if the prisoners were so continually together, why should he have noticed their being together upon this particular occasion?

The only other circumstance affecting Ram Ghulam, is that he produced the jewels from the corner of his house on the afternoon of Saturday the 20th June. I have given much anxious consideration and reflection to the question whether this can be regarded as corroboration showing that Ram Ghulam participated in the murder. It would no doubt be corroboration of the evidence of an accomplice that the prisoner participated in a robbery, or that he has dishonestly received stolen property, but, in my opinion, it can be carried no further. It is quite within the bounds of possibility that a murderer might hand the proceeds of his crime to a person who might be found in possession of them and be in guilty possession of them to the extent of knowing they were stolen; but it requires a very long and dangerous leap to arrive at the conclusion that the possession of the property taken from a murdered person

is adequate corroboration of the evidence of an accomplice, charging such person in possession with participation in a murder. Under these circumstances, I have come to the conclusion, though not without much doubt and hesitation, that there is no proper corroboration of the statements of the accomplice, Sukhai, or of the co-confessing prisoner, Piru, sufficient to satisfy the requirements of the law, and that for this reason the appeal of Ram Ghulam must be allowed and he must stand acquitted.

[314] It follows as a necessary consequence that, if the case for the prosecution as against Ram Ghulam fails, it must fail as against the other two accused, Ram Saran and Mohib Ali; for neither of them was found in possession of any property whatever belonging to Gur Prasad, and there is no other evidence. I have only a few words to add as to the remarks made by the learned Judge, towards the close of his judgment, in regard to the materials upon which he bases his conclusions. He says:—"These narratives are corroborated by the finding of the corpse buried in Piru's house"—which is undoubtedly strong evidence against Piru,—“by the finding of the ornaments hidden on the premises of Ram Ghulam”—upon this point I need not repeat the observations I have already made—“by the evidence of Rang Lal and of Ishri, *Mali*,”—as to which again I need not repeat what I have said—“by the association of all five, or of all but Sukhai, in the lease of the grove from Misri Lal, a grove which adjoins that of Damri Lal, where the boy had gone for mangoes,”—a fact of very little value—“by the neglect of Shamsheera, brother of Piru, a town chaukidar, to give his message about the boy's being missed”—a matter the importance of which, or how it affects the prisoners, I am unable to see,—“by the association in depravity of all four (Ram Saran being excepted), by Ram Saran's close intimacy with Ram Ghulam, and by the propinquity of the dwellings of Sukhai, Mohib Ali, and Piru, and of Damri Lal, and by the bad character of all five men.” Now, here I must observe that the learned Judge appears to me to have been over-pressed by certain matters which ought not to have influenced his mind at all. He had nothing to do with the bad characters of the prisoners. Their characters were absolutely irrelevant to the case. If they or any of them had previously been convicted of any crime, such as was relevant to the particular matter now charged, such, for instance, as robbery, dacoity, or any similar offence, such conviction might have been proved in a formal and proper manner and would then have been relevant. But the bad characters of the accused were not relevant, and the Judge appears to have allowed his mind to be influenced by matters which were calculated to mislead him, and to cause his mind to place a colouring upon the facts, which did not assist him in forming a calm and dispassionate judgment on the case.

[315] Before concluding, I must remark, that according to the statements of Sukhai and Piru, the jewels were given on the night of the murder to one Durga Tewari. It is not clear from the statements of Piru whether Durga was aware of the manner in which the jewels had been obtained; but, if Sukhai be believed, Durga was not aware of it, and did not know that the ornaments were the proceeds of a murder. It is remarkable that Durga Tewari was never placed in the witness-box to state what actually happened, and whether the jewels were in fact handed to him as stated. This evidence would have been important; because I am not sure that if the jewels had been handed to him in the presence of all the prisoners, immediately after the murder and near the scene of it, there would not have been corroboration of the statements of those two persons. My brother TYRRELL and I have most anxiously considered this case. We may of course have our suspicions as

to the correctness of the conclusions arrived at by the Judge and the assessors ; but our decisions in criminal cases, and especially in so grave a matter as a capital offence, must not depend on mere suspicion but must be regulated by the principles of law laid down for the guidance of Courts of Justice. We have no alternative but to allow the appeals of Ram Saran, Mohib Ali, and Ram Ghulam, and direct that they stand acquitted. With regard to Piru, his appeal is dismissed, and we direct that the capital sentence be carried into execution.

Tyrrell, J.—I fully concur in what has fallen from my brother **STRAIGHT** and in the orders he proposes.

NOTES.

[See also 8 All., 509 ; 9 All., 528 ; 21 Cal., 612 ; (1911) 35 Mad., 247 ; (1912) 35 Mad., 397 F.B.]

[8 All. 315]

PRIVY COUNCIL.

The 17th February, 1886.

PRESENT :

**LORD BLACKBURN, LORD MONKSWELL, LORD HOBHOUSE, AND
SIR R. COUCH.**

Balwant Singh.....Appellant

versus

Daulat Singh.....Respondent.

[On Appeal from the High Court, North-Western Provinces]

Civil Procedure Code, s. 549.

An appeal, although it may have been rejected by the Appellate Court, under s. 549 of the Code of Civil Procedure upon failure by the appellant to furnish security demanded under that section may be restored, on sufficient grounds, at the Court's discretion.

[316] The High Court having apparently treated an appeal as though, after rejection of it under the above section, a petition tendering security to the amount demanded, and asking restoration of the appeal, was not entertainable and could not be considered, *held* by the Judicial Committee that restoration was within the Court's discretion and that there were grounds for it, upon the appellant's giving approved security within such time as the Court might fix.

APPEAL by special leave from an order (29th November 1882) of the High Court, refusing to restore to the file an appeal rejected (14th August 1882) for default in furnishing security for costs demanded by its previous order (26th June 1882).

The present appellant, as the son of the deceased elder brother of Jagendra Balli, deceased, late Raja of Sikri, obtained a decree, (21st November 1881) in the Court of the Deputy Commissioner of Jalaun against the respondent, the late Raja's younger and surviving brother, for possession of the raj estates. This decree was reversed by the Commissioner of Jhansi on the 28th February 1882, and against it an appeal to the High Court was filed on the 5th May following. On the 3rd June, the respondent obtained an order under s. 541 of

the Code of Civil Procedure, calling on the appellant to show cause why security to the amount of Rs. 2,500 should not be given by him for costs of the appeal. On this the appellant did not appear, and the High Court, on the 26th June, made the order that the appellant should deposit security within six weeks. On the 5th August, three days before the six weeks expired, appellant showed cause why he should not be ordered to give security. This, however, had no effect to prevent the High Court, on the 14th August, striking the appeal off the file with costs, on the ground that this was "of necessity," as the security had not been filed within the time prescribed.

On the 9th September following the appellant presented a petition for the restoration of the appeal, alleging that the order of the 3rd June had not at any time been served upon him, and offering security to the amount fixed in the order of the 3rd June. On this notice to the respondent to show cause was issued, and cause being shown on the 29th November 1882, the petition of restoration was rejected by an order of that date, of which the terms are set forth in their Lordships' judgment.

The appellant on the 28th January 1883, applied to the High Court, for permission to appeal to Her Majesty in Council; and [317] notice to the opposite party having been issued, under section 600 of the Code of Civil Procedure, the certificate of leave to appeal was refused.

On the 12th December 1883, on the appellant's petition setting forth the above facts as grounds, on which petition Mr. *W. A. Rarkes* appeared for the petitioner, special leave to appeal was granted by the Judicial Committee.

On this appeal, Mr. *R. V. Doyne* and Mr. *W. A. Rarkes*, for the Appellant. Whether the order of the 26th June 1882, was rightly made or not, that of the 14th August was clearly made without due regard to the appellant's not having had an opportunity to show cause, a fact which appeared on his petition of the 5th August. The order of the 29th November 1882 was wrong for the same reason; and the tender of security should have been held sufficient to secure to the appellant the appeal to which he was entitled.

Mr. *T. H. Cowie*, Q. C., and Mr. *C. W. Arathoon*, for the Respondent. The High Court rightly exercised its discretion to refuse to re-admit an appeal, rejected strictly within the terms of s. 549.

Counsel for the appellant were not called upon to reply.

Their Lordships' judgment was delivered by

Lord Hobhouse.—This came before their Lordships in rather a peculiar way, and there is some difficulty in saying what in substance is the proper course to be taken. It appears that the appellant is seeking to recover property in the possession of the respondent, and that being defeated before the Commissioner of Jhansi, he appealed to the High Court. The respondent applied that the appellant might give security for costs, and on the 3rd June 1882, the High Court made an order directing the appellant to show cause why the respondent's petition should not be granted. That order to show cause was not properly served upon the appellant, and on the 26th June, the appellant, then, as it would seem, knowing nothing about the order, a further order was made by the High Court in these terms:—"Appellant has not appeared, and he is hereby required to deposit security to the extent of Rs. 2,500 within six weeks from this date" viz., by the 8th August. On the 5th August the appellant

presented a petition showing cause why he should not be ordered to give security, and [318] on the 14th August another order was made by the High Court. It is simply in these terms :—“ Security has not been filed within the time prescribed by the Court. The appeal is therefore of necessity struck off the file with costs.” Whether the Court considered the merits of the cause then for the first time shown by the appellant, does not appear; but if they did, he was not allowed any time at all to tender his security. On the 9th of September the appellant presented a petition in which he stated the non-service of the original order to show cause of the 3rd June, and his ignorance of it until he got information in time to file his petition on the 5th August; and he prayed for the restoration of the appeal. It would seem that, on that petition, an order was made dated 13th September 1882; but their Lordships cannot tell certainly upon what proceedings that order was made, nor can they do more than guess at the terms of it, for by some omission which is entirely unexplained, that order has not been transmitted to this country. The direction given by Her Majesty on the petition for leave to appeal was that the High Court should transmit the prior orders and also all subsequent orders relating to the refusal to restore the appeal, but for some reason or other this order has not been transmitted. The nature of it can only be gathered from a subsequent order which was made in this way. On the 27th November 1882, the appellant again petitioned the High Court, and in that petition he states that “ in obedience to the order of the Court, dated 13th September 1882, the petitioner submits herewith two security-bonds for Rs. 2,500, as detailed below, and prays that proper order may be made for the restoration of the appeal to its original number of file.” Therefore it would seem that by the order of the 13th September, the Court had held that the appellant must give security, and had allowed time for the purpose. On the 27th November he tenders the security and asks that the proper order may be made for the restoration of the appeal. Upon that there comes an order of the 29th November, which their Lordships have great difficulty in understanding. It is a very short one. It does not say on what petition or proceedings it was made except that it was on a petition of the appellant. It does not state who appeared upon it. The whole of the order is this :—“ The petitioner’s appeal was [319] not dismissed under ss. 556 or 557 of the Civil Procedure Code. This petition therefore is not entertainable under s. 553 of that Code, and it is inapplicable to an order made, as ours was made, under s. 549 of the Code.” It is extremely difficult to apply the terms of this order to the petition of the 27th November, and is a matter now of uncertainty and dispute what petition the order speaks of and what order it speaks of. The effect of it is apparently to maintain in full force the order of the 14th August, by which the appeal was struck off the file.

It appears to their Lordships that the case has never been fully considered by the High Court.

The question is first, whether the appellant should give security; and their Lordships assume that on the 13th September he was ordered to give security after hearing him; and next, whether, on giving security, the appeal should be restored to the file. That seems never to have been considered by the High Court, because they held that the petition of the 27th November, which was to restore after tendering security, was not entertainable and could not be listened to. Their Lordships will humbly advise Her Majesty to make an order that the appellant may give security for the costs mentioned in the order of the 3rd June 1882, of such nature as shall be satisfactory to the High Court and within such reasonable time as shall be fixed by that

Court; and that upon his giving such security his appeal shall be restored to the files of that Court. There will be no costs of this appeal.

Solicitors for the Appellant: Messrs. *Oehme and Summerhays*.

Solicitors for the Respondent: Mr. *T. L. Wilson*.

NOTES.

[No appeal lies from an order refusing to restore the rejected appeal:—(1908) 20 All., 143.

The time for complying with the order to furnish security may be extended and the appeal may be rejected if in the end it is not furnished:—(1889) 17 Cal., 512; (1897) 21 Bom., 576.

In (1903) 4 M. L. T., 416 where the decision was similar to 30 All., 143 it is stated as follows:—"The decision of the Privy Council in *Balwant Singh v. Daulat Singh*, 8 All., 315, the head-note of which in the *Indian Law Reports* is far from accurate, was arrived at on a peculiar state of facts, and is not, in our opinion, an authority for the position that an appeal duly rejected under sec. 549, C. P. C. (1882) can be restored by the Court which rejected it."

[8 All 319]
APPELLATE CIVIL.

The 22nd March, 1886.

PRESENT :

SIR COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE STRAIGHT.

Lakhmi Chand.....Plaintiff
versus
Gatto Bai.....Defendant.*

Adoption—Hindu Law—Jains—Second adoption by widow.

In a suit to which the parties were Jains, and in which the plaintiff claimed a declaration that he was adopted by the defendant to her deceased husband, and [320] that as such adopted son he was entitled to all the property left by her deceased husband, it was found that subsequent to the husband's death, the defendant had adopted another person, who had died prior to the adoption of the plaintiff, and without leaving widow or child.

Held that the powers of a Jain widow, except that she can make an adoption without the permission of her husband or the consent of his heirs, and may adopt a daughter's son, and that no ceremonies are necessary, are controlled by the Hindu law of adoption, and the *Kritima* form of adoption not being recognised by the Jain community, or among the Hindus of the North-Western Provinces, it must be assumed that the widow had power to make a second adoption, and that such adoption was to her husband.

Held therefore that the adoption of the plaintiff was valid and effective.

Held that the effect of the second adoption being to make the second adopted son the son of the deceased husband, he must be treated as if he had been born, or at all events conceived, in the husband's lifetime, and his title related back to the death of the elder brother, the first adopted son, so that if the elder brother left no widow or child who would succeed him to the exclusion of his younger brother, the second adopted son would succeed as heir to the father. *Sheo Singh Rai v. Dakho*, I. L. R., 1 All., 638; L. R., 5 Ind. Ap. 87, referred to.

THE parties to this suit were Jains (Saraogis). The plaintiff sued the defendant for a declaration that he was adopted in January 1856, by the defendant to her deceased husband Kishen Lal, (who died in September 1843), and that as such adopted son he was entitled to possession of all the property left by Kishen Lal. The defence to the suit was, that subsequent to

* First Appeal No. 184 of 1884, from a decree of Maulvi Muhammad Sami-ul-lah-Khan, Subordinate Judge of Aligarh, dated the 27th June 1884.

the death of her husband Kishen Lal, the defendant, in 1844, had adopted one Nemi Chand, in whom the whole estate had thereupon vested, and that she had consequently no power to make a second adoption; and that, in fact, she had not adopted the plaintiff.

It appeared that not long after the death of Kishen Lal the defendant had adopted Nemi Chand. Nemi Chand died in August, 1855, at the age of 13 years, without leaving either widow or child. The lower Court dismissed the suit, holding that the defendant had not adopted the plaintiff, and that she could not do so, the adoption of a second son not being valid, according to the precepts of the Jain religion.

The plaintiff appealed to the High Court, contending that the lower Court was in error in holding that his adoption by defendant was not established, and that the defendant had no power to make it.

[321] Mr. *W. M. Colvin*, Mr. *C. H. Hill*, and Pandit *Ajudhia Nath*, for the Appellant.

Mr. *G E A Ross* and Mr. *T. Conlan*, for the Respondent.

Petheram, C. J., and **Straight, J.** (After coming to the conclusion that the adoption of the plaintiff was established, observed as follows) —

But it is said for the respondent, even if this be so, that is something short of proof of an adoption to Kishen Lal. We do not feel pressed by this contention, if there was an adoption, in fact, we think it must be taken that it was an ordinary adoption to her deceased husband. It is true that the powers of a Jain widow in the matter of adoption are of an exceptional character, namely, that she can make an adoption without the permission of her husband or the consent of his heirs, and that she may adopt a daughter's son; and further, that no ceremonies or forms are necessary. But, except that in these respects it is not controlled by the Hindu law of adoption, we think that in all others its principles and rules are applicable, and that the *Kritima* form of adoption not being recognised in the Jain community, or among the Hindus of these Provinces, it must be assumed that she had the power to make a second adoption, and that such adoption was to her husband.

The only remaining question of law is, whether the defendant having once adopted Nemi Chand after the death of her husband, and the whole estate having vested in him, she had the power to make a second valid adoption to her husband, so as to divest herself a second time of the property, and to vest it in the second adopted son.

It is contended on behalf of the defendant that upon the death of Nemi Chand, the estate of Kishen Lal vested in her as his heir, and not as the heiress of her deceased husband, and that it could not afterwards be divested so as to vest in another person as a second adopted son of her husband. This, however, does not seem to us to be the case, as the effect of the second adoption being to make the second adopted son the son of her husband, he must be treated as if he had been born, or at all events conceived, in the lifetime of the husband, and his title relates back [322] to the date of the death of the elder brother, the first adopted son, so that if the elder brother has left no widow or child who would succeed him to the exclusion of his younger brother, a second adopted son succeeds as heir to the father.

This view seems to us to be the reasonable and necessary consequence of the fiction that the widow, by adoption, makes the adopted son the son of the deceased husband, and it appears to be in accordance with that taken by the Privy Council in the case of *Sheo Singh Rai v. Dakho*, 1 L R, 1 All 688; L. R., 5 Ind. Ap., 87, and with the statement of the customs of the Jains as declared by Seth Raghunath Das and the other lay witnesses for the plaintiff. It is true there is a difference of opinion on the question of the custom

among the expert witnesses, but in our opinion that of the lay witnesses is of infinitely more value on this point; and for these reasons we think that the defendant had power to make a valid adoption to her husband a second time, and that the adoption of the plaintiff was valid and effective.

NOTES.

[As regards adoption by Jain widows, see also (1892) 16 Mad., 182, (1899) 27 Cal., 379; (1906) P. R., 110; (1907) 23 All., 495, (1908) 30 All., 197.]

[8 All 322]

. The 11th May, 1886

PRESENT

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, AND MR. JUSTICE TYRRELL

Idu Applicant

versus

Amiran...Opposite Party.*

Muhammadan Law—Custody of children—Act IX of 1861, s. 5—Appeal.

The Muhammadan law takes a more liberal view of the mother's rights with regard to the custody of her children than does the English law, under which the father's title to the custody of his children subsists from the moment of their birth, while, under the Muhammadan law, a mother's title to such custody remains till the children attain the age of seven years.

An application was made by a Muhammadan father under s. 1 of Act IX of 1861 that his two minor children, aged respectively 12 and 9 years, should be taken out of the custody of their mother and handed over to his own custody. The application having been rejected by the District Judge, an appeal was preferred to the High Court as an appeal from an order. It was objected to the hearing of the appeal that in view of s. 5 of Act IX of 1861, the appeal should have been as from a decree, and should have been made under the rules applicable to a regular appeal.

Held, that, looking to the peculiar nature of the proceedings, the objection was a highly technical one, and as all the evidence in the case was upon the record and was all taken down in English, it would only be delaying the hearing of the appeal upon very inadequate grounds, if the objection were allowed.

[323] *Held* also, that, according to the principles of the Muhammadan law, the appellant was by law entitled to have the children in his custody, subject always to the principle, which must govern a case of this kind, that there was no reason to apprehend that by being in such custody they would run the risk of bodily injury, and that (without saying that this exhausted the considerations that might arise warranting the Court in refusing an application for the custody of minors) there was nothing in the record in this case which disclosed any proper ground to justify the refusal of the application.

The facts of this case are sufficiently stated in the judgment.

Mr. W. M. Colvin, for the Appellant.

Mr. T. Conlan and Murshi Hanuman Prasad, for the Respondent.

Straight, Offg. C.J.—This is an appeal from an order passed by the Judge of Jaunpur, on the 20th February last, rejecting an application made by the present

* First Appeal No. 45 of 1886, from an order of W. H. Hudson, Esq., Judge of Jaunpur dated the 20th February 1886

appellant under s. 1 of Act IX of 1861. The parties are respectively husband and wife, and the minors, in regard to whom the application was made, are Yusuf Ali and Basit Ali, respectively aged 12 and 9 years, they being the sons of the appellant and respondent. At present they are in the possession of the respondent, and the application was to have them taken out of such custody and handed over to the appellant, their father. The Judge refused the application, and hence this appeal. It has been urged as an objection to our hearing the appeal that it has been preferred as an appeal from an order, whereas, in view of s. 5 of Act IX of 1861, the appeal should have been as from a decree, and it should have been made under the rules applicable to a regular appeal. Looking to the peculiar nature of the proceedings, it seems to me that this is a highly technical objection, and as all the evidence of the case is upon the record and is all taken down in English, it is clear that we should be only delaying the hearing of the appeal upon very inadequate grounds were we to accede to the learned Munshi's contention. We have therefore heard the case, and have no doubt whatever that upon the materials disclosed in the record, the learned Judge was wrong in rejecting the application made to him by the appellant. The Muhammadan law takes a more liberal view of the mother's rights with regard to the custody of her children than does the English law, under which, if my memory serves me rightly, the father's title to the custody of his children [324] subsists from the moment of their birth; whilst, under the Muhammadan law, a mother's title to the custody of her children remains until they attain the age of 7 years. I may observe in passing that this principle of Muhammadan law was enunciated by my brother MAHMOOD, J., very recently in the determination of First Appeal No. 129 of 1885 (see next case). *Prima facie*, therefore, the appellant, who is the father of the two boys, was by law entitled to have them in his custody, subject always to the principle which must govern a case of this kind, that there was no reason to apprehend that by being in such custody they would run the risk of bodily injury. I do not say that this exhausts the considerations that might arise that would warrant the Courts in refusing an application for the custody of minors; but it is enough to say, in regard to the present case, that there is nothing in the record which discloses any proper grounds to justify the Court below in refusing to grant the application which the appellant made. Under these circumstances, the appeal is decreed with costs, the rejection of the application of the appellant is set aside, and his application is granted; and it is ordered, that the respondent do, within one month from the date on which this order reaches the Court below, deliver up the two boys, Yusuf Ali and Basit Ali, into the custody of their father, the appellant; and it is further ordered that, in the event of respondent failing so to do, coercive measures to enforce this order, as provided in s. 260 of the Civil Procedure Code, may be adopted.

Tyrrell, J.—I concur.

Appeal allowed.

[3 All. 325]

The 5th May, 1886.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Sita Ram.....Plaintiff

versus

, Amir Begam and others.....Defendants.*

Muhammadan Law—Alienation by widow—Rights of other heirs—Minor—Mother—Guardian—Mortgage—First and second mortgagees—Suit by first mortgagee for sale of mortgaged property—Second mortgagee not made a party—Act IV of 1882 (Transfer of Property Act), ss. 78, 85—Res-judicata—Civil Procedure Code, s. 13—Meaning of “between parties under whom they or any of them claim.”

Upon the death of *G*, a Muhammadan, his estate was divisible into eight shares, two of which devolved upon his son *A*, one upon each of his five daughters and one upon his widow *B*. The name of *B* only was recorded in the revenue registers in respect of the zamindari property left by *G*. In 1876, *A* and *B* gave to *X* a deed of simple mortgage of $2\frac{1}{2}$ biswas out of a 5 biswas share of a village included in the said property. In 1878, *A* and *B* gave to *S* a deed of simple mortgage of the 5 biswas, which were described in the deed as the widow's “own” property. In 1882, *X* obtained a decree upon his mortgage for the sale of the mortgaged property, and it was put up for sale and purchased by *X* himself in January 1884. In February and November 1884, the daughters of *G* obtained *ex parte* decrees against *A* and *B* in suits brought by them to recover their shares by inheritance in the 5 biswas. In 1885, *S* brought a suit upon his mortgage of 1878, claiming the amount due thereon and the sale of the whole 5 biswas. To this suit he made defendants *A* and *B*, *G*'s daughters, and *X*, alleging that the decrees of February and November 1884, were fraudulently and collusively obtained, and as to the auction-sale of January 1884, that the $2\frac{1}{2}$ biswas were sold subject to his mortgage, he not having been made a party to the suit brought by *X* upon the deed of 1876, and therefore not being bound by any of the proceedings taken therein or consequent thereto. It was contended that *B*'s position as head of the family entitled her to deal with the property so as to bind all the members of the family, though using her name only, and it was suggested that, at the time of the mortgage of 1878, some of the daughters were minors. On behalf of the daughters it was contended (*inter alia*) that the decrees obtained by them against *A* and *B* in February 1884, were conclusive, by way of *res judicata*, against the plaintiff, who, as mortgagee from *A* and *B*, claimed under a title derived from them.

Held, that there being no evidence to show that the decrees of February and November 1884, were fraudulently and collusively obtained, the Court of First Instance was right in exempting the shares of the daughters from the lien sought to be enforced by the plaintiff and that, inasmuch as the deed of 1876 was prior in date to the plaintiff's deed of 1878, and there was no allegation of fraud or collusion in regard to it, the decree and sale in enforcement of the former deed would defeat the rights of the plaintiff under the latter.

Khub Chand v. Kalia Das, I. L. R., 1 All., 240, and *Ali Hasan v. Dhirja*, I. L. R., 4 All., 518, referred to.

Per MAHMOOD, J.—According to the Muhammadan Law, the surviving widow, though held in respect by the members of the family, would not be entitled to deal with the property

* First Appeal No. 129 of 1885, from a decree of Maulvi Muhammad Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 28th April 1885.

so as to bind them, and the entry of her name in the revenue registers in the place of her deceased husband would probably be a mere mark of respect and sympathy. Her position in respect of her husband's estate is ordinarily nothing more or less than that of any other heir and even where her children are minors, she cannot exercise any power of disposition with reference to their property because although she may, under certain limitations, act as guardian of their persons till they reach the age of discretion, she cannot exercise control or act as their guardian in respect of their property without special appointment by the ruling authority, in default of other relations who are entitled to such guardianship. Even therefore if some of the daughters in the present case were minors at the time of the plaintiff's mortgage, their shares could not be affected thereby. They could only be so affected if circumstances existed which would furnish grounds for applying against them the [321] rule of estoppel contained in s. 115 of the Evidence Act or the doctrine of equity formulated in s. 41 of the Transfer of Property Act but here no such circumstances existed.

Also *per* MAHMOOD J.—The decrees of February and November 1894 did not operate as *res judicata* against the plaintiff inasmuch as a mortgage cannot be bound by a decision relating to the mortgaged property in a suit instituted after his mortgage, and to which he was not a party. After a mortgage has been duly created the mortgagor in whom the equity of redemption is vested, no longer possesses any such status which would entitle him to represent the rights and interests of the mortgagee in a subsequent litigation so as to render the result of such litigation binding upon and conclusive against such mortgagee. The plaintiff in the present suit could not be treated as a party claiming under his mortgagee, within the meaning of s. 13 of the Civil Procedure Code and that section must be interpreted as if, after the words “under whom they or any of them claim” the words “by a title arising subsequently to the commencement of the former suit” had been inserted. *Dooma Sahoo v. Joonarain Lall* 12 W. R. 362 and *Bonomalee Nig v. Koylash Chunder Dey*, 1 L. R., 4 Cal. 692, referred to *Outram v. Morewood* 3 List., 316 *Boykuntinath Chatterjee v. Ameeroomissa Khatoon* 2 W. R. 191 *Kulama Nitchan v. Simul Raja Mooltoo Vjaya Ragu nadhr*, 9 Moo. I. A. 539 and *Ram Coomar Seem v. Prasunno Coomar Seem*, W. R., Jan. July, 1864, p. 375 distinguished.

The principles of the rule of *res judicata* is part of the law of civil procedure properly so called and those of the rule of estoppel, as part of the law of evidence, explained and distinguished.

THE facts of this case were as follows —

One Ghulam Rasul Khan died in 1872, leaving, as his heirs his widow Amir Begam, a son called Ali Sher Khan, and five daughters called severally Wilayat Begam, Nihal Begam, Nawab Begam, Sikina Begam and Jafri Begam. According to the Muhammadan law of inheritance his estate was divisible into eight shares, two of which devolved on the son, one on each daughter, and one on the widow. On his death the name of his widow only was recorded in the revenue registers in respect of the zamindari property left by him. This property included a five biswa share of a village called Kaduganj. On the 17th October 1876, Amir Begam and Ali Sher Khan gave one Alam Singh and certain other persons a simple mortgage of 2½ biswas out of the 5 biswas. On the 25th October 1878, Amir Begam and Ali Sher Khan gave the plaintiff in this case a bond for Rs. 3,000, in which the 5 biswas, described as the widow's own property, was mortgaged by way of simple mortgage. On the 1st December 1882, [327] Alam Singh and his co-mortgagees obtained a decree against Amir Begam and Ali Sher Khan for the sale of the mortgaged property, and caused it to be put up for sale, and bought it themselves, on the 31st January 1884.

Subsequently Nihal Begam, Nawab Begam, Sikina Begam, and Jafri Begam, four of the daughters of Ghulam Rasul Khan, having sued their mother and brother for their shares by inheritance in the 5 biswas, obtained an *ex parte*

decree against them on the 27th February 1884; and Wilayati Begam, the fifth daughter of Ghulam Rasul Khan, also having brought a suit against Amir Begam and Ali Sher Khan, for her share in the 5 biswas, obtained on the 24th November 1884, an *ex parte* decree for the same.

In January 1885, the plaintiff brought the present suit on the bond of the 28th October 1878, in which he claimed Rs. 5,404-15, principal and interest, and the sale of the 5 biswas. Besides the executants of the bond, Amir Begam and Ali Sher Khan, he made the four surviving daughters of Ghulam Rasul Khan and the heirs of the fifth daughter, deceased, defendants to the suit; and also Alam Singh and the other purchasers of 2½ biswas of the 5 biswas. He prayed that he might be allowed to recover the amount due on the bond by the sale of the 5 biswas, "without any regard to the decrees of the 27th February 1884, and the 24th November 1884, and the auction sale of the 31st January 1884." He alleged as to those decrees that they were fraudulently and collusively obtained, and as to the auction-sale, that the 2½ biswas were sold subject to his mortgage.

The Subordinate Judge of Mainpuri, by whom the suit was tried, held that the decrees impugned were not fraudulently and collusively obtained, and the shares of the daughters were not liable to be sold in satisfaction of the plaintiff's mortgage; and that the portion of the 5 biswas purchased by Alam Singh and his co-mortgagees was not liable to be sold in satisfaction of the plaintiff's mortgage, his being a second mortgage; and gave the plaintiff a decree for the recovery of the money claimed by the sale only of the rights and interests of Amir Begam and Ali Sher Khan remaining in the 5 biswas.

[328] The plaintiff appealed to the High Court.

Mr. C. H. Hill and Munshi Hanuman Prasad, for the Appellant.

Mr. T. Conlan, Mr. W. M. Colvin, Mr. Abdul Majid, and Pandit Bishambar Nath, for the Respondent.

Oldfield, J.—This suit was brought on a bond, dated the 28th October 1878, executed by Amir Begam, widow of one Ghulam Rasul Khan, in consideration of an advance of Rs 3,000. The plaintiff sought a decree for principal, with interest, and sale of the 5 biswas share in a village which the bond purported to hypothecate. The suit has been decreed in the Court below against the widow, Amir Begam, and against the son, Ali Sher Khan; but so far as it sought to make the shares of the five daughters of Ghulam Rasul Khan liable, and so far as it sought to interfere with a prior bond in respect of a 2½ biswas share of the property, and the right of the respondents Alam Singh and others (auction purchasers), the plaintiff's suit was dismissed. The appeal is preferred by the plaintiff against that portion of the decision of the lower Court which was given against him.

The hypothecation-bond sued on purports to be made in the name of Amir Begam herself, in respect of her own property, acting on her own behalf and in her own right; and the suit also was brought on the allegation that the property hypothecated was owned and possessed by the executant of the bond; and it has not been brought on the footing that she held the property in any way for the other heirs of Ghulam Rasul Khan. The whole of the property hypothecated clearly was not held by her in her own right. The five daughters of Ghulam Rasul Khan had a right to shares in the same as heirs of their father, and for this right they brought suits and obtained decrees, as they were fully entitled to do. I do not see that there was any fraud or collusion, and, in my opinion, the lower Court was right in exempting this set of defendants from all liability to the plaintiff.

The next point urged, namely, that the appellant is entitled to bring to sale the property bought by the auction-purchasers Alam Singh and others also fails. The hypothecation-bond, upon which the decree and sale proceeded, was a prior one dated the 17th [329] October 1876, and the property was purchased by Alam Singh and others on the 31st January 1884. The appellant's hypothecation-bond being the later one, the transaction could only be questioned on the ground of fraud, of which there appears to be none whatever. For the above reasons the decision of the lower Court must be affirmed and this appeal dismissed with costs. The two sets of respondents will be entitled to costs in proportion separately.

Mahmood, J.—I am of the same opinion. The facts of the case are simple enough, namely, that the deceased Ghulam Rasul Khan died sometime in the year 1872, leaving as his heirs, according to Muhammadan law, a widow named Amir Begam, a son named Ali Sher Khan, and five daughters named Jafri Begam, Wilayati Begam, Nawab Begam, Nihal Begam, and Sakina Begam. It is clear that immediately on the death of Ghulam Rasul Khan, according to the rigid system of inheritance which is to be found in the sacred texts of the Kuran, his property devolved in specific portions on these seven persons, who were his heirs. What happened afterwards was, that in respect of such of his property as consisted of land paying Government revenue, instead of the names of all the heirs being entered in the Government records, the name of the old lady alone was entered. This is often done among Muhammadans out of respect to the mother of a family; but on the part of the appellant there has, in the present instance, been a very faint attempt to make out that the Begam was put in possession of the whole property in this manner in lieu of dower. This might be made out, of course, where there were adequate grounds, and when such grounds were supported by adequate evidence. But in the present case there are no grounds for such a contention. It was further urged that her position as head of the family entitled her to deal with the property, so as to bind all the members of the family, though using her name only. But that is not so; and the argument of the learned pleader for the appellant upon this point seemed to me to proceed upon a confusion between the position of a Hindu widow and the legal *status* of a Muhammadan widow, as in this case. The surviving widow among Muhammadans, though looked on with respect by her own children or younger members of the family, holds a position very different to that of the widow among other nations, where the law of inheritance and succession proceeds upon other principles. The mother, being looked upon with respect and sympathy, would probably have the consent of her children to the entry of her name in lieu of her deceased husband's name as a mark of respect. An illustration of this is furnished by the unreported case of *Maulvi Inayat Rasul v. Khairunnissa*, decided by this Court on the 15th July 1875. From all I have learnt of the present case, the entry of Amir Begam's name was entirely due to the notions and feelings which I have just described; for if it had been to show a possession adverse to the five daughters, these people would not have been on such affectionate terms as it is shown they were. Amir Begam, I understand, was not the step-mother of these young ladies, but their own mother, and therefore no such argument as to adverse possession could be easily sustained. What happened after this record of the old lady's name was, that on the 17th October 1876, she and her son, Ali Sher Khan, executed a hypothecation-bond in favour of the respondents Alam Singh and others, defendants No. 3. The bond was sued upon, and the 2½ biswas share was purported to be sold in enforcement of lien on the 31st January 1884. I mention this to show the connection of Alam Singh and others, who purchased the property at that sale.

On the 27th February 1884, four of these young ladies having sued their mother and their brother, obtained a decree for their shares of the property,—a circumstance which suggests the inference that they had heard of the alienations which their mother and brother had been making, and became anxious to secure their rights. The fifth lady, Wilayati Begam, similarly obtained a decree for her share on the 24th November 1884. Both decrees were *ex parte*, and this circumstance has been referred to as supporting the plaintiff's allegation of fraud and collusion, but I cannot admit that it does. The plaintiff's rights arose from the bond of the 28th October 1878, which in no way could affect the share of these young ladies, unless, indeed, circumstances existed which would furnish grounds for applying against them the rule of estoppel contained in s. 115 of the Evidence Act (I of 1872), or the doctrine of equity formulated in s. 41 of the Transfer of [331] Property Act (IV of 1882). But here no such circumstances exist, for it is not shown or pretended that the young ladies, who are "*pardah-nashins*," by any declaration, act, or omission, intentionally caused or permitted the plaintiff to believe that their mother and brother were the exclusive owners of the property when the mortgage was made in the plaintiff's favour. Nor is it made out that the plaintiff is a *bona fide* transferee for value, in the sense of his having taken reasonable care to ascertain the title of his transferors. On the contrary, he knew that the property had been inherited from Ghulam Rasul, and he might easily have found out that there were other heirs besides the widow and the son.

Then, as to the decrees of 27th February 1884, and 24th November 1884, there is absolutely no evidence that these decrees, though *ex parte*, were passed in collusion. I should say that it was impossible to contest those decrees, and the mother and son acted rightly in not defending the suits. On the other hand, the argument suggested on behalf of the respondents, that the decrees are conclusive against the plaintiff, seems to me to be unsound, though it raises an important question of law, which I shall decide in this case. In the case of *Dooma Sahoo v. Joonarain Lall*, 12 W. R., 362, the general principle was laid down by DWARKA NATH MITTER, J., that a mortgagee cannot be bound by a decision relating to the mortgaged property in a suit instituted after his mortgage, and to which he was not a party. The principle of the rule was subsequently adopted in *Bonomalee Nag v. Koylash Chunder Dey*, 1 L. R., 4 Cal., 692, by MARKBY and PRINSEP, JJ., who, however, complained of the paucity of case-law upon the subject, and adopted the rule, after expressing considerable hesitation and doubt, because MITTER, J., had not stated any reasons for the rule he laid down. With due respect to those learned judges, I cannot help feeling that there is no substantial ground for entertaining doubts upon the question, and I will take this opportunity of stating my reasons for this proposition.

The plea of *res judicata* as a bar to an action belongs to the province of adjective law, *ad litem ordinationem*, but difference of opinion prevails among jurists as to whether the rule belongs to the domain of procedure or constitutes a rule of the law of evidence as furnishing a ground of estoppel. In England, and I may say also in America, the rule is usually dealt with as belonging to the law of evidence, for there judgments *in personam*, which operate as *res judicata*, are as often treated as falling under the category of estoppels by record. Sir FITZ JAMES STEPHEN, the distinguished jurist who framed our Indian Evidence Act (I of 1872), and whose views have been accepted by our Indian Legislature in framing s. 40 of that Act, adopted what seems to me the only logical and juristic classification by treating the rule of *res judicata* as falling beyond the proper region of the law of evidence, and as appertaining to

procedure properly so called. That the effect of the plea of *res judicata* may, in the result, operate like an estoppel, by preventing a party to a litigation from denying the accuracy of the former adjudication, cannot be doubted. But here the similarity between the two rules virtually ends; and it is equally clear that the *ratio* upon which the doctrine of estoppel, properly so called, rests, is distinguishable from that upon which the plea of *res judicata* is founded. The essential features of estoppel are those which have found formulation in s. 115 of the Evidence Act, the provisions of which proceed upon the doctrine of equity (upon which s. 41 of the Transfer of Property Act is also based) that he who by his declaration, act, or omission has induced another to alter his position, shall not be allowed to turn round and take advantage of such alteration of that other's position. All the other rules to be found in Chapter VIII of the Evidence Act, relating to the estoppel of tenant, or of acceptors of bills of exchange, bailees or licensees, proceed upon the same fundamental principles. On the other hand, the rule of *res judicata* does not owe its origin to any such principle, but is founded upon the maxim *nemo debet bis vexari pro una et eadem causa*—a maxim which is itself an outcome of the wider maxim *interest reipublice ut sit finis litium*. The principle of estoppel, as I have already said, proceeds upon different grounds, and I think the framers of the Indian Codes of procedure acted upon correct juristic classification in dealing with the subject of *res judicata* as appertaining to the province of procedure properly so called. Perhaps the shortest way to describe the difference between the plea of *res judicata* and an estoppel, is to say that whilst [333] the former prohibits the Court from entering into an inquiry at all as to a matter already adjudicated upon, the latter prohibits a party, after the inquiry has already been entered upon, from proving anything which would contradict his own previous declaration or acts to the prejudice of another party, who, relying upon those declarations or acts, altered his position. In other words, *res judicata* prohibits an inquiry *in limine*, whilst an estoppel is only a piece of evidence. Further, the theory of *res judicata* is to presume by a conclusive presumption that the former adjudication declared the truth, whilst "an estoppel," to use the words of Lord COKE, "is where a man is concluded by his own act or acceptance to say the truth," which means, he is not allowed, in contradiction of his former self, to prove what he now chuses to call the truth. Thus the plea of *res judicata* proceeds upon grounds of public policy properly so called, whilst an estoppel is simply the application of equitable principles between man and man—two individual parties to a litigation. I have given expression to these views because they explain and form necessary steps of the reasons upon which my ruling, as to the exact point before us, will proceed.

The question then resolves itself into this, whether the decrees of the 27th February 1884, and the 24th November 1884, which were obtained by the respondents in a litigation commenced subsequent to the plaintiff's mortgage of 1878, and to which litigation he was not a party, can be held to operate as *res judicata* against him. And in this light the question seems to me to rest upon the interpretation of s. 13 of the Civil Procedure Code,—a section which has, before now, given rise to much judicial exposition. The main part of that section is as follows:—“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit, or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

Here it is clear that the plaintiff was not a party to the former suit, and all that can be said in support of the argument, that he is bound by the former decrees, must proceed upon the hypothesis [334] that, as mortgagee from Amir Begam and Sher Ali, he claims under a title derived from them. The merits of the argument depend upon the interpretation of the words emphasized by me in reading s. 13 of the Code; for the issue in this litigation as to the title of the plaintiff-respondent is the same as in the former suits, and the effect of the former decrees would be conclusive against the plaintiff, if he could in this litigation be treated as a party claiming *under* his mortgagors, within the meaning of the section. The section has been no doubt carefully framed, and has given legislative expression to one of those rules of law which are most difficult to formulate for purposes of codification. The difficulty of formulating such a rule is best illustrated by the fact that the language adopted by the Legislature in s. 13 of the Code of 1877 had to undergo considerable alteration when the present Code (Act XIV of 1882) was enacted. Further, as illustrating the difficulty, I may refer to what I said in *Sheoraj Rai v. Kashi Nath*, I. L. R., 7 All., 247, as to the interpretation of the word "*suit*" in the section, with reference to the Privy Council ruling in *Misir Raghobardial v. Sheo Baksh Singh*, I. L. R., 9 Cal., 439: I. R., 9 Ind. Ap., 197. But I have no doubt that in interpreting the language of that section, we cannot ignore the fundamental principles of the rule to which that section gives expression, unless, indeed, the express words of the statute clearly contradict those principles. Now, what is the meaning of *claiming under* as used in the section? There can be no doubt that the plaintiff in this case derives his right under the title which his mortgagors, Amir Begam and Sher Ali, possessed in the mortgaged property, and in this sense his title had been derived in privity to them; but is that privity subject to the adjudication of the 27th February 1884, and of the 24th November, 1884? This really is the question upon which the determination of the point now before us depends; and I may add that the decision of the question must practically rest upon similar principles, whether we regard the matter as appertaining to the class of estoppels by record or to the rules of procedure properly so called. Further, in the decision of this point, the question whether the former decrees were passed in contested or uncontested suits would play no important part; for if the plaintiff can be properly regarded as privy to his mortgagors, for the purposes of this question, he would, in the absence of fraud, be concluded by *ex-parte* decrees as much as by decrees in contested suits, on the ground that a title hampered by either an estoppel or an adjudication cannot pass free of the consequences of such estoppel or such conclusive adjudication, in conformity with the principle which is the foundation of the maxim that he gives nothing who has nothing,—*nilhil dat qui non habet*. But the maxim itself affords indications of another rule of law, that he who takes under another, is not bound by any acts which that other does subsequent to the grant. It is upon this principle that the law of mortgage recognizes the rule that no act of the mortgagor done subsequently to the mortgage can operate in derogation of the mortgagee's right. And I will presently show that it is upon the same principle that no estoppel incurred after the mortgage, and no conclusive adjudication as the result of a subsequent litigation by which the mortgagor is bound, can affect the rights of the mortgagee. The reasons of the rule are nowhere stated better than by the eminent American writer Mr. *Bigelow*, in his celebrated treatise on the law of estoppel (at page 94), and I will quote him here as adopting his language at the risk of prolixity:—

"Having ascertained the effect of judgment estoppels upon the actual parties to the record, let us now inquire into the effect and operation of personal judgments against those who were not strictly or nominally parties to the former

suit, but whose interests were in some way affected by it. And first of privity, which, by Lord COKE, is divided into privity in law—i.e., by operation of law, as tenant by the courtesy; privity in blood, as in the case of ancestor and heir; and privity in estate—i.e., by the action of the parties, as in the case of feoffor and feoffee. These divisions are only important in defining the extent of the doctrine of privity; and as the rules of law are not different in questions of estoppel in these divisions, it will not be necessary to present them separately. But it should be noticed that the ground of privity is property and not personal relation. Thus an assignee is not estopped by judgment against his assignor in a suit by or against the assignor alone, instituted after the assignment was made, though if the judgment has preceded the assignment the case would have been different; hence privity in estoppel arises by virtue of succession. [336] Nor is a grantee of land affected by judgment concerning the property against his grantor in the suit of a third person begun after the grant. Judgment bars those only whose interest is acquired after the suit, excepting of course the parties."

The principles stated in this passage are supported by many cases, chiefly American, which the learned author cites in the pages that follow. Speaking for myself, I am perfectly prepared to accept this enunciation of the law as applicable to Indian mortgagees, because, whilst there is nothing in s. 13 of the present Civil Procedure Code to contradict my view, my notions of jurisprudence are consistent with what I have said. Looking to the definition of mortgage as contained in the first paragraph of s. 58 of the Transfer of Property Act (IV of 1882) and to cl. (b) of the same section, which defines simple mortgages, I am of opinion that hypothecation or simple mortgage, as understood in this country, is, in the eye of jurisprudence, a species of what are known as *jura in re aliena*, that is, estates carved out of full ownership, and that when such an estate has once been created, the mortgagor cannot represent it in any subsequent litigation. And, to use the words of Mr. Bigelow, "it should be noticed that the ground of privity is property and not personal relation." And if this is so, the estate which has already vested in a mortgagee cannot be represented in, or adjudicated upon, in a subsequent litigation to which he is not a party; for the simple reason that a decree of Court in such cases can neither create new rights, nor take away existing ones, but can only enforce the rights as they stand between the parties, and in enforcing such rights, cannot go beyond the rights of the parties to the litigation.

The effect of this view no doubt is to go somewhat beyond the letter of the statute, though not to contradict a single expression employed in s. 13 of the Civil Procedure Code. To put the matter concretely, I interpret that section as if after the words "*under whom they or any of them claim*," the words "*by a title arising subsequently to the commencement of the former suit*," existed in the section; and I think I am within the recognised rules of interpretation when I read the section in this manner.—(Vide Chap. IX, *Maxwell on the Interpretation of Statutes*, p. 274, &c.). Indeed, as a pure question of analogy, I may refer to the words in cl. (b), [337] s. 27 of the Specific Relief Act (I of 1877), which are similar to those which I have interpreted in s. 13 of the Civil Procedure Code, as fortifying my view, because the ultimate principle upon which a specific performance of contracts may be enforced against those who were not actual parties to the contract itself, proceeds upon principles analogous to those upon which a judgment *in personam* against a party operates as *res judicata* against those who claim under him,—the question of notice needing proof in the one case, and in the other being presumed under a doctrine similar to the one upon which constructive notice by *lis pendens* is founded.

I will now deal with the cases which were cited before MARKBY and PRINSEP, JJ., in *Bonomalee Nag v. Koylash Chunder Dey*, I. L. R., 4 Cal., 692, as opposed to the view which I have expressed. The case of *Outram v. Morewood*, 3 East, 346, does not touch the question, because all that Lord ELLENBOROUGH held in that case was, that the matter which had been adjudicated upon in a previous litigation as against Ellen Morewood (she being then sole), before her husband had any right to the subject-matter of the litigation, could not be re-opened in a subsequent litigation between the same parties, though such litigation may have had a different form or object. This clearly is not the case here. Again, the next case—*Boykuntnath Chatterjee v. Amee-roonissa Khatoon*, 2 W. R., 191, does not apply either, because a purchaser at a sale for arrears of Government revenue takes a title which is regulated by special legislation, which cannot govern cases such as the present. The case of *Katama Natchiar v. Srimut Raja Moottoo Vijaya Ragunadha*, 9 Moo. I. A., 539, would at first sight seem more to the point, but it really is not applicable, because the equity of redemption possessed by a mortgagor is vastly different to the estate of a Hindu widow, who, as the Lords of the Privy Council (at page 608) point out, is an absolute owner for some purposes; and the question whether a conclusive adjudication against her, *quoad* the estate, would bind the reversioners, would naturally depend upon the nature and *bond fides* of the litigation. The position of a mortgagee is in no sense similar to that of a Hindu reversioner, and it follows that the same rule would not be applicable to both. Nor has the case of *Ram Coomar Sein v. [338] Prosunno Koomar Sein*, W. R., Jan.—July, 1864, p. 375, any bearing upon the present question, simply because a person who acquires a prescriptive title by adverse possession under the law of limitation, is not bound to respect any contracts entered into between the mortgagor and the mortgagee, to both of whom his possession is adverse—a state of things which is not applicable to the present case, even by analogy. There is thus no authority against the view which I have enunciated at such length, and I hold that after a mortgage has been duly created, the mortgagor, in whom the equity of redemption is vested, no longer possesses any such estate as would entitle him to represent the rights and interests of the mortgagee in a subsequent litigation, so as to render the result of such litigation binding upon, and conclusive as against, such mortgagee. Applying this conclusion to the present case, I hold that the decrees of 27th February 1884, and 24th November 1884, do not operate as *res judicata* against the plaintiff-appellant.

But whilst the decrees are not conclusive against the plaintiff, it should be noticed that the present suit was brought to enforce his lien, not only against the shares of his mortgagors, Amir Begam and Ali Sher Khan, but also against the shares of the five daughters, and further, also against the property purchased by Alam Singh and others, covered by the hypothecation of the 17th October 1876. The simple issue therefore in the case is, as my brother OLDFIELD has put it—Has the plaintiff acquired, under the hypothecation-bond of the 28th October 1878, any lien over more than Amir Begam and Ali Sher Khan possessed in their own right at the time they executed the bond? I have already said that the position of a Muhammadan widow in respect of her deceased husband's estate, is ordinarily nothing more or less than that of any other heir, and I will here add, with reference to what has been urged on behalf of the appellant, that even in case of minority of her children, she cannot exercise any power of disposition with reference to their property, because she cannot act as their guardian in respect of such matters. Under certain limitations, she may act as guardian of the person of her children till they reach the age of discretion, but the control of

their property never vests in her without special appointment by the ruling [339] authority, in default of other relations who are entitled to such guardianship. The facility of divorce on the one hand, and of remarriage of widows on the other, account for this doctrine of the Muhammadan law. So that, even if some of the daughters were minors, as is suggested here, at the time of the plaintiff's mortgage, their shares could not be affected by the transfer. Then, of course, there is also the important fact that the widow in executing the mortgage now sued upon, did not profess to act on behalf of her daughters. And therefore on neither hypothesis can their shares be subjected to the lien which the plaintiff seeks to enforce in this litigation.

Now as to the remaining defendants Alam Singh and others, it is urged on behalf of the plaintiff-appellant that, inasmuch as he was not made a party to the suit for enforcement of lien on the bond of the 17th October 1876, therefore he is not bound by any proceedings which took place upon that bond, including the sale of the 31st January 1884. This argument has only partial force, but cannot prevail. The law, as it stood before the Transfer of Property Act, as to the necessity in a suit by a first mortgagee of making a subsequent mortgagee a party, was explained by me in *Ali Hasan v. Dhirja*, I. L. R., 4 All., 518, following the ruling of TURNER, J., in *Khub Chand v. Kalian Das*, I. L. R., 1 All., 240. It was there held that it was not absolutely necessary to make puisne incumbrancers parties to a suit by a first mortgagee, and that a sale in enforcement of the prior mortgage would defeat the rights of the puisne incumbrancer, who is conclusively presumed in jurisprudence to take with knowledge of the prior mortgage, or at least cannot take more than his mortgagor had to give. The puisne incumbrancer could of course escape the decree by proving fraud or collusion, or he might prevent the sale in enforcement of the prior incumbrance by redeeming it. But if neither conditions are satisfied, sale in enforcement of the prior incumbrance would defeat the puisne incumbrance. Since the passing of the Transfer of Property Act (IV of 1882), it seems, under certain conditions, necessary, according to s. 85 of the Act, to make puisne incumbrancers parties, with the result that if they do not redeem, their lien will be defeated in the absence of fraud, which might disturb the rule of priority [340] under conditions such as those contemplated by s. 78 of the Transfer of Property Act (IV of 1882). But no such case is set up here, and I therefore concur with my brother OLDFIELD in the order which he has made.

Appeal dismissed.

NOTES.

[As regards the effect of alienation by one of several co-heirs, see also (1902) 26 Mad., 734; (1895) 20 Bom., 199; 338; (1901) 3 Bom. L. R., 658; (1902) 5 O. C., 197; (1906) 9 O. C., 97, (1907) P. L. R., 43.

As regards the powers of alienation under Mahomedan Law of a *defacto* guardian, see also (1912) 23 M. L. J., 244.

As regards the effect of non-joinder of all the incumbrancers, see also (1888) 10 All., 520; (1911) 21 M. L. J., 213.

As regards *res judicata*, see also (1898) 12 C. P. L. R., 91; (1905) 1 C. L. J., 387; (1894) 22 Cal., 364, (1907) 6 C. L. J., 621; (1908) 5 M. L. T., 37; (1908) 8 C. L. J., 478; (1888) 11 All., 148; (1889) 12 All., 1.]

[8 All. 340]

ORIGINAL CIVIL.

The 9th May, 1886.

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE.

G. S. Jones ... Plaintiff

versus

H. Ledgard and others..... Defendants*

*Arbitration—Filing award in Court—Civil Procedure Code, ss. 525, 526—
Partnership—Agreement to refer disputes to arbitration.*

The three parties to a deed of partnership agreed that in case of any dispute or difference, the matter should be referred to the arbitration of persons chosen by each party to such dispute, and that in case any such party should refuse or fail to nominate an arbitrator, then the arbitrator named by the other party should nominate another arbitrator, and the two should nominate a third person as umpire. Certain differences having arisen among the three partners two of them called upon the executors of the third to nominate an arbitrator under the terms of the deed but they refused to do so. The first mentioned partners then nominated an arbitrator, who in his turn nominated another, and these having appointed an umpire, made an award. One of the partners at whose instance the matter in dispute had been referred to arbitration presented an application under s. 525 of the Civil Procedure Code praying that the award might be filed in Court. This application was opposed by the executors of the third partner, who appeared and lodged verified petitions disclosing grounds of objection within the meaning of s. 520 or s. 521 of the Code.

Held, that the word "parties" as used in s. 525 should not be confined to persons who are actually before the arbitrators; that if persons by an agreement have undertaken between themselves that, in the event of a certain state of things happening, a particular procedure shall be followed which, under one state of circumstances, may be adopted *in invitum*, they should, for the purposes of s. 525, be regarded as parties to that arbitration; and that there was sufficient reason to show that the defendants in the present case were *prima facie* bound by the arbitration, so as to bring them within the terms of s. 525 as parties thereto, who should be called on to show cause why the award should not be filed. *Willcox v. Storkey*, L. R., 1 C. P., 671, and *Re Newton and Hetherington*, 19 C. B. (N. S.) 342, referred to.

Held, also, that ss. 525 and 526 of the Code, read together, mean that the party coming forward to oppose the filing of the award must show cause, that is, must establish by argument, or proof, or both, reasonable grounds to warrant the Court in arriving at the conclusion that the award is open to any of the objections mentioned in s. 520 or s. 521, and it is not sufficient, when it is sought to make the award a rule of Court, for the defeated party to come and merely say upon a verified petition that, [341] this or that ground referred to in ss. 520 and 521 existed against the filing. *Sree Ram Chowdhry v. Denobundhoo Chowdhry*, I. L. R., 7 Cal., 490, and *Ichamoyee Chowdhranee v. Prosunno Nath Chowdhry*, I. L. R., 9 Cal., 557, dissented from. *Dutto Singh v. Dosad Bahadur Singh*, I. L. R., 9 Cal., 575, *Dandekar v. Dandekars*, I. L. R., 6 Bom., 663, and *Chowdhry Murtaza Hossein v. Bechunnussa*, L. R., 3 Ind. Ap., 209, referred to.

THIS was an application to file and enforce an award, dated the 30th March 1885, under the provisions of ss. 525 and 526 of the Civil Procedure Code.

The application was made to the Subordinate Judge of Cawnpore, and, having been numbered and registered as a suit, was subsequently transferred to the High Court for trial.

* Suit No. 1 of 1886.

The applicant was Gavin Sibbald Jones, and the other parties were William Wilson and Henry Ledgard, executors of the last will and testament of Henry Charles Bevan Petman. It was stated in the application that the said G. S. Jones, James Hunt Condon and H. C. B. Petman carried on business together at Cawnpore as Wool Manufacturers, under the style of the "Cawnpore Woollen Mills Company" from the 18th April 1878, to about the 3rd August 1882, under a deed of partnership, dated the 18th April 1878; that divers differences and disputes having arisen between the said G. S. Jones, J. H. Condon, and H. C. B. Petman with respect to the accounts relative to the said trade, which embraced also a claim made by one Jai Dayal against the Company, (and which had been paid by the said G. S. Jones), he the said G. S. Jones and the said J. H. Condon, in accordance with the provisions of the 32nd clause of the deed of partnership, dated the 18th April 1878, called upon the said William Wilson and Henry Ledgard as such executors as aforesaid by a letter, dated the 25th March 1885, requiring them, *inter alia*, to refer the said disputes to arbitration; that the said Henry Ledgard as one of such executors as aforesaid replied to the said letter on the 25th March 1885, protesting against any resort to arbitration, whereupon he the said G. S. Jones and J. H. Condon, by an agreement, dated the 27th March 1885, referred the said disputes to the arbitrament of Samuel Maurice Johnson, who by virtue of the powers conferred upon him by the deed of partnership and the said agreement of the 27th March 1885, nominated [342] the Reverend George H. McGrew as the other arbitrator; that the said arbitrators, (having first duly nominated Samuel Burton Newton as their umpire) did on the 30th March 1885, duly make and publish their award in writing concerning the matters referred to them, and ordered, amongst other things, that the several payments in the said award directed to be made should be made within three months from the date of the award; and that the said H. Ledgard and W. Wilson as such executors as aforesaid and the said J. H. Condon had had due notice of the publication of the said award, but they had not paid the sums therein directed to be paid to him, the said G. S. Jones.

The prayer in the application was that the Court would, in accordance with the provisions of ss. 525 and 526 of the Civil Procedure Code, order that the said award should be filed, and further that it would give judgment in accordance therewith and pass a decree thereon.

On the 16th March 1886, on the application of the executors, Mary Petman, widow of H. C. B. Petman, was joined as a defendant.

On the 28th April 1886, H. Ledgard filed a written statement in which he stated as follows:—

"1. That undersigned has been the acting executor of the said Henry Charles Bevan Petman's estate, since grant of probate of the same to undersigned with William Wilson of Delhi, his co-executor, by this Honourable Court in the month of March 1885.

2. That in discharge of the duties imposed upon undersigned as such executor, undersigned had occasion to write a letter on the 25th March 1885, to Mr. T. Lewis Ingram, Barrister-at-law, Lucknow, who was then acting as counsel for the said Gavin Sibbald Jones and James Hunt Condon, Civil Surgeon of Cawnpore, in the following terms, that is to say:—

'Cawnpore, March 25th, 1885, Lewis Ingram, Esq. (Lucknow).

Dear Sir,—In reply to your letter of January 24th and in continuation of mine of 27th *idem* and February 26th, I beg to inform you that probate of the will of the late Mr. H. C. B. Petman has now been granted in favour of Mr. Wilson and myself.

We have taken the opinion of the late Mr. Petman's legal adviser and of independent counsel on the subject of the claim you make against the estate on behalf of Mr. G. S. Jones.

and Dr. Condon, and which you desire to refer to arbitration. In reply thereto I beg to invite your attention to Mr Howard's (the late Mr Petman's counsel) letter to you of January 26th, 1884, which was written [343] during Mr Petman's life-time, and to state that we do not feel justified in departing from the course he then adopted, and that we, therefore, protest against any resort to arbitration in the matter, and further we deny the liability in respect of the claim put forward by Messrs G S Jones and Dr Condon

'As I purpose leaving for England the end of the current week, I shall be much obliged by your addressing any further communication on the subject to Mr William Wilson of Delhi.

I am,

Yours faithfully

(Sd) H LEDGARD,

Executor for the estate of the late Mr H C B Petman'

8 That despite the protest contained in the said letter and refusal on the part of the undersigned to join in any reference to arbitration, the said Gavin Sibbald Jones and James Hunt Condon professed to make a submission to arbitration on the part of the estate of the said Henry Charles Bevan Petman under a deed of co partnership entered into on the 18th day of April 1878, between the three aforesaid parties for the term of 500 years, but which was superseded and which said partnership was altered and a new partnership substituted by the addition of two new partners, to wit William Earnshaw Cooper and George William Allen, who formed a new partnership with the aforesaid three persons on the 22nd day of December 1881, whereby there was a complete novation in respect of the capital of the said partnership concern, the term of duration of the said business which was reduced to one hundred years, and the good will thereof and the said last mentioned partnership was further absolutely dissolved and determined in August 1882, when the said five co partners formally transferred the stock and good will of their business to a Limited Liability Company incorporated under the Indian Companies' Act

4 That the matters of account forming the matter of the said alleged reference to arbitration, an award in which is sought to be filed against the executors of the said Petman's estate, were the subject matter of a civil suit instituted by one Jai Dayal Chaube of Cawnpore, in the Court of the Subordinate Judge of Cawnpore, on the 29th March 1882, against the partners of the said Woollen Mills Company for a sum of Rs. 23 10½ with interest, and in which the said Gavin Sibbald Jones was a confessing defendant, whilst the said Henry Charles Bevan Petman and the said James Hunt Condon successfully defended the same, and the said Subordinate Judge of Cawnpore, on the 3rd February 1883, dismissed the said suit with costs in favour of the said defendants, which said judgment and decree were never appealed from by the said plaintiff and became final as between the said parties

5. That in the course of the said judgment of the said Subordinate Judge of Cawnpore, the learned judge commented in strong and unfavourable terms on the conduct of the said Gavin Sibbald Jones in relation to his private dealings with the said Jai Dayal Chaube and his conduct towards his said co partners in connection therewith

6 That for nearly a whole year subsequently to the dismissal of the said suit, and for nearly two years subsequently to the formal dissolution of the said [344] partnership by incorporation in a public company, the said Gavin Sibbald Jones and the said James Hunt Condon, whilst the said Henry Charles Bevan Petman was in India, made no attempt to raise any question as to the said matters or any others relating to the said dissolved business, and it was not until the said Henry Charles Bevan Petman retired to England during the winter of 1883 that any proposal was made to him to submit the said questions to arbitration, and the said Henry Charles Bevan Petman at once repudiated any liability for accounting to his said co-partners by arbitration or otherwise, with respect to any of the said matters alleged to be in dispute between the said persons, and on the 26th January 1884, Mr. Petman's standing counsel, Mr. Howard, formally communicated the said refusal and objection on the part of the said H C B Petman to Mr Ingram aforesaid, who was then acting as counsel for the said Gavin Sibbald Jones and the said James Hunt Condon

7. That notwithstanding the above refusal, nothing was done to submit the said matters to arbitration, until after Mr. Petman's death had deprived his estate of such evidence as he himself might have adduced before any Court in which the award, if given during his lifetime, had been sought to be filed.

8. That the award said to have been made in pursuance of the aforesaid reference to arbitration to which undersigned was no party is bad, upon the face of it, for the following, amongst other, reasons :—

- (a) Because it is made and purports to consider and weigh evidence which it took the said Subordinate Judge of Cawnpore several months to record, and professes to scrutinize items of account without, as stated in the said award on the face of it, any examination of vouchers or witnesses, on the the 30th day of March 1885, the very day and date on which one of the said arbitrators, to wit George Harrison McGrew, was appointed by Samuel Maurice Johnson, the arbitrator for Messrs. Jones and Condon, to consider, in the interests of the said Petman's estate, the various matters in dispute discussed in the said award, thus bearing evidence upon the face of the same of all absence of due regularity and propriety in the proceedings of the said arbitration.
- (b) Because the said award avowedly on the face of it revises and reverses the findings and reasons of the said Subordinate Judge of Cawnpore with respect to the various matters treated and finally disposed of in his said judgment dated 3rd February 1883, in the suit of the said Jai Dayal Chaube, and makes the said partnership responsible for sums expressly disallowed as not due by the said judgment.
- (c) Because the said award, whilst professing to deal with a reference between the co-partners relating to a dispute alleged to exist between them concerning a partnership business, in effect and throughout the main provisions thereof deals with the claims of the said Jai Dayal Chaube, an outsider, against the members of the said partnership, and the money award made by the said arbitrators against the said Petman's estate is in effect a decree of the said Jai Dayal's claim as against all the three said co-partners.

[345] 9. That the said Gavin Sibbald Jones, in the application before this Honorable Court to file the said award against the estate of the said H. C. B. Petman, avowedly bases the claim to file the same as against undersigned on a voluntary payment and discharge of the claim of the said Jai Dayal Chaube alleged to have been made (at some time not specified) by the said Gavin Sibbald Jones, and as such no payment made by the said Gavin Sibbald Jones can bind the said Petman's estate.

10. That the said Gavin Sibbald Jones was further not entitled to make the said reference to arbitration as against the estate of the said H. C. B. Petman under the 32nd clause of the deed of co-partnership referred to in his said application to file the said award, within the true meaning and intent of the said deed of co-partnership.

11. That the claim of the said Gavin Sibbald Jones to file the said award under the provisions of ss. 525 and 526 of the Code of Civil Procedure is bad in law, in that it is contrary to the provisions of s. 28 of the Indian Contract Act and s. 21 of the Specific Relief Act, and the award deals with items of account on which a suit would be barred by limitation.

12. That the rights of minor children of the said H. C. B. Petman are involved in the administration of the said estate, and undersigned prays that for the reasons above set forth the said claim to file the said award as against the estate of the said H. C. B. Petman be dismissed with costs in favour of undersigned as executor of the said estate."

On the same day William Wilson filed a written statement, in which he stated as follows :—

"1. That he joined with one Henry Ledgard of Cawnpore in obtaining probate of the will of the late Henry Charles Bevan Petman deceased from the Honorable the High Court of Judicature for the North-Western Provinces on the 2nd day of March 1885.

2. That since the said date the undersigned has joined with the said Henry Ledgard in administering to the said estate, and jointly with the said Henry Ledgard declined to join any reference to arbitration of matters connected with the said estate.

3. That undersigned denies the right of any person joining in the said reference to arbitration to bind the estate of the said H. C. B. Potman behind the back of the duly authorized representatives of the said estate by *ex-parte* proceedings, had, not between existing co-partners of a subsisting business, but by persons who at the time of the said reference were acting outside the scope and powers of the 32nd paragraph of a deed of co-partnership which was terminated in December 1881, and relating to items connected with accounts of the year 1879, which had formed the subject of litigation between the parties in the year 1882, and which said litigation was finally concluded and determined by a judgment and decree of the Subordinate Judge of Cawnpore, dated the 3rd February 1883, which became final and binding in the premises.

4. That the award made by the said arbitrators is illegal and bad on the face thereof.

[346] 5. That the attempt on the part of the plaintiff to make the same a rule of Court is contrary to the terms of s. 28 of the Indian Contract Act and s. 21 of the Specific Relief Act.

6. That under the provisions of s. 526 of the Civil Procedure Code this Honourable Court should dismiss the said application to file the said award with costs in favour of undersigned defendant."

On the 5th May 1886, H. Ledgard filed a supplementary written statement, in which he stated as follows :—

"1. That the appointment of the Reverend George Henry McGrew as an arbitrator is bad in consequence of the failure of the plaintiff to comply with the provisions of the 32nd clause of the deed of co-partnership.

2. That the defendants were never served with notice of the date or place of arbitration and had no knowledge thereof prior to the making of the award; and the so-called arbitrators made their award without giving the defendants the opportunity of producing evidence if they had been so advised or of being heard."

On the same day the Court framed the following preliminary issue for trial :—

"Looking to the language of clause 32 of the partnership-deed of the 18th April 1878, and to the circumstances under which the arbitration-proceedings were held, were the defendants in law parties to the arbitration-proceedings, and so bound by the award in the sense of the procedure laid down in ss. 525 and 526 of the Civil Procedure Code."

The 32nd clause of the deed of partnership of the 18th April 1878, ran as follows :—

— "That in case any dispute or difference shall at any time arise between the said partners, or any partner or partners that may hereafter be admitted into the business with the aforesaid consent of all the parties to those presents, or between the survivors of them and the heirs, executors or administrators of a deceased partner or partners, touching or concerning the said business or any matter or thing herein contained or in any wise whatsoever relating to the said partnership business, or any of the affairs thereof, or concerning the true meaning and intent of these presents, the said dispute or difference shall, upon the request in writing of either of the said parties be referred to the arbitration of disinterested or indifferent persons to be chosen by each party in difference within fifteen days of such requisition in writing having been made and left at the place of business for the time being of the said partnership, or at the last known address of the said partners or representative of a deceased partner, and in case any of the said partners in difference or their or his heirs, executors and administrators shall refuse, neglect or fail to nominate an arbitrator, then the arbitrator named by the other party shall nominate another arbitrator, and the two arbitrators to be appointed as aforesaid shall, before proceeding in the said reference, nominate

[347] another indifferent person to be umpire, and the said arbitrators shall make their award in writing within thirty days next after such reference shall be made, or in case the said arbitrators shall not make the award within the time last mentioned, then the matter in difference shall be submitted to the said umpire, who shall make his award in writing within thirty days next after the said matter shall have been so referred to him either by the arbitrators or by the parties or any or either of them, and such arbitrators and umpire or any or either of them shall have full power to examine the said parties and their respective witnesses, on oath or otherwise, and to call for and require the production of all books, papers, deeds, letters, vouchers, documents and writings that they or he shall think necessary, and shall have all the power and authority given by the statute in that behalf, and the award of the said arbitrators, and the umpirage of the said umpire as the case may be, shall be final and conclusive between the said parties, and to this end it is equally understood and agreed that any submission or reference to arbitration under or by virtue of these presents, shall and may from time to time be made a rule of the Civil Courts of Cawnpore aforesaid, and be binding upon all the said partners under the provisions of ss. 525 and 526, Act X of 1877, otherwise called the new Code of Civil Procedure."

Mr. T. Conlan and Mr. G. E. A. Ross, for the Plaintiff.

Mr. J. E. Howard and Mr. C. H. Hill, for Henry Ledgard and William Wilson, executors of the deceased H. C. Petman.

Mr. Ross Alston, for Mary Petman, widow of H. C. Petman.

Straight, Offg. C.J.—This is an application by Gavin Sibbald Jones, under s. 525 of the Civil Procedure Code, asking to file an award, dated the 30th March 1885. Notice was issued to the parties said to have been affected by the award, and who are also alleged to have been parties to the arbitration, to show cause why the award should not be filed; and they have now appeared and lodged verified petitions, setting forth the grounds on which they maintain that the application ought not to be granted. Before dealing more immediately with the application and the sections relating to it, namely, ss. 525 and 526 of the Code, I think it desirable, by way of preliminary, and for the purpose of explaining my views, to examine the provisions of Chapter XXXVII of the Code in which those sections are to be found. These provisions have been framed to provide for three things—*first*, a reference to arbitration by consent of the parties in the course of a suit; *secondly*, means for making an agreement to refer, or the submission to arbitration, a rule of Court, and so seizing the Court of the matter, and giving it jurisdiction over [348] the award subsequently passed on the reference; and, *thirdly*, for an application by the parties who have entered into a private agreement under which an arbitration has been held, to file the award which is its outcome. These are three clear, distinct, and separate matters with which a Court has power to deal under Chapter XXXVII. As regards the first, I need say nothing, because its nature is well understood. With reference to the second, it appears to me that what was contemplated was, that the parties, having entered into an agreement to refer, could come to a Civil Court and ask it to make the agreement a rule of Court, and thus not only give the Court power to deal with any award made subsequently, but also jurisdiction over the arbitrators, so as to entitle it to exercise the powers which a Court, making a reference in a suit, would have under ss. 518, 520, and 521. That these provisions apply to this second class of matters, is shown by s. 524, which says:—"The foregoing provisions of this chapter, so far as they are consistent with any agreement so filed, shall be applicable to all proceedings under an order of reference made by the Court under s. 523, and to the award of arbitration, and to the enforcement of the decree founded thereupon." But ss. 525 and 526, with which we are more particularly concerned, present a

different state of things. The parties having by private agreement gone to arbitration, and an award having been obtained, any one of them may come to the Civil Court and have the award filed *in invitum* against the others, unless they can show that the award is open to objection on any of the grounds mentioned in s. 520 or s. 521. It is clear from the limitation mentioned in s. 526, which specifically confines the objections that may be taken to those referred to in s. 520 or s. 521, that the Court considering whether the award should be filed has no power to touch the terms of the award; and, if the ground of misconduct or other matters referred to in those sections are disclosed, the Court must refuse to file the award. Now, what is the effect of filing the award? The award, if filed, is to have the effect of an award under the provisions of this chapter. This means that when a Court resolves to file the award, having in this case determined beforehand whether any objections under s. 520 or s. 521 have been satisfactorily put forward, there must be a judgment and decree passed there and [349] then, and the award must be turned into a decree in the manner contemplated by s. 522. Whereas, in the one case, in cases referred by the Court in a suit, or in case of reference by an agreement by parties, which has been made a rule of the Court, objections are to be entertained after the award has come back to the Court; in the other, the objections are preliminary to the award being filed.

In the present case the defendants have made two main objections to the filing of the award. In the first place, it has been contended that Messrs. Wilson and Ledgard, as executors of the deceased Petman, were not parties to the arbitration proceedings, and therefore cannot be bound by them; in the second place, it has been contended that, assuming them to have been parties, still, they having filed verified statements, which, upon the face of them, disclose grounds of objection within the meaning of s. 520 or s. 521, I must at once stay my hand, and cannot proceed to inquire into the "*bona fides*" or validity of those objections.

As regards the first point, it seems to me the answer is to be found in the language of cl. 32 of the partnership-deed. That partners may, in a partnership-deed, contract that future disputes shall be settled in a particular manner which ousts the jurisdiction of the ordinary tribunals, is undoubted, and is a condition which is recognized by the Courts. In saying this, I may refer to *Willcox v. Storkey*, L. R., 1 C. P., 671. In the argument in that case, ERLE, C.J., referred to *Re Newton and Hetherington*, 19 C. B., (N. S.) 342, the effect of which is, that where the parties have agreed to refer matters of difference arising between them with regard to partnership matters to arbitration, they are bound by such agreement and by any proceedings that may be adopted thereunder. Moreover, it is laid down at p. 63 of Russell's work on Arbitration that "when the agreement, though not naming the referees, provides for their appointment in a particular manner, and they are afterwards so appointed in writing, though contrary to the will of one of the disputing parties, this has the same effect as if the referees were named in the clause itself." In my opinion, by cl. 32 of the partnership-deed now before me, the parties to it did agree that they would submit their partnership disagreements to arbitration, for they said in terms [350] that if any difference should arise, "the said dispute or difference shall, upon the request in writing of either of the said parties, be referred to the arbitration of disinterested or indifferent persons, to be chosen by each party in difference within fifteen days of such requisition in writing having been made and left at the place of business for the time being of the said partnership, or at the last known address of the said partner or representative of a deceased partner, and"—this is the most material passage—"in case any

of the said partners in difference, or their or his heirs, executors, and administrators, shall refuse, neglect or fail to nominate an arbitrator, then the arbitrator named by the other party shall nominate another arbitrator, and the two arbitrators to be appointed as aforesaid shall, before proceeding in the said reference, nominate another indifferent person to be umpire." Now, on the 24th January 1885, Mr. Ingram as representing the present applicant, wrote to Messrs. Wilson and Ledgard, stating as follows:—"My clients purpose referring their claim to arbitration under the terms of the deed of partnership, but have no desire to avail themselves of the power to force on an arbitration without you. I shall therefore be glad if you will inform me at your convenience whether it is your wish to join in the arbitration or not." That letter was not directly answered till the 25th March, when Mr. Ledgard replied to it in these terms:—"We have taken the opinion of the late Mr. Petman's legal advisers and of independent counsel on the subject of the claim you make against the estate on behalf of Messrs. G. S. Jones and Dr. Condon, and which you desire to refer to arbitration. In reply thereto, I beg to invite your attention to Mr. Howard's (the late Mr. Petman's counsel) letter to you of the 26th January 1884, which was written during Mr. Petman's lifetime, and to state that we do not feel justified in departing from the course he then adopted, and that we therefore protest against any resort to arbitration in the matter, and further that we deny the liability in respect of the claim put forward by Messrs. G. S. Jones and Dr. Condon." Having given this matter my best attention, and having put the best construction upon this letter that I can, I am of opinion that it amounts to a distinct refusal on the part of Mr. Howard's clients to the nomination of an arbitrator, or to do anything in connection with arbitration proceedings. In consequence of the letter, Mr. Jones and Dr. Condon, by an agreement dated the 27th March 1885, reciting all the matters concerned in the submission, agreed to refer the matters in difference to the arbitration of one Samuel Maurice Johnson. This agreement purported to be drawn up in accordance with cl. 32 of the partnership-deed. Mr. Johnson, in his turn, in conformity with the terms of the clause, nominated one George McGrew, and on the 30th March, a third person, Samuel Burton Newton, was formally appointed umpire. All that I need say is that it appears to me there is sufficient reason to show that Messrs. Wilson and Ledgard are "*prima facie*" bound by the arbitration proceedings so as to bring them within the terms of s. 525 of the Civil Procedure Code, as parties to the arbitration who should be called on to show cause why the award should not be filed. Mr. Hill has contended that the word "parties," as used in s. 525, applies only to persons who are actually before the arbitrators. But I do not think I ought to place so narrow a construction upon the terms of the section. If parties, by an agreement, have undertaken between themselves that, in the event of a certain state of things happening, a particular procedure shall be followed which, under one state of circumstances, may be adopted *in invitum*, it appears to me that for the purposes of s. 525 they should be regarded as parties to that arbitration. Were I to hold otherwise, they would have no power to appear before me, as in the present case, to lodge objections, with the result that no alternative would be open to me than to order the award to be filed. I think therefore that the first objection fails, and it is to the defendants' interest that it should do so. With regard to the second objection, namely, that the defendants having filed a verified petition, which discloses grounds of objection within s. 520 or s. 521, I should at once and without inquiry stay my hand, and refuse to file the award, leaving the parties to a regular suit upon the award, in which all matters relating to their differences might be investigated. Mr. Howard and Mr. Hill have cited two rulings by two

learned Judges, for whose opinions I entertain the very highest respect, and from whom I should hesitate in differing, unless I felt constrained to do so. The first of these is *Sree Ram Chowdhry v. Denobundhoo Chowdhry*, I. L. R., 7 Cal., 490, in which PONTIFEX, J., if I may say so with [*sic*] impropriety, appears to have somewhat unnecessarily gone out of his way to place a construction upon the meaning of the words "show cause" as mentioned in s. 525 and "ground" in s. 526. In *Ichamoyee Chowdhranee v. Prosunno Nath Chowdhry*, I. L. R., 9 Cal., 557, WILSON, J., dealt with the point, and decided in effect that the contention now urged by Mr. Howard and Mr. Hill is sound, and is a correct view of the statute. Before examining the terms of the sections, I think it right to mention that FIELD, J., who, with PONTIFEX, J., heard the appeal in *Sree Ram Chowdhry v. Denobundhoo Chowdhry*, I. L. R., 7 Cal., 490, expressed no opinion upon the point, and that MACPHERSON, J., in the other case to which I have referred, observed that he would "hesitate to say that when such grounds of objections are set forth in a verified petition or affidavit, the Court is to make no inquiry." In *Dutto Singh v. Dosad Bahadur Singh*, I. L. R., 9 Cal., 575, two learned Judges, MITTER and O'KINEALY, JJ., in terms expressed their dissent from the judgment of WILSON, J., in *Ichamoyee Chowdhranee v. Prosunno Nath Chowdhry*, I. L. R., 9 Cal., 557. Now let us see what is the language of the section. Under s. 525, what is required is that the parties, other than those applying, must "show cause." As observed by MELVILL, J., in *Dandekar v. Dandekars*, I. L. R., 6 Bom., 663, this is a perfectly well understood expression. I do not agree with Mr. Howard's suggestion that because the word "ground" is used in s. 526, the meaning of the expression "show cause" in s. 525 is cut down. It appears to me that if these sections are read together, they mean that the party coming forward must show cause, that is to say, must establish by argument, or proof, or both, reasonable ground for the conclusion that the award is open to any of the objections mentioned in s. 520 or s. 521. It is important to notice that ss. 525 and 526 in the present Code represent no novel principle. In s. 327 of Act VIII of 1859, the same provision occurred, except that the words there used were "sufficient cause." I find that their Lordships of the Privy Council, in dealing with an appeal relating to an award that had been filed under s. 327, went very elaborately into the grounds put forward by those who opposed the filing of the award in the Court below, and it seems to me that the remarks of [353] their Lordships favour the view I take of the provisions of the existing Code. I do not think that because the words "sufficient cause" in s. 327 of the Code of 1859 have been altered to "ground such as is mentioned or referred to in s. 520 or s. 521" in s. 526 of the present Code, the whole scope of the section has been altered, as the interpretation of WILSON and PONTIFEX, JJ., suggests. I think that s. 526 was so framed as to bring the provisions of the Code into harmony with the language used by Sir JAMES COLVILLE in the Privy Council case to which I have referred—*Chowdhry Murtaza Hossein v. Bechunnissa*, L. R., 3 Ind. Ap., 209.

In addition to the cases I have mentioned, I have the authority of MELVILL, J. in *Dundekar v. Dandekars*, I. L. R., 6 Bom., 663, and, under these circumstances, after giving the case my best consideration, I feel bound to hold that WILSON and PONTIFEX, JJ., placed an incorrect interpretation upon s. 525, and one which those who framed never intended it to bear. I need scarcely point out the mischief which would arise if, when parties had agreed to refer matters to arbitration, and an award had been passed, the defeated party were entitled, when it was sought to make the award a rule of Court, to come and merely say upon a verified petition that this or that ground referred to in ss. 520 and 521 existed against the filing. Something more than this was, I think, intended

by the Legislature, and so, it seems to me, common sense should require. What I consider is required, is that such party should, by argument or evidence, or both, show substantial materials to warrant the Court in arriving at a conclusion that the reasons referred to in s. 520 or s. 521 exist in the particular case.

For these reasons, I am of opinion that both preliminary objections fail, and it will now be necessary to determine what the other issues in the matter ought to be.

NOTES.

[The expression 'show cause' includes *proving* it and implies jurisdiction to go into its sufficiency :—(1889) 16 Cal., 482 ; (1893) 21 Cal., 213 ; (1898) 25 Cal., 757 ; (1894) 17 All., 21 ; (1906) 28 All., 621.

As regards Bombay, see also (1905) 29 Bom., 621, where the previous decisions were discussed.

The Legislature has placed the matter beyond doubt by suitable words in para. 21, Second Schedule, C. P. C., 1908.]

[354] FULL BENCH.

The 10th May, 1886.

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, MR. JUSTICE OLDFIELD,
MR. JUSTICE BRODHURST, MR. JUSTICE TYRRELL, AND
MR. JUSTICE MAHMOOD.

Ajudhia Prasad and others.... Plaintiffs

versus

Balmukand and others.....Defendants.*

*Appeal—Ex parte decree—Civil Procedure Code, ss. 103, 108, 540, 560,
584—Construction of statute—General words.*

Held, by the Full Bench (STRAIGHT, Offg. C.J., and TYRRELL, J., expressing no opinion), that a respondent in whose absence the appeal has been heard *ex parte*, and against whom judgment has been given, may prefer a second appeal from the decree, under the provisions of s. 584 of the Civil Procedure Code, and his remedy is not limited to an application under s. 560 to the Court which passed the decree to re-hear the appeal. *Ramjas v. Baijnath* I. L. R., 2 All., 567, approved.

Per OLDFIELD, J.—There is a distinction between the case of a defendant in a of First Instance and that of a respondent in an appellate Court not appearing, with reference to ss. 108 and 560 of the Code. *Lal Singh v. Kunjan*, I. L. R., 4 All., 387, and *Ramshet Bachaset v. Balkishna Ababhat*, 6 Bom. H. C. Rep., 161, referred to.

Per MAHMOOD, J.—The distinction is one of detail merely and not of principle. *Lal Singh v. Kunjan*, I. L. R., 4 All., 387, dissented from. *Zain-ul-ab-din Khan v. Ahmad Raza Khan*, I. L. R., 2 All., 67 ; I. R., 5 Ind. Ap., 233 ; *Jamaitunnissa v. Lutfunnissa*, I. L. R., 7 All., 606 ; *Ashrufunnissa v. Lehareaux*, I. L. R., 8 Cal., 272 ; *Luckmidas Vitthaldas v. Ebrahim Osman*, I. L. R., 2 Bom., 644 ; *Anantharama v. Madhava Paniker*, I. L. R., 3 Mad., 264, and *Modalatha's Case*, I. L. R., 2 Mad., 75, referred to.

Also *per* MAHMOOD, J.—Where two procedures or two remedies are provided by statute, one of them must not be taken as operating in derogation of the other.

* Second Appeal No. 558 of 1885, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Shahjahanpur, dated the 24th January 1885, modifying a decree of Pandit Bunsidhar, Munsif of Shahjahanpur, dated the 24th November 1884.

THIS was a reference to the Full Bench by BRODHURST and TYRRELL, JJ. The facts and the point of law referred are stated in the ORDER OF REFERENCE which was as follows:—

" This was a suit brought by the holders of a hundi against Ajudhia Prasad and Juala Prasad, the drawers, and Fateh Lal, said to represent the firm of Baldeo Das, drawee of the same. In the Court of the Munsif, Juala Prasad, who has failed in business, confessed judgment.

[355] Ajudhia Prasad denied that his son, Juala Prasad, had power to sign the hundi for him, and Fateh Lal made no appearance in the suit.

The Munsif gave the plaintiffs a decree against the confessing defendant, Juala Prasad, accepted the defence of non-responsibility set up by Ajudhia Prasad, and, on what materials we know not, dismissed the claim against Fateh Lal also. The latter had made no defence to the suit, had of course produced no evidence, and his interest in the matter does not seem to have been brought into issue. Under this decision, the plaintiffs held a decree against Juala Prasad alone, their suit standing dismissed against Ajudhia Prasad and Fateh Lal. The plaintiffs appealed to the District Court against this exemption of Ajudhia Prasad and Fateh Lal, and again Fateh Lal made no appearance in the appeal, but judgment was given by the Lower Appellate Court against him on the merits *ex parte*, as well as against the other respondent, Ajudhia Prasad, who defended the appeal. Now all these defendants—Fateh Lal, Ajudhia Prasad and Juala Prasad—have brought this second appeal.

A preliminary objection is taken for the respondents, that Fateh Lal, against whom the lower Court gave judgment *ex parte*, cannot maintain a second appeal against that judgment, but is restricted to his remedy as specially provided by s. 560 of the Code.

It has been ruled by a Bench of this Court in *Ramjas v. Bajinath*, I. L. R., 2 All., 567, that a second appeal would lie; but as one of the learned Judges, who was a party to that decision, subsequently held in Full Bench that a first appeal is not open to a defendant against an *ex parte* judgment under s. 108, Civil Procedure Code, and one of us has doubts with regard to the ruling under s. 560, Civil Procedure Code, we think it well to refer this question in the first instance, and also the decision of the appeal, to a Full Bench. We make order accordingly."

Pandit Bishambar Nath, for the Respondents. Fateh Lal cannot appeal from the *ex parte* appellate decree made against him. He should have applied under s. 560 of the Civil Procedure Code for the re-hearing of the appeal. The ruling of the Full Bench in [356] *Lal Singh v. Kunjan*, I. L. R., 4 All., 387, is in point. In that case the word "may" in s. 108 has been construed to mean "shall," and the word "may" is also used in s. 560.

Mr. Amir-ud-din, for the appellant Fateh Lal. The case of *Lal Singh v. Kunjan*, I. L. R., 4 All., 387, is not in point. That related to an *ex parte* decree of a Court of First Instance and not of an appellate Court. Section 584 does not provide that there shall be no appeal in such a case, nor is there anywhere in the Code a provision against an appeal in such a case.

Oldfield, J.—The question referred to us has arisen in a suit which Balmukand and others, plaintiffs, brought against Fateh Lal and others, on a hundi. The suit was decreed in the first Court against one of the drawers, but dismissed against Fateh Lal, the drawee, and one of the drawers. The plaintiffs appealed, and the first appellate Court gave judgment *ex parte* against Fateh Lal. He instituted a second appeal in the High Court, and the question referred is, whether a second appeal will lie on the part of Fateh Lal, a

respondent against whom a judgment has been given by the first appellate Court *ex-parte*, inasmuch as s. 560 of the Civil Procedure Code gave him another remedy by applying for a re-hearing of the appeal by the first appellate Court.

It has been ruled by a majority of the Full Bench of this Court that a defendant against whom a decree has been passed *ex parte* by a Court of First Instance cannot appeal, but is confined to the remedy provided in s. 108, by applying to have an order to set aside the *ex parte* decree—*Lal Singh v. Kunjan*, I. L. R., 4 All., 387. I was one of the Judges who dissented from the view held by the majority, and I was of opinion that the remedy by appeal is not taken away by reason of a procedure being provided by application for setting aside the *ex parte* decree, and I am still of the same opinion for the reasons which I gave in that case.

I should, however, consider myself bound to follow the ruling in that case, if applicable to the case before us; but I think there is a distinction between the provisions in s. 108 and s. 560. In the latter the respondent would appear to have no right to insist upon [357] a re-hearing of the appeal, even when he satisfies the Court that the notice was not duly served, or that he was prevented by sufficient cause from attending when the appeal was called on for hearing; for the section provides that in that case "the Court may re-hear the appeal," thus allowing it a discretion to re-hear it or not. If this is so, the right of appeal cannot be taken away.

There is also a distinction between the case of a respondent who has succeeded in the first Court, and against whom a decree has been given *ex parte* by the appellate Court, and the case of a defendant who sets up no defence and produces no evidence in the first Court. This distinction was pointed out in *Ramshet Bachaset v. Balkishna Ababhat*, 6 Bom. H. C. Rep., 161, and also by Sir R. STUART, Chief Justice of this Court, in the Full Bench case of *Lal Singh v. Kunjan*, I. L. R., 4 All., 387, who while he concurred in holding that under s. 108 of the Civil Procedure Code, a defendant against whom a decree was passed *ex parte* could not appeal, drew a distinction between this case and that of a respondent against whom a decree has been given *ex parte* by an appellate Court, who, he held, would still have his remedy by appeal, notwithstanding that he might apply for a re-hearing under s. 560; and this was the effect of the ruling by a Division Bench of this Court in the case of *Ramjas v. Baijnath*, I. L. R., 2 All., 567.

I would reply to the reference that a respondent against whom judgment is given by an appellate Court *ex parte* is not deprived of his right of second appeal by reason of anything in s. 560 of the Civil Procedure Code, which permits him to apply to the appellate Court for a re-hearing of the appeal, and return the case to the Division Bench for disposal.

Brodhurst, J.—A second appeal will, in my opinion, lie from an *ex parte* decree of a Lower Appellate Court. In my judgment in *Lal Singh v. Kunjan*, I. L. R., 4 All., 387, I have given my reasons for holding that an appeal will lie by a defendant from a decree passed *ex parte* under the provisions of Chapter VII of the Civil Procedure Code, and the opinions I have expressed are in accordance with judgments of one or more Benches of every High Court in India.

On the analogous question now referred, I think it sufficient to say that I concur in the judgments of STUART, C.J., and SPANKIE, J., [358] in *Ramjas v. Baijnath*, I. L. R., 2 All., 567, and in which those learned Judges ruled that an appeal will lie from an *ex-parte* decree of a Lower Appellate Court.

Mahmood, J.—I have arrived at the same conclusions as my learned brothers OLDFIELD and BRODHURST, but as at the hearing of the appeal the

case appeared to me somewhat distinguishable from that decided by the majority of the Full Bench in *Lal Singh v. Kunjan*, I. L. R., 4 All., 387, I think it necessary to state my reasons fully, with the object of showing that now I hold that no real distinction in principle exists. What was ruled in that case was this, that because by s. 108 of the Civil Procedure Code there is provided a special procedure for the case of non-appearance by a defendant against whom a decree is passed, therefore the general provisions of s. 540, conferring the right of appeal, do not apply to such a case. My own view is that the right of appeal being a special remedy, apart from the ordinary application of the maxim *ubi jus ibi remedium*, can only be created by specific enactment. In this country, with regard to appeals, no rule of the common law exists, but there is a specific provision in the Civil Procedure Code. When I say that the right of appeal must be expressly granted by statute, I think I am within the authority of cases decided by the highest tribunals in England.

The question therefore is whether the appellant Fateh Lal could have maintained an appeal to the Lower Appellate Court. This is not the specific question to which this reference relates, but the answer to it must in principle be the same as the answer to the question which has been referred to the Full Bench. In the present case the plaintiff sued certain persons—Fateh Lal, Ajudhia Prasad, and Juala Prasad. Among these defendants Juala Prasad admitted the claim. Ajudhia Prasad said that he could not be held liable in law to the claim. Fateh Lal did not appear at all. The Munsif's decree was, that the claim, as against Juala Prasad, should be decreed because it was admitted; that as against Ajudhia Prasad it should be dismissed, because he had succeeded in proving his non-liability; and with regard to Fateh Lal, that it should be dismissed for reasons that do not clearly [359] appear. The plaintiff appealed to the Judge from that portion of the Munsif's decree which exempted Ajudhia Prasad and Fateh Lal from liability, and the District Judge heard the appeal in the presence of Ajudhia Prasad, and *ex-parte* so far as concerned Fateh Lal; but in consequence of the view which the learned Judge took of the law, he passed a decree against both. In the present case, Ajudhia Prasad and Fateh Lal have joined with Juala Prasad in appealing to this Court against the whole of the Judge's decree, and this has given rise to the present reference.

It is an admitted proposition relating to the construction of statutes, that whenever the common law is varied by statute, it is one of the elements of what has been called "the golden rule" of construction, that, in case of any difficulty arising, the Court will look to the common law to see how it stood before it was altered by the Legislature; and, in giving effect to the new law, will place a beneficial construction so as to "suppress the mischief and advance the remedy," the mischief being mainly indicated by what has been repealed or abolished. This was laid down by Lord COKE in *Heydon's Case*, and has ever since, I believe, been acted upon by the Courts in England. In this country, I believe, it is not going too far to say that, just as a Court is bound to take notice of alterations of the common law effected by statute, so also, for similar reasons, it is bound to take notice of changes of the law by statutes which alter the specific provisions of earlier enactments *in pari materia*. Under the old Code, Act VIII of 1859, such matters were dealt with by s. 119. That section began with the following words:—"No appeal shall lie from a judgment passed *ex-parte* against a defendant who has not appeared, or from a judgment against a plaintiff by default for non-appearance." This clearly shows that decrees of this kind were not, under the Code of 1859, open to appeal. This provision stood when Act XXIII of 1861 was passed. That Act dealt

with the question of appeal; and in a section (s. 23) substituted for s. 332 of the old Code, we find these words:—"Except when otherwise expressly provided in this or any other Regulation or Act for the time being in force, an appeal shall lie from the decrees of the Courts of original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts." So that under [360] Act XXIII of 1861, the law stood that, by an express provision, *ex-parte* decrees were not open to appeal.

But it must be remembered that, even under that law, the Lords of the Privy Council in *Zain-ul-ab-din Khan v. Ahmad Raza Khan*, I. L. R., 2 All., 67; L. R., 5 Ind. Ap., 233, placed a very strict construction upon s. 119 of the old Code upon the ground that "a defendant ought not to be deprived of the right of appeal, except by express words or necessary implication;" and they held that a defendant who had once appeared was excluded from the prohibition, and could appeal, even though the case was heard in his absence, and a decree was passed against him *ex-parte*. Then came Act X of 1877, in which the first sentence of s. 119 (already quoted) of the old Code was omitted. In ss. 103 and 108 of that Act, it was *not* laid down as in the former Act that decrees of this kind were not appealable. Moreover, if it had been intended to maintain the former rule restricting the right of appeal, s. 540 of the new Act—which was word for word the same as s. 540 of the present Code—should have contained a proviso that the right of appeal should not exist where the plaintiff failed to appear, and the suit was dismissed on that ground; or where, in consequence of the defendant's failure to appear and set up a defence, the suit was decreed. Section 540, however, contained no such proviso. It was expressed in the following terms:—"Unless, when otherwise expressly provided in this Code, or by any other law for the time being in force, an appeal *shall* lie from the decrees, or from any part of the decrees, of the Courts exercising original jurisdiction, to the Courts authorised to hear appeals from the decisions of those Courts." I need say nothing as to the word "*shall*," but I must here point out that the section does not say "expressly provided *for*," but only "expressly provided,"—two phrases which, as I understand the English language, mean two different things, and the difference of meaning is in favour of the opinion which I shall presently express. In the present case, there can be no doubt that the Judge was authorised to hear the appeal; and the question is, whether the word "*decree*" in s. 540 means to exclude the *ex-parte* decrees contemplated by s. 108. I take it to be an undoubted proposition of law that, in the interpretation of general words in a [361] statute, the Courts are bound to give those words the broadest possible effect, unless there is some specific reason for limiting their meaning. Further, there can be no doubt that if those words operate in derogation of the rights of the subject, the strictest interpretation must be placed upon them; and by analogy to the rule of criminal law that an accused person is entitled to the benefit of every doubt, every ambiguity (if any) must be construed in favour of the subject. The question then is, what reason is there for holding that the word "*decree*" in s. 540 means only decrees passed in contested suits? I see no reason for so holding. The only argument is that, in another part of the Code, s. 108, the Legislature has provided one form of procedure for setting aside *ex-parte* decrees; but I have already said that "provided," as used in s. 540 must not be read as if meant that the contingency is "provided *for*." Then the question is, where two procedures or two remedies have been provided, can one of them be taken as operating in derogation of the other? Of course, where a statute itself creates a substantive right, obligation, or duty, and, as it were in the same breath, provides a special and exclusive remedy, such

remedy would be the only one available for that purpose (Maxwell on the Interpretation of Statutes, pp. 495-500). But those principles are not applicable to the enactment now under consideration, and, as I observed during the argument, I see no more reason for holding that the right of appeal conferred by s. 540 is subject to the provisions of s. 108, than for holding that s. 108 must be read subject to the provisions of s. 540. Again, it must be remembered that a statute, though the expression of the will of the Legislature, is after all a document, and must be interpreted according to the broad and fundamental principles applicable to the construction of documents in general. This being so, I am within the authorities when I say that, in the construction of documents, a later covenant or provision governs those preceding it, on the theory that the later clause represents the later intention; but the preceding covenants or provisions never govern the subsequent ones; and it is also a rule that every attempt should be made to avoid inconsistency of meaning. These rules, however, are applicable only in cases of real conflict; but with due deference to the majority of the Full Bench in *Lal Singh v. Kunjan*, I. L. R., 4 All., 387, [362] no such conflict exists, for, as I shall presently show, s. 108 and s. 540 aim at two different ends. Section 108 says that the defendant against whom an *ex-parte* decree has been passed, "may" apply to the Court which has passed it to set it aside for certain specific reasons. It gives a choice to the party aggrieved, and does not compel him to adopt the remedy which it provides, or make other remedies impossible. If there is no conflict between the two rules, s. 540 obviously enables, not only a defendant, but a plaintiff, who does not appear, to appeal under the general provisions relating to appeals. In the case of the plaintiff's default, it is said that one who has taken no care to prosecute his claim in the Court of First Instance, should not be allowed to appeal in the same way as if he had taken all proper care. There appears to me to be nothing in this argument, because, supposing that the plaintiff does not appear, and the defendant does appear, the Court is bound to give the latter a decree, unless he admits the claim or part thereof; while, supposing the plaintiff does not appear, because he, in good faith, expects the defendant to be honest enough to admit the claim, and supposing the Court, in violation of the rule contained in s. 102 of the Code, which, in these circumstances, imperatively requires it to decree so much of the claim as is admitted, dismisses the suit *in toto*, in such a case the plaintiff, even though in default, would be entitled to appeal. It has never been contended in such circumstances that when a suit has been taken up in the absence of the plaintiff, and the Court, instead of decreeing the suit, dismisses it, the plaintiff could not appeal under the provisions of s. 540. It follows that, to this extent at all events, decrees passed in the absence of one of the parties are among the decrees to which s. 540 relates. What reason, then, is there for holding that a defendant who is in default has not the same right?

I have already said that the mere granting of one form of remedy cannot be regarded as taking away another. If we applied a different rule, it may be said that because s. 523 or s. 525 as to arbitration provides one form of remedy, therefore in those cases the ordinary remedy by a regular suit is barred; or that because s. 623 gives the power to apply for a review of judgment, the party entitled to make such application is thereby deprived of his right of appeal. I believe that the latest authorities on the [363] subject in England justify the proposition that anything, broadly speaking, which may be made the subject of an application for a new trial, may also be made the subject of appeal under the Judicature Acts; and I do not think our own law is radically different on this point.

For these reasons I am of opinion that s. 540 applies to *ex-parte* decrees, by which a suit is either decreed or dismissed, and enables a defaulting plaintiff to come up in appeal; and he would succeed if he showed that the Court below should not have dismissed his suit. It appears to me that there is no reason to regard s. 540 as limited in its scope to decrees passed in contested suits only. And if this is so, a defendant against whom a decree is passed *ex-parte* would, *a fortiori*, have a right of appeal. Nor is the reason far to seek. He may satisfy the Appellate Court that upon the case as presented by the plaintiff himself in the plaint or upon the evidence as produced by him, the suit should not have been decreed, either because it was barred by some positive rule of law, (such as limitation, *res judicata*, etc.), or because the plaintiff's own evidence contradicted the case set up by him. And I must add that this view does not imply that, in the absence of adequate materials on the record, the Appellate Court would be bound to entertain any such grounds for setting aside the lower Court's decree as are contemplated by s. 108 of the Code. Ordinarily an appellant is confined to the facts and materials upon the record.

The truth is that s. 560 of the Code is a reproduction, *mutatis mutandis*, of the rule stated in s. 108 in the earlier part of the Code with reference to suits. The section provides that "when an appeal is heard *ex-parte*, in the absence of the respondent, and judgment is given against him, he may apply to the Appellate Court to re-hear the appeal; and if he satisfies the Court that the notice was not duly served, or that he was prevented by sufficient cause from attending when the appeal was called on for hearing, the Court may re-hear the appeal on such terms as to costs or otherwise as the Court thinks fit to impose upon him." This is exactly the same rule as is stated in s. 108, though I also feel that much might be said upon the distinction between the words "may" and "shall" which my brother OLDFIELD has pointed out. And I [364] may add that s. 560 of the Code is only a further illustration of the dissentient opinion which I expressed in *Jamaitunnissa v. Lutfunnissa*, I. L. R., 7 All., 606, in interpreting s. 582, that the Code throughout preserves the analogy, *ad litis ordinationem*, between the defendant in a suit and the respondent in an appeal. Section 584 of the Code, relating to the ground upon which second appeals may be preferred, is analogous in its provisions to s. 540, and the expression used in both sections is "unless when otherwise provided by" by this Code, and the expression "otherwise provided for" is not adopted. And to what I have already said upon the point I may add that the distinction is a very wide one. The word "for" would imply that a remedy was elsewhere provided to meet the contingency; the word "by" without the word "for" means that the statute itself says there shall be no appeal. Again, s. 522 provides that where a decree has been passed on an arbitration award, and is co-extensive therewith, "no appeal shall lie." This is an illustration of what the Legislature means by the words "provided by" in ss. 540 and 584. Then again, another illustration is to be found in s. 586, which provides that "no second appeal shall lie in any suit of the nature cognizable in Courts of Small Causes," where the value is less than Rs. 500. So that there it is "otherwise provided by" the Code, that no appeal is to lie. There is no corresponding provision laying down that no appeal shall lie from an *ex-parte* decree.

With reference to the case-law on the subject, I may refer to *Ashrufunnissa v. Lehareaux*, I. L. R., 8 Cal., 272; *Luckmidas Vithaldas v. Ebrahim Oosman*, I. L. R., 2 Bom., 644, and *Anantharama v. Madhava Paniker*, I. L. R., 3 Mad., 264, which all support my view. There is also a ruling of this Court in *Ramjas v. Patijnath*, I. L. R., 2 All. 567, and another of the Madras Court

in *Modalatha's case*, I. L. R., 2 Mad., 75, laying down the rule that, in second appeals, at all events, an appeal will lie from an *ex-parte* decree of the Lower Appellate Court. Further, even under the old law, there is a case—*Ramshet Bachaset v. Balkrishna Ababhat*, 6 Bom., H. C. Rep., 161—in which a distinguished Judge, COUCH, C. J., draws a marked distinction between the case of a defendant and that of a respondent not appearing. I accept [366] this distinction, but it is in my humble opinion one of detail only, and not of juridical principle as representing a fundamental doctrine.

For these reasons I hold that our answer to the question referred must be that a second appeal lies, under s. 584 of the Code, from a decree of the Lower Appellate Court passed in the absence of the respondent, whether the respondent were plaintiff or defendant in the suit.

Straight, Offg. C. J., and Tyrrell, J.—Upon consideration of the question referred to the Full Bench, we are of opinion that, as an amendment of the law on this subject is in contemplation by the Legislature, and will in all probability be shortly carried into effect, any remarks by us on the present occasion would, under the circumstances, be undesirable.

NOTES.

[In (1887) 9 All., 427 this was followed; but see (1905) 31 Mad., 157; (1902) 5 O. C. 296; (1907) P. R. 121; (1892) 12 A. W. N. 2.

As regards reference to expired and repealed Acts, see also (1886) 11 Bom. 6.]

[8 All. 365]

APPELLATE CIVIL.

The 12th May, 1886.

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, AND MR. JUSTICE MAHMOOD.

Sant Kumar, minor, by his guardian, Sukh Nidhan.....Plaintiff

versus

Deo Saran and others.....Defendants.*

*Hindu Law—Daughter's son—Hindu widow—Decree against widow—
Reversioner—Res-judicata—Declaratory decree—Act I of 1877
(Specific Relief Act), s. 42—Civil Procedure Code, s. 578.*

A suit brought against K, the widow of R, a Hindu, by the representatives of R's brothers H and P, for possession of his estate, ended in a compromise by which the defendant recognized the plaintiffs' rights, and conceded that the family was joint. After K's death, M, a daughter of R, brought a suit on her own behalf against the above-mentioned plaintiffs for possession of her father's estate, but afterwards withdrew her claim. Subsequently, S, M's son, who had been born after K's compromise, brought a suit against M and the representatives of H and P to recover possession of the estate, on the allegation that, the family being a divided one, he was entitled, under the Hindu law, to succeed to such estate, and that both the compromise entered into by K and the withdrawal of the former suit by M were in fraud of his succession, and did not affect his rights. The Court of First Instance found that the plaintiff was entitled to succeed to the estate, but that, his mother

* Second Appeal No. 1279 of 1885, from a decree of Maulvi Muhammad Ahmad-ul-lah Khan, Subordinate Judge of Gorakhpur, dated the 18th May 1885, reversing a decree of Maulvi Aziz-ul-Rahman, Munsif of Bansgaon, dated the 5th January 1885.

being still alive, he was entitled to possession after her death only, and, upon these findings gave him a decree declaring his right to [366] possession on M's death. The Lower Appellate Court reversed the decree, holding that the compromise entered into by K was conclusive against the plaintiff's claim, and also that, during his mother's lifetime, he had no *locus standi* to maintain the suit.

Per MAHMOOD, J., that the plaintiff's rights as a daughter's son (which were not affected by his birth having taken place after his maternal grandfather's death) did not entitle him, under ordinary circumstances, to succeed to his maternal grandfather's estate in a divided Hindu family, during the existence of a daughter, whether she were his own mother or his maternal aunt; and that the claim for possession was therefore rightly dismissed. *Aumirtolal Bose v. Rajoneekant Mitter*, 15 B. L. R., 10; L. R., 2 Ind. Ap., 113, *Sibta v. Badri Prasad*, I. L. R., 3 All., 134, and *Bajinath v. Mahabir*, I. L. R., 1 All., 608, referred to.

Also that the prayer in the plaint was wide enough to include a prayer for declaratory relief such as the first Court had given.

Also that the rule whereby decrees obtained against a Hindu widow succeeding to her husband's estate as heir are binding by way of *res-judicata* against all who in the order of succession come after her, and in that sense may be dealt with as her representatives, was limited to decrees fairly obtained against the widow in a contested and *bona fide* litigation, and would not apply to the compromise effected by K, which could scarcely be regarded as on a higher footing than an alienation which the widow in possession of her husband's divided estate might have made, and which the plaintiff distinctly alleged had not been fairly obtained. *Rani Anund Koer v. The Court of Wards*, I. L. R., 6 Cal., 764; L. R., 8 Ind. Ap., 14, *Nand Kumar v. Radha Kuari*, I. L. R., 1 All., 282, and *Katama Natchiar's case*, 9 Moo., I. A., 543, referred to.

Also that M's withdrawal of her suit was not a bar to the suit of the plaintiff.

Also that it could not be said that a daughter's son was not, under any condition, competent to maintain a declaratory suit of this nature during the lifetime of his mother or maternal aunt, in respect of his maternal grandfather's property, to the full ownership of which he had a reversionary right.

Also that the awarding of declaratory relief, as regulated by s. 42 of the Specific Relief Act, is a discretionary power which Courts of equity are empowered to exercise with reference to the circumstances of each case and the nature of the facts stated in the plaint, and the prayer of the plaintiff; that so long as a Court of First Instance possesses jurisdiction to entertain a declaratory suit, and entering into the merits of the case arrives at right conclusions and awards a declaratory decree, such a decree cannot be reversed in appeal simply because the discretion has been improperly exercised; and that such improper exercise of discretion under s. 42 of the Specific Relief Act has no higher footing than that of an error, defect or irregularity, not affecting the merits of the case or the jurisdiction of the Court, within the meaning of s. 578 of the Civil Procedure Code.

This does not imply that, even in cases where the discretionary power to award declaratory relief has been exercised wholly arbitrarily, and in a manner [367] grossly inconsistent with judicial principles, the Court of appeal would have no power to interfere.

Ram Kanaye Chuckerbutty v. Prosunno Coomar Sein, 13 W. R., 175, *Sadut Ali Khan v. Khajeh Abdool Gunnee*, 11 B. L. R., 203; L. R., Ind. Ap., Sup. Vol., 165, *Sheo Singh Rai v. Dakho*, I. L. R., 1 All. 688; L. R., 6 Ind. Ap. 87, and *Damoodur Surmah v. Mohee Kant Surmah*, 21 W. R., 54, referred to.

THE facts of this case were as follows:—One Ram Fakir had two brothers, Hanuman and Sheo Parshan, represented in this case by their sons. The plaintiff was the son of Mohra, daughter of Ram Fakir, who died many years ago, leaving also a widow, Kadma. Upon the death of Ram Fakir, Kadma, his widow, obtained possession of his zamindari property, a 1 anna and 4 pies share in each of three villages, on the allegation that her deceased husband, having been separated from his brothers, and having died without leaving a

son, she was entitled to succeed to his estate according to the Hindu law. After this, about the year 1865, probably soon after Ram Fakir's death, the sons of Hanuman and Sheo Parshan instituted a suit against Kadma for possession of the estate of Ram Fakir, and that litigation ended in a compromise, which the widow entered into with them on the 8th November 1865. Under the terms of this compromise the widow recognized their rights, and conceded that, the family of Ram Fakir being joint, her right in his estate was limited to receiving maintenance for life only. At that time Sant Kumar, the plaintiff in the present case, had not been born. Kadma having died, Mohra, the mother of the plaintiff, instituted a suit on her own behalf for her father's estate, against the sons of Hanuman and Sheo Parshan, about the year 1880, but subsequently withdrew her claim on the 5th November 1880, apparently without reserving any right to sue again.

The present suit was instituted by the plaintiff Sant Kumar as a minor, through his guardian, on the 1st December 1884, against Mohra and the sons of Hanuman and Sheo Parshan, and its object was to recover possession of the estate of Ram Fakir, which was in the possession of the sons of Hanuman and Sheo Parshan, who were the principal defendants, on the allegation that, the family being divided, he was entitled, under the Hindu law, to succeed to such estate, and that the compromise of the 8th Nov-**[368]**ember 1865, entered into by Kadma, and the withdrawal of the former suit by Mohra, were both in fraud of the plaintiff's succession, and were not binding upon him.

The suit was resisted by the principal defendants mainly upon the ground that Ram Fakir was a member of a joint Hindu family; that his widow, Kadma, was therefore entitled only to maintenance; that the compromise entered into by her before the plaintiff's birth was *bona fide*, as also the withdrawal of her claim by the plaintiff's mother, Mohra; that plaintiff was neither entitled to set aside those proceedings, nor had he any right to sue for possession in the lifetime of his mother Mohra; and that the suit was barred by the rule of *res-judicata*, the plaintiff's *status* being that of a legal representative of Kadma through Mohra. All these pleas were disallowed by the Court of First Instance which found, *inter alia*, that Ram Fakir was separate in estate from his brothers; that the plaintiff was, therefore, entitled to succeed to the share of his maternal grandfather; that the proceedings taken by Kadma and Mohra could not prejudice his rights; but that the mother of the plaintiff being still alive, he was entitled to possession only upon her death. Upon these findings the Court of First Instance gave a decree to the plaintiff declaring his right to obtain possession of the property upon the death of his mother Musammât Mohra.

Upon appeal the Lower Appellate Court, having regard to the case of *Nand Kumar v. Radha Kuar*, I. L. R., 1 All., 282, reversed the decree of the first Court on the ground that, Kadma's compromise of the 8th November 1865, was conclusive and binding upon the plaintiff, and also on the ground that, the plaintiff's mother being still alive, the plaintiff had no *locus standi* to maintain the suit. For this latter proposition the Lower Appellate Court relied upon *Bajjnath v. Mahabir*, I. L. R., 1 All. 608.

The plaintiff appealed to the High Court.

Babu Sitdl Prasad Chatterji, for the Appellant.

Pandit Ajudhia Nath and Shah Asad Ali, for the Respondents.

Mahmood, J.—In my opinion the first question to be considered in this case is, whether, upon the facts as stated by plaintiff **[369]** himself, he has any *locus standi* to maintain the suit. The general rule of Hindu law is, that a

daughter's son can never succeed to the estate of his grandfather so long as there is in existence any daughter who is entitled to take, either as heir or by survivorship to her other sisters. This is the effect of the ruling of the Lords of the Privy Council in *Aumirtolal Bose v. Rajoneekant Mitter*, 15 B. L. R., 10; L. R., 2 Ind. Ap., 113, and also of the other cases cited by Mr. Mayne in his excellent work on Hindu Law and Usage, s. 478. In s. 479 of the same work the learned author, upon the authority of the ruling of this Court in *Sibta v. Badri Prasad*, I.L.R., 3 All. 134, goes on to say that, according to the Mitakshara law, a daughter's son takes his maternal grandfather's estate as full proprietor; on his death such estate devolves on his heirs and not on the heirs of his maternal grandfather, but that until the death of the last daughter capable of being an heiress, he takes no interest whatever, and can transmit none, and therefore if he should die before the last of such daughters leaving a son, that son would not succeed because he belongs to a completely different family, and he would offer no oblation to the maternal grandfather of his own father. These I take to be the undoubted propositions of the Mitakshara school of Hindu law, and fully consistent with the rule laid down by this Court in *Bajinath v. Mahabir*, I. L.R., 1 All. 608, so far as that case follows the ruling of the Privy Council above referred to. In short, a daughter's son—to use the words of Mr. Mayne—"takes not as heir to any daughter who may have died, but as heir to his own grandfather, and, of course, cannot take at all so long as there is a nearer heir in existence." I do not understand any of the rulings to which I have referred to lay down any rule which goes beyond saying that, during the existence of any daughters, the daughter's son cannot succeed to—that is to say, obtain proprietary possession of—his maternal grandfather's estate in a divided Hindu family; and it seems to me equally clear that, whenever, according to the rule of succession, the daughter's son does succeed to his maternal grandfather's estate, he succeeds as "full owner" in the sense in which that expression is understood in Hindu law. Now, this being so, I hold that during the lifetime of a daughter, the position of the daughter's son, with reference to his maternal grandfather's divided estate, is, at least by a close analogy, similar [370] to the status of such reversioners as trace their descent through the main line to the full owner. This is a conclusion which I think is borne out by the learned summary of the historical aspect of the rights of a daughter's son given by Mr. Mayne in s. 477 of his work: and I may add that the circumstance of the daughter's son being born after the death of his maternal grandfather, would have no effect upon his rights in a case such as the present. But it is of course clear that those rights do not entitle him under ordinary circumstances to succeed to the maternal grandfather's estate during the existence of a daughter, whether she be his own mother or maternal aunt. The claim for possession in this case was, therefore, rightly dismissed by the Munsif, but the question remains whether the declaratory decree, which he awarded to the plaintiff, was rightly interfered with by the Lower Appellate Court.

Upon this last question the nature of the plaint has to be considered, and after having read the pleadings in the case, I am of opinion that the prayer in the plaint is expressly and clearly wide enough to include a prayer for declaratory relief. This being so, the next point is, whether the plaint discloses any such circumstances as would entitle the plaintiff to ask for a decree such as the Munsif has given him. Questions of this kind formerly arose under the somewhat indefinite provisions of s. 15 of the old Civil Procedure Code (Act VIII of 1859), and numerous rulings are to be found in the reports as to the exact scope of declaratory relief. The matter is now governed by the provisions of s. 42 of the Specific Relief Act (I of 1877), and I have before now, in the case

of *Balgobind v. Ram Kumar*, I. L. R., 6 All., 431, had occasion to express the manner in which I interpret that section in its application to declaratory suits by Hindu reversioners. According to those views, and with reference to the ruling of their Lordships of the Privy Council in *Rani Anund Koer v. The Court of Wards*, I. L. R., 6 Cal., 764: L. R., 8 Ind. Ap., 14, it seems to me that the present is a case in which, if the facts alleged by the plaintiff are true, he can maintain the suit. It is perfectly true, as was held by this Court in *Nand Kumar v. Radha Kuari*, I.L.R., 1 All., 282, that where, on her husband's death, a Hindu widow obtains possession of his estate as his heir, in a suit against her for possession thereof [371] by certain persons claiming to succeed to the estate as rightful heirs, a decree obtained by them would be a bar to a new suit against those persons by the daughter claiming the estate in succession to the widow; in other words, such a decree would operate as *res judicata* against all who, in the order of succession, came after the widow, and in that sense may be dealt with as her representatives. But the peculiar nature of the "widow's estate" under the Hindu law is such that her position in litigation must necessarily be subjected to the qualification which the ruling which I have just cited imposes upon the operation of such a plea in bar of the action, namely, that the decree should have been fairly obtained against the widow in a *bonâ fide* litigation. This seems to me to be perfectly clear from the ruling of the Privy Council in the case of *Katama Natchiar*, 9 Moo. I. A., 543, where their Lordships made the following observations at p. 608 of the report:—

"It seems, however, to be necessary, in order to determine the mode in which this appeal ought to be disposed of, to consider the question whether the decree of 1847, if it had become final in *Anga Mootoo Natchiar's* life-time, would have bound those claiming the zemindari in succession to her. And their Lordships are of opinion that unless it could be shown that there had not been a fair trial of the right in that suit—or in other words, unless that decree could have been successfully impeached on some special ground—it would have been an effectual bar to any new suit in the zila Court by any person claiming in succession to *Anga Mootoo Natchiar*. For, assuming her to be entitled to the zemindari at all, the whole estate would for the time be vested in her absolutely for some purposes, though, in some respects for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindu widow, and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

[372] Now, in the present case, the compromise which the principal defendants obtained from Musammat Kadma on the 8th November 1865, was an arrangement which can scarcely be regarded as having any footing higher than that of an alienation which the widow in possession of her husband's divided estate could have made. At any rate, the compromise, whether it was made by a rule of Court or not, cannot, in my opinion, be dealt with as having the full force of a decree which would be the result of adjudication in a contested suit. Moreover, the plaintiff distinctly alleges in the plaint that the transaction of the compromise was not *bonâ fide*, and that it had not been fairly obtained. The question was therefore clearly in issue, and whilst the Court of First Instance took a view favourable to the plaintiff's case, the Lower Appellate Court has failed to enter into the merits of it, apparently under the view that the *bonâ fides* of the compromise was a matter of no significance at all.

Almost the same remarks, *mutatis mutandis*, are applicable to the manner in which the Lower Appellate Court has dealt with the position of Musammat Mohra and her action in withdrawing the suit which she had instituted against the principal defendants. It is admitted that the object of that suit was to recover possession of the property now in suit, on the ground that it formed the separate property of Ram Fakir, and devolved upon her upon the death of her mother Musammat Kadma, which is said to have taken place in Asark 1286 fasli (1879). The suit was not adjudicated upon but ended in being withdrawn on the 5th November 1880, under circumstances which the plaintiff distinctly alleges were tainted with fraud and collusion. Upon this point also the Munsif took a view favourable to the plaintiff, but the lower Court has failed to go into the merits of the question because it held that the very existence of Musammat Mohra constituted a full answer to the present suit, as it deprived the plaintiff of *locus standi*. For this view the learned Subordinate Judge has relied upon the ruling of this Court in *Barjath v. Mahabir*, I.L.R., 1 All., 608. Having carefully considered the report of that case, I am of opinion that it is not on all fours with the present case. The main proposition of law there laid down is undoubted; but there is nothing in the judgment delivered [373] by the learned Judges in that case to show that a daughter's son is not under any condition competent to maintain a declaratory suit of this nature during the life-time of the mother or maternal aunt in respect of his maternal grandfather's property, to the full ownership of which he has a reversionary right. The awarding of declaratory relief is a discretionary power which Courts of Equity are empowered to exercise with reference to the circumstances of each case and the nature of the facts stated in the plaint, and the prayer of the plaintiff. The discretion is now regulated by s. 42 of the Specific Relief Act, and I have already said enough to indicate that, if the allegations of the plaintiff are true, a suit of this nature, so far as it prays for declaratory relief, would be maintainable: and I wish to take this opportunity of expressing a view which I have long entertained in connection with the power of interference which the Appellate Court should exercise in cases where it is doubtful whether the circumstances fully justified a declaratory decree. The awarding of specific relief belongs to one of those branches of law, regarding which even the great jurists are not unanimous as to whether it falls within the province of procedure, *ad litem ordinationem*, or appertains to the region of substantive law, *ad litem decisionem*. Perhaps the simplest and safest view is to regard the subject as occupying a middle place between these two great divisions of law. But whether the awarding of declaratory decrees is a rule of procedure or a rule of substantive law, it seems to me that it does not occupy such a position in the juristic arrangement of legal rules as would vitiate decrees awarded in cases where its application may be doubtful. I may here observe that the Legislature, in framing the rule in s. 42 of the Specific Relief Act, has dealt with the matter as purely discretionary with the Court, and it is noticeable that the only restriction to which the discretionary power is made subject by the express letter of the statute, is contained in the proviso to that section, which lays down "that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so." Beyond this restriction, no other limitation is imposed by the Legislature, though it may well be taken for granted, and it goes without saying, that the Legislature did not intend the discretionary power [374] to be exercised in an unsound manner. The absence of any other restriction in s. 42 is all the more significant when we find that the same enactment, in laying down the rule as to a cognate branch of specific relief, and in leaving it to the discretion of the Court to decree specific performance of contracts, has framed s. 22 in language

which expressly provides restrictions upon the power. For the latter section, after giving the power, goes on to say that "the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles, and capable of correction by a Court of Appeal." Then the section goes on further, and, in two carefully-framed clauses, indicates the class of "cases in which the Court may properly exercise a discretion *not* to decree specific performance;" and again in another clause indications are given of the intentions of the Legislature as to the nature of cases in which Courts may award such relief. There are, of course, further provisions in the following few sections regulating the awarding of specific performance. Now, no such rules, or elaborate indications, of restrictions are to be found in the Act with reference to declaratory decrees. And I have said all this in order to answer the question whether, in a case such as the present, and granting that the plaintiff had *locus standi* to maintain the suit, and that the decree of the Court of First Instance was sound upon the merits, the Lower Appellate Court would have been justified in reversing the decree simply upon the ground that the discretionary relief was improperly exercised in the affirmative by the Munsif.

I am of opinion that the question must be answered in the negative, and I hold that, so long as a Court of First Instance possesses jurisdiction to entertain a declaratory suit, so long as that Court entering into the merits of the plaintiff's case arrives at right conclusions, and awards a declaratory decree, such a decree cannot be reversed in appeal simply because the discretion has been improperly exercised. I know that in saying this I am laying down a strong proposition of law, and I am anxious to justify it further by the statutory provisions themselves. I have already shown that whilst the discretion to decree specific performance of contracts is expressly declared to be "capable of correction by a Court of Appeal," no such provision exists in the Specific Relief Act as to declaratory decrees. I will say nothing as to the effect [375] of the word "*shall*" in the proviso to s. 42, because, even if the plaintiff's whole case be accepted, that proviso would not apply to this case—he not being entitled "to ask further relief than a mere declaration of title" within the meaning of the statute. Putting the proviso, therefore, out of the question, I hold that an improper exercise of discretion under s. 42 of the Specific Relief Act has no higher footing than that of an "error, defect, or irregularity, whether in the decision or in any order passed in the suit or otherwise, not affecting the merits of the case or the jurisdiction of the Court," within the meaning of s. 578 of the Civil Procedure Code. That section contains one of the most salutary rules of law which the Code provides. The obvious aim of the clause, in keeping with many another provision in the Code, is to prevent technicalities from overcoming the ends of justice, and from operating as a means of circuitry of litigation, which the old method of English Common Law Courts so much encouraged. And in applying the clause to declaratory decrees in the manner in which I have suggested, it seems to me that we should be only giving effect to the policy of the Legislature. For I fail to understand what possible harm can arise where *A*, being admittedly entitled to a right against *B*, goes to a Court of competent jurisdiction, and after a full trial of his cause obtains from that Court a declaration consistent with the actual merits of the dispute. Such a declaration may possibly have been improperly made, owing to the absence of sufficient reasons for awarding such a relief. But, after all, such a declaration, though irregular, only asserts a fact and confirms a right. The holder of such a decree obtains a conclusive evidence against his antagonist; and if the decree is sound upon the merits, the ends of justice are promoted by the issues not being re-opened and re-tried at a later period, when,

by the lapse of time, the muniments of title and the evidence of witnesses may have disappeared.

Nor is the view which I have taken wholly unsupported by the case-law. I am aware that there are cases to be found in the Reports (under s. 15 of the Code of 1859), which may not be wholly consistent with my opinion. But the law has since been newly formulated by the express interference of the Legislature; and it is clear that a great deal of what I have said proceeds upon [376] the construction of s. 42 of the Specific Relief Act. But apart from this, there is a judgment of that eminent Indian Judge, the late Mr. Justice DWAR-KANATH MITTER, in *Ram Kanaye Chuckerbutty v. Prosunno Coomar Sein*, 13 W. R., 175, where the learned Judge laid down the rule of law which seems to me to be best suited to the conditions of litigation in this country, and to be consonant with sound principles of procedure. Referring to s. 15 of Act VIII of 1859 (which corresponds with s. 42 of the Specific Relief Act), and s. 350 of the same Act, which has been replaced and practically reproduced in s. 578 of the present Code, the learned Judge went on to say:—"It is true that it is entirely in the discretion of the Court to make a declaratory decree under s. 15, Act VIII of 1859; but after this discretion has been already exercised by a Court of competent jurisdiction, it does not lie within the power of a Court of Appeal to set aside the decree of the lower Court upon an objection like this, which does not affect the merits of that decree, and which was not even taken at the time when it was passed." Whilst accepting this enunciation of the law, I will guard myself against being understood to say that, even in cases where the discretionary power to award declaratory relief has been exercised wholly arbitrarily, and in a manner grossly inconsistent with judicial principles, the Court of Appeal would have no power to interfere. I will lay down no rule upon this subject because, as I have already shown, the point does not arise in the case. It is sufficient to say that in *Sadut Ali Khan v. Khajeh Abdool Gunnee*, 11 B. L. R., 203; L. R., Ind. Ap., Sup. Vol., 165, the Lords of the Privy Council, referring to the discretionary power as to declaratory decrees, expressed the principle that where a Court "has exercised its discretion in a matter wherein the law gives it a discretion, their Lordships would not upon light ground interfere with the exercise of that discretion." And I may further add, as supporting my view, that in the case of *Sheo Singh Rai v. Dakho*, 1 L. R., 1 All., 688; L. R., 6 Ind. Ap., 87, the Lords of the Privy Council denominated the objections as to the impropriety of maintaining the declaratory suit, when raised in appeal, as "somewhat technical," and declined to entertain them. The present case seems to me to be similar to *Damoodur Surmah v. Mohe Kant Surmah*, 21 W. R., 54, and if the allegations of the plaintiff [377] are substantiated, he can, in my opinion, maintain the suit, and reasonably claim declaratory relief. But unfortunately the manner in which the Lower Appellate Court has viewed this case, has prevented it entirely from entering into the merits of the case, upon the issues of fact raised by the parties. The defendants went the length of denying that the plaintiff's mother, Musammah Mohra, was the daughter of Ram Fakir. They alleged that Ram Fakir was not divided from his brothers, whom the defendants represent. There were also minor allegations of facts upon which the parties did not agree, but none of these points have been considered or determined by the Lower Appellate Court, and there is not even a finding as to whether the family of Ram Fakir and his brothers was joint or divided,—a point which is of course all-important in this case.

Under these circumstances, I think it is impossible to dispose of this appeal finally here, and I would therefore decree this appeal, and, setting aside the

decree of the Lower Appellate Court, remand the case to that Court, under s. 562 of the Civil Procedure Code, for disposal upon the merits, with reference to the observations already made. Costs to abide the result.

Straight, Offg. C.J.—I agree to the order proposed by my brother MAHMOOD.

Case remanded.

NOTES.

[A decree obtained against the widow upon a fair trial is binding upon the reversioners :—(1886) 8 All., 429; (1903) 5 Bom. L. R., 885; (1907) 29 All., 487; (1907) 6 C. L. J., 490; (1910) 20 M. L. J., 204; (1912) 14 I. C., 814.

As regards consent decrees, see (1910) 38 Cal., 639.

As regards interference with the discretion exercised under sec. 42, Specific Relief Act 1877, see also (1887) 9 All., 622; (1900) P. L. R., 24.]

[8 All. 377]

The 21st May, 1886.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE BRODHURST.

Abdul Hayai Khan.....Plaintiff

versus

Chunia Kuar.....Defendant.*

Amendment of decree—Execution of decree—Objection to validity of amendment—Civil Procedure Code, s. 206.

The Court in a suit upon a bond gave the plaintiff a decree, making a deduction from the amount claimed of a sum covered by a receipt produced by the defendant as evidence of part-payment, and admitted to be genuine by the plaintiff. The decree was for a total amount of Rs. 1,282. Subsequently, on application by the decree-holder, and without giving notice to the judgment-debtor, the Court which passed the decree, purporting to act under s. 206 of the Civil Procedure Code, altered the decree, and made it for a sum of Rs. 1,460. The decree-holder took out execution, and the judgment-debtor objected that the decree was for Rs. 1,282 and had been improperly altered. The Court executing the [378] decree disallowed the objection, on the ground that it was not such as could be entertained in the execution department.

Held, that the decree as it originally stood was in accordance with the judgment, and the Court had no power to alter it as it did, and the proceeding was further irregular, in that no notice was given to the opposite party, as required by s. 206 of the Code.

Held, also, that when a decree-holder executes his decree, a judgment-debtor is competent to object that the decree is not the decree of the Court fit to be executed, and therefore not capable of execution; and that the judgment-debtor in this case could raise the question whether the decree, which was altered behind his back, was a valid decree and fit to be executed.

THE facts of this case were as follows:—In September 1880, Chunia Kuar brought a suit against Abdul Hayai Khan on a bond, claiming Rs. 925, principal, and Rs. 1,116-13 interest,—total Rs. 2,041-13. The defendant pleaded payment in satisfaction of the bond-debt to the extent of Rs. 1,196-14. In support of this plea he produced two receipts, one dated the 13th May 1877, and the other, covering Rs. 875, dated the 27th November 1878. The plaintiff

* Second Appeal No. 64 of 1885, from an order of W. T. Martin, Esq., Additional Judge of Aligarh, dated the 2nd April 1885, affirming an order of Maulvi Sami-ullah, Subordinate Judge of Aligarh, dated the 22nd March 1884.

admitted the first receipt, but denied the genuineness of the second. The only issue which the Court framed was as to whether the second receipt was genuine or not. This issue it decided against the defendant; and, making a deduction of the amount covered by the first receipt, it gave the plaintiff a decree for Rs. 815-2, principal, and Rs. 467-3-6 interest,—total Rs. 1,282-5-6. The decree was dated the 8th February 1881. On the 22nd March 1881, the plaintiff applied to have the decree amended, alleging that the amounts, both of principal and interest, entered in the decree, were not correct amounts. She alleged that the principal should be Rs. 817-4-6 and the interest Rs. 643-9-6,—total Rs. 1,460-14. On the 14th May 1881, without giving notice to the defendant, the Court ordered the decree to be amended as prayed. On the decree-holder applying for execution of the decree as amended, the judgment-debtor objected to the validity of the amendment. The Court executing the decree held that it was not competent to entertain the objection in the execution department. On appeal by the judgment-debtor the Lower Appellate Court concurred in the view taken by the first Court, and further decided that "the amendment was owing to arithmetical errors in calculating interest, and the amendment was not contrary to the judgment."

[379] The judgment-debtor appealed to the High Court. The respondent not appearing, the appeal was heard *ex parte* in her absence, and the Court (OLDFIELD and BRODHURST, JJ.) decreed the appeal, and set aside the orders of the lower Courts allowing execution. The respondent applied for the re-hearing of the appeal, and the application having been granted, the appeal again came on for hearing.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the Appellant.

Pandit *Ajudhia Nath* contended that the amendment of the decree was illegal, as it was not at variance with the judgment as originally framed, and because no notice of the proposed amendment had been given to the judgment-debtor.

Mr. *T. Conlan* and Mr. *G. T. Spankie*, for the Respondent.

Mr. *Spankie* contended that the specification of relief granted in the decretal order of the judgment was arithmetically wrong, and at variance with that part of the judgment which preceded the decretal order; that a decree should agree with that part of the judgment which preceded the decretal order, and might be amended when it did not do so, notwithstanding it agreed with the judgment where the same specified the relief granted, but specified it erroneously by reason of arithmetical errors. It was further contended that the Court executing a decree, which had been amended by a Court competent to amend it, was not competent to determine whether the amendment was valid or invalid. In the execution-department only the questions mentioned in s. 244 of the Civil Procedure Code can be determined.

Oldfield and Brodhurst, JJ.—This appeal was on the part of a judgment-debtor against the decree-holder, and was heard and decided on the 25th November 1885. It has been admitted for re-hearing. It appears the decree, as it originally stood, was for Rs. 1,282-5-6. Subsequently, on application by the decree-holder, the Court which passed the decree, purporting to act under s. 206 of the Code, altered the decree and made it for a sum of Rs. 1,460-14-0. The decree-holder took out execution, and the judgment-debtor objected that the decree was for Rs. 1,282-5-6 and had been improperly altered. The objection was disallowed. On **[380]** appeal to the Judge that officer affirmed the order, and the judgment-debtor has preferred a second appeal to this Court.

We think our original order of the 25th November 1885 must stand. The decree, as it originally stood, was in accordance with the judgment. The Court had no power to alter it as it did, and the proceeding is further irregular, in that no notice was given to the opposite party as required by s. 206. But a further contention on the part of the decree-holder is, that a question of this kind cannot be entertained in the execution-department; that the decree must stand as altered, and is not open to an inquiry whether it was properly altered when proceedings in execution are being taken. In our opinion this contention is not valid. We think that when a decree-holder executes his decree, a judgment-debtor is competent to object that the decree is not the decree of the Court fit to be executed, and therefore not capable of execution; and we think he could in this case raise the question whether the decree, which was altered behind his back, was a valid decree and fit to be executed. On these grounds our order on this application is similar to the order we made in November 1885, setting aside the execution proceedings with costs.

Appeal allowed.

NOTES.

[It is open in execution to object that the decree sought to be executed is not the decree of the Court:—(1889) 11 All., 314., which was, however, dissented from in (1914) 20 C. L. J. 512.

In (1900) 28 Cal., 177 it was pointed out that an order under sec. 206, C. P. C., 1882 was not appealable as such.]

[8 All. 380]

CRIMINAL REVISION.

The 22nd May, 1886.

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE.

Queen-Empress

versus

Maheshri Bakhsh Singh.

*Act XLV of 1860 (Penal Code), s. 189—Threat of injury to public servant—
Necessity of proving actual words used.*

In a prosecution for an offence under s. 189* of the Penal Code, the witnesses differed as to the exact words used by the prisoner in threatening the public servant, though they agreed as to the general effect of those words. The Magistrate, however, considered that the offence was clearly proved, and convicted the prisoner. The Sessions Judge, on appeal, affirmed the conviction, observing that it was immaterial what the words used were, and that the intention and effect of the words were plain.

Held, that the Judge was mistaken in regarding it as immaterial what the words used actually were, and that, on the contrary, it was most material that those words should be before the Court to enable it to ascertain whether in fact a threat of injury to the public servant was really made by the accused.

* [Sec. 189 :—Whoever holds out any threat of injury to any public servant, or to any person in whom he believes that public servant to be interested,

Threat of injury to a public servant. for the purpose of inducing that public servant to do any act, or to forbear or to delay to do any act, connected with the exercise of the public functions of such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.]

THIS was an application for revision of an order of Mr. F. E. Elliot, Sessions Judge of Allahabad, dated the 1st May 1886, [381] affirming an order of Mr. P. Gray, Joint-Magistrate of Allahabad, dated the 1st April, convicting the applicant of an offence punishable under s. 189 of the Penal Code, and sentencing him to three months' rigorous imprisonment and Rs. 25 fine, or, in default, two months' further rigorous imprisonment. The applicant was charged with having threatened one Niamat Ali, head-constable of Karchana, for the purpose of deterring him from the proper exercise of his functions as a public servant. The case for the prosecution was that on the evening of the 28th December 1885, the head-constable was inquiring into a burglary which had taken place the night before in the house of one Mata Din, and was questioning certain persons of suspicious character, when the accused came up and threatened him by saying that these persons were his ryots, and if they were questioned further, he (the accused) would make a complaint about him. The head-constable deposed that the accused also threatened another constable by saying that he could have him deprived of his badge of office; but the constable in question stated that he had heard no such threat. The other witnesses for the prosecution differed from the head-constable as to the exact words used by the accused to the latter, though they agreed as to the general effect of those words. The Joint-Magistrate was of opinion that the offence specified in s. 189 of the Penal Code was clearly proved, and convicted and sentenced the applicant as above-mentioned. On appeal, the Sessions Judge observed:—"It does not matter what the words used were. The witnesses do not agree as to the exact words used. We must look to the intention with which the words were used and the effect they had. It is perfectly plain to me that the intention was to intimidate the Police-officer, and so to deter him from doing his duty; and it is in evidence that though the officer was not deterred from proceeding with his inquiry, the investigation was seriously hindered and impeded by the attitude taken by the appellant. Under these circumstances the Magistrate's order was, in my judgment, fully justified, and I therefore affirm both the conviction and sentence."

It was contended on behalf of the applicant that in the absence of proof of the exact words used and complained of, the conviction under s. 189 of the Penal Code was improper.

[382] *Lala Lalta Prasad*, for the Applicant.

The Government Pleader (Munshi Ram Prasad), for the Crown.

Straight, offg. C. J.—This conviction cannot be sustained. There is a serious conflict of testimony as to the words which were used by the petitioner regarding the complainant Niamat Ali, and it is exceedingly doubtful, upon the face of the whole evidence, whether any such threat of injury, as came within s. 189 of the Penal Code, was held out by the petitioner to the complainant. I do not agree with the Judge's observation, that it is immaterial what the words used actually were; on the contrary, it was most material that those words should be before the Court to enable it to ascertain whether, in fact, a threat of injury to the constable was really made by the petitioner. It does not appear in what mode the complainant was conducting his examination of the several persons suspected of participation in the burglary, and it is possible that he conducted it in such a manner as might properly elicit from the petitioner a remonstrance or observation as to the impropriety of his conduct, accompanied by a threat to complain of him, which under such circumstances could not be the subject of a charge under s. 189. However this may be, the case is such a doubtful one that the conviction is not sustainable. The

application for revision must, therefore, be allowed, and quashing the orders of the Magistrate and the Judge, I acquit the petitioner, and direct that he be at once released, and that the fine, if realized, be refunded.

Conviction set aside

[8 All. 382]

The 28th May, 1886.

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE.

Queen-Empress

versus

Jugal Kishore.

*Act XLV of 1860 (Penal Code), s. 182—Prosecution under s. 182—
Criminal Procedure Code, s. 195.*

A prosecution under s. 182* of the Penal Code may be instituted by a private person, provided that he first obtains the sanction of the public officer to whom the false information was given, or of his official superior. *Queen-Empress v. Radha Kishan*, 1. L. R., 5 All., 36, overruled.

Where a specific false charge is made, the proper section for proceedings to be adopted under is s. 211 of the Penal Code.

[383] THIS was a case reported to the High Court for orders by Mr. T. Benson, Sessions Judge of Saharanpur. In this case three persons named Chajju Ram, Sadu Ram, and Jugal Kishore, were tried and convicted by the Cantonment Magistrate of Roorkee of an offence under s. 182 of the Indian Penal Code. The false information, in respect of which they were charged and tried, was given to a head constable, and was to the effect that they believed it was probable that stolen property would be found in the complainant's house. The house was accordingly searched, but no stolen property was found, and it appeared that the object of the accused in giving the information was merely to annoy and humiliate the complainant. The latter obtained sanction from the District Superintendent of Police to prosecute the accused, and in the result they were tried and convicted as above mentioned, and fined Rs. 10 each. The Sessions Judge was of opinion that the conviction was bad, inasmuch as a private person was not competent to institute proceedings under s. 182 of the

* [Sec. 182 :—Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause such public servant to use the lawful power of such public servant to the injury or annoyance of any person, or to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.]

Penal Code, with reference to the ruling of STRAIGHT, J., in *Queen-Empress v. Radha Kishan*, I. L. R., 5 All., 36. He added:—"It appears to me that the High Court's ruling in *Queen-Empress v. Radha Kishan*, I. L. R., 5 All., 36, does away entirely with the remedy which apparently, on the face of s. 182, a private person has who is injured by false information given to the police, where such information is not in the nature of a complaint or institution of proceedings. It would appear to me, however, that the person so aggrieved has no other remedy. Nor can I see anything in s. 195 of the Criminal Procedure Code indicating that a private person cannot prosecute under s. 182,—rather the contrary. The section apparently contemplates a prosecution on the part of a private person sanctioned by a police-officer."

Straight, Offg. C J.—I am glad that the learned Judge has reported this case, because it has afforded me an opportunity of considering my ruling in the case of *Queen-Empress v. Radha Kishan*, I L. R., 5 All., 36. Upon further consideration I have come to the conclusion that the latter portion of my judgment in that case was erroneous, and that a prosecution under s. 182 of the Penal Code may be instituted by a private person, provided that he first obtains the sanction of the public officer to whom the false information was given, or of his official superior. I am induced to adopt this altered view upon closer consideration of s. 195 of the Criminal Procedure Code, where a distinction is drawn between "sanction" and "complaint;" and I think that by the use of the former word it was contemplated that a prosecution may emanate from some person other than the officer interested. Though I take this view of the matter now, it would in no way have altered the order I made in *Queen-Empress v. Radha Kishan*, I. L. R., 5 All., 36, had I held it when that was passed, as, in my opinion, when a specific false charge is made, as in that case, the proper section for proceedings to be adopted under is s. 211. With these remarks the record may be returned.

[8 All. 384]

APPELLATE CIVIL.

The 29th May, 1886.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE TYRRELL.

Lachman Singh and others.....Defendants

versus

Salig Ram and others.....Plaintiffs*

Lambardar and co-sharer—Government revenue—Payment by lambardar of arrears of revenue due by co-sharer—Charge—Act XII of 1861 (N.-W. P. Rent Act), s. 93 (g).

In execution of a decree obtained by a lambardar under s. 93 (g) of the N.-W. P. Rent Act the decree-holder caused to be attached a certain share upon which the arrears of

* Second Appeal No 1663 of 1885, from a decree of Maulvi Muhammad Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 22nd August 1885, reversing a decree of Maulvi Muhammad Wajid Ali Khan, Munsif of Mainpuri, dated the 13th February 1885.

Government revenue which he had satisfied had accrued. In defence to a suit brought by certain purchasers of the same property from the judgment-debtors to have it declared that the property was not liable to sale under the decree, and to remove the attachment, the decree-holder pleaded that, by the fact of paying the arrears of revenue due on the estate of the plaintiffs' vendors, he had obtained a charge on it, and could bring it to sale to satisfy the decree.

Held, that a charge of this nature could not be enforced in execution of a decree which was merely a personal one for arrears of Government revenue against persons against whom it was passed by a Revenue Court not competent to establish or enforce a charge on property, or to do more than pass a personal decree, and whose powers in execution were confined to realization from personal and immoveable property of the judgment-debtors. *Nugender Chunder Ghose v. Sreemutty Kaminee Dossee*, 11 Moo. I. A., 258, referred to.

THE facts of this case are stated in the judgment of the Court.

[385] Munshi Madho Parshad, for the Appellants.

Pandit Nand Lal, for the Respondents.

Oldfield, J.—The facts are as follows:—The appellant (defendant) Lachman Singh, lambardar and co-sharer in mauza Gujarpur, satisfied arrears of revenue due on the shares of his co-sharers, defendants 2, 3, and 4, and brought a suit against them under s. 93 (g) of the Rent Act, to recover the amount he had paid, and obtained a decree, and in execution attached a 2-biswa and 7½ biswansi share on which the arrears had accrued.

The plaintiffs-respondents took objections to the attachment, they having, subsequently to Lachman Singh's decree, but prior to attachment, purchased the property from Lachman Singh's judgment-debtors in satisfaction of a mortgage-debt, and they contended that the property was not liable to sale under the decree. This objection was disallowed, and they have brought this suit to have it declared that the property is not liable to be sold in execution of the defendant Lachman Singh's decree, and to remove the attachment.

There were several defences to the suit set up by the principal defendant, but the only one with which we are concerned in this appeal is that, by the fact of paying the arrears of revenue due on the estate of the plaintiffs' vendors, he obtained a charge on it, and can bring it to sale to satisfy the Rent Court decree. The first Court dismissed the suit on the authority of a decision of this Court—*Wazir Muhammad Khan v. Gauridat*, I. L. R., 4 All., 412. The Lower Appellate Court has decreed the claim, apparently holding that the appellant Lachman Singh's contention that, by paying revenue, he obtained a charge on the estate, was invalid.

We have now an appeal on the part of the defendants. The question we have to decide is, not so much whether the defendant Lachman Singh obtained a charge on the property of the plaintiffs' vendors, as whether he can enforce any such charge in execution of the Rent Court decree which he holds. The decree which he holds is in a suit brought under s. 93 (g), Rent Act, in the Revenue Court. It is, and can be, no more than a decree for money against the vendors of the plaintiffs for arrears of Government revenue [386] payable by them through the lambardar. The suit does not, and could not, in a Revenue Court, seek to establish or enforce a charge on property, and neither does the decree give it, nor are there any powers conferred on the Revenue Court in execution of its decrees to enforce charges on immoveable property. Section 171 and the following sections deal with the powers of the Court in execution, which are confined to realization from personal and immoveable property of the judgment-debtors.

No doubt, by paying arrears of revenue, which he was bound to do, the defendant would obtain a charge on the estate against all persons interested

therein for the sum paid, and this has been laid down by their Lordships of the Privy Council in *Nugender Chunder Ghose v. Sreemutty Kaminee Dossee*, 11 Moo. I. A., 258; but that case is also an authority for the view I take in this case, that a charge of this nature cannot be enforced under a decree which is merely a personal decree against the judgment-debtors, against whom it was passed by a Revenue Court not competent to do more than pass a personal decree. If the defendant wished to establish a charge against the property in the hands of the plaintiffs, he should have established the same by suit against them in a Court of competent jurisdiction.

The case referred to by the first Court has no bearing on the question before us.

Second Appeal No. 379 of 1882 decided by a Division Bench of this Court on the 9th March 1883, was referred to by the pleader for the appellants, to support his contention, and no doubt it does do so; but for the reasons I have stated, I am unable to concur in the view of the law taken in that case. I would dismiss the appeal with costs.

Tyrrell, J.—I concur.

Appeal dismissed.

NOTES.

[See also (1890) 13 All., 195; (1891) 11 A. W. N., 9.]

[387] *The 3rd June, 1886.*

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE TYRRELL.

Dalib and others.....Defendants

versus

Ganpat.....Plaintiff.*

Hindu Law—Inheritance—Sudras—Illegitimate son.

Held, that an *Ahir* who was the offspring of an adulterous intercourse, was incapable of inheriting his father's property, even as a Sudra. *Venkatachela Chetty v. Parvathamall* 8 Mad. H. C. Rep., 134; *Parisi Nayudu v. Bangaru Nayudu*, 4 Mad. H. C. Rep., 204; *Viraramuthu Udayan v. Singaravelu*, I. L. R., 1 Mad., 306; *Rathi v. Govinda*, I. L. R., 1 Bom., 97, and *Narayan Bhurthi v. Laving Bhurthi*, I. L. R., 2 Bom. 140, referred to.

THE facts of this case are sufficiently stated in the judgment of the Court.

Babu Baroda Prasad Ghose, for the Appellants.

Munshi Hanuman Prasad and Munshi Madho Prasad, for the Respondent.

Oldfield and Tyrrell, JJ.—This appeal raises a question as to the rights of inheritance of illegitimate sons of Sudras, the parties in this case being *Ahir*. The plaintiff claims to succeed to a share of the property left by Shahzadeh, on the ground that he is his son by a woman named Musammat Salomi. It

* Second Appeal No. 1725 of 1885, from a decree of G. R. C. Williams, Esq., Deputy Commissioner of Jhansi, dated the 7th October 1885, confirming a decree of Syed Mahdi Ali, Extra Assistant Commissioner of Mau Ranipur, Jhansi District, dated the 28th August 1885.

has been found as facts by both Courts that Salomi was the wife of Shahzadeh's paternal uncle, and on the death of her husband she entered into a *karao* marriage with one Sukhain, and that the plaintiff was the offspring of an adulterous intercourse between her and Shahzadeh after her marriage with Sukhain. Accepting these facts, with the findings on which we cannot in second appeal interfere, we are of opinion that the plaintiff has no right to inherit Shahzadeh's property. He is the offspring of adulterous and consequently illegal intercourse, and incapable of inheriting even as a Sudra.

There are numerous decisions by the Courts to this effect—*Vencatachella Chetty v. Parvathammal*, 8 Mad. H. C. Rep, 134; *Parisi Nayudu v. Bangaru Nayudu*, 4 Mad. H. C. Rep., 204; *Viraramuthi Udayan v. Singaravelu*, 1 L.R., 1 Mad., 306; *Rahi v. Govinda*, 1 L. R., 1 Bom., 97, and *Narayan Bharthi v. Laving Bharthi*, 1 L. R., 2 Bom., 140.

The appeal is decreed, and the decrees of the Courts below are set aside, and the suit dismissed with all costs.

Appeal allowed.

NOTES.

[As regards Jains, see (1898) 23 Bom., 257.

As regards the rights of illegitimate daughters, see also (1908) 32 Bom., 562.]

[388] *The 8th June, 1886.*

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, AND MR. JUSTICE TYRRELL.

Sitla Bakhsh, minor by his Guardian Punno Kuar, and
another.....Defendants

versus

Lalta Prasad.....Plaintiff.*

Mortgage—Mortgage by conditional sale—Foreclosure—Suit for possession of mortgaged property—Regulation XVII of 1806, s. 8—Conditions precedent—Demand for payment of mortgage-money—Proof of service of notice—Proof of notice being signed by the Judge—Proof of forwarding copy of application with notice Act IV of 1862 (Transfer of Property Act).

• The provisions as to the procedure to be followed in taking foreclosure proceedings under Regulation XVII of 1806 are not merely directory, but strict satisfaction of the prescribed conditions therein laid down precedes the right of the conditional vendee to claim the forfeiture of the conditional vendor's right, and the various requirements of that section have to be strictly observed in order to entitle a mortgagee to come into Court, and, upon the basis of the observance of those requirements, to assert an absolute title to the property of the mortgagor. *Norender Narain Singh v. Dwarka Lall Mundur*, 1 L. R., 3 Cal., 397; L. R., 5 Ind. Ap., 18; and *Madho Pershad v. Gajadhar*, 1 L. R., 11 Cal., 111; L. R., 11 Ind. Ap., 186, followed.

In a suit for possession of immoveable property by a conditional vendee under a deed of conditional sale, alleged to have been foreclosed under Regulation XVII of 1806, it appeared that, except a recital in the application for foreclosure itself, there was nothing to show that

* First Appeal No. 145 of 1885, from a decree of Syed Farid-ud-din Ahmad, Subordinate Judge of Cawnpore, dated the 15th January 1885.

any preliminary demand was ever made upon the mortgagors for payment of the mortgage-debt; that there was no proof of the "notice" itself having been served upon the mortgagors, which it lay upon the plaintiff to establish; that there was nothing to show that the notice which was issued was signed by the Judge to whom the application was made; and that it was not proved that a copy of the application was forwarded along with the notice to the mortgagors, or that its terms were ever brought to their knowledge.

Held, applying to the case the principles stated above, that the provisions of Regulation XVII of 1806 had not been satisfied, and that the plaintiff had not fulfilled his obligation, namely, to prove affirmatively that those provisions were strictly followed.

Held, also, that to treat the suit as one instituted under the Transfer of Property Act, and to allow the plaintiff to obtain such relief as he would be entitled to by that Act, would be to countenance an entire change in the nature and character of the suit as it was originally instituted, and that this was a course not sanctioned by the law.

THE plaintiff in this case claimed possession of an eight annas share of a village called Bharauli as the conditional vendee under a deed of conditional sale, dated the 13th December 1864, which [389] had been foreclosed under Regulation XVII of 1806. He stated in his plaint as follows:—

An application for foreclosure was presented on behalf of the plaintiff on the 12th June 1882, regarding an eight annas zamindari share of the said village, excepting the eight annas zamindari share owned and possessed by himself, and after deducting Rs. 780 received on account of interest, that application was valued at Rs. 20,887-4-0. But the mortgage-money, including principal and interest or any portion thereof, was not deposited on behalf of any defendant, in consequence of which the plaintiff, at the end of the usual year of grace, became absolute owner, entitled to the proprietary possession of the remaining eight annas zamindari share, together with all the rights and interests appertaining thereto. The plaintiff acquired that on the 10th July 1883, the date on which the year of grace expired; but the defendants, who are in possession, have not delivered possession, but have refused to do so, and that is the date on which the cause of action accrued."

The Court of First Instance (Subordinate Judge of Cawnpore) gave the plaintiff a decree for possession of the property. The defendants Sitla Bakhsh (a minor represented by his mother and guardian) and Sonidha Kuar appealed to the High Court, impugning the decree on grounds which are stated in the judgment of the Court.

Mr. C. H. Hill, Pandit Sundar Lal, Pandit Bishambhar Nath and Pandit Nawal Bihari, for the Appellants.

Mr. Habibullah, Pandit Ajudhia Nath and Munshi Kashi Prasad, for the Respondent.

Straight, Offg. C.J.—This is an appeal from a decision of the Subordinate Judge of Cawnpore, passed upon the 15th January 1885. There were several defendants to the suit, but we are only concerned in the appeal to this Court with one Sitla Bakhsh, a minor, who is represented by his mother, Musammatt Panno Kuar, as his guardian *ad litem*, who is the sole appellant. The suit was brought by the plaintiff-respondent, as the proprietor of eight annas in a certain property, to obtain possession of that property, on the basis of a document of the 13th December 1864, which, the plaintiff contends, amounted to a conditional sale-deed, and certain foreclosure proceedings taken thereon. It is, in fact, upon the strength of a statutory title, which he says that he obtained by the operation of Regulation XVII of 1806, that he claims to be entitled to possession of the property to which he lays claim. Now the relief which is asked in the plaint is that "a decree for proprietary possession of eight annas zamindari share out of the entire [390] sixteen annas zamindari in mauza Bharauli, pargana Bindki, tahsil Kaliyanpur, in the Fatehpur district,

with all the rights appertaining to the aforesaid zamindari, may be passed in the plaintiff's favour against all the defendants by actual dispossession of Pahlwan Singh, Sitla Bakhsh, Musammat Chhogar Kuar, and Lala Har Prasad, defendants, and by extinction of the rights of the above-named defendants, by protecting the right of Sheo Ram defendant, and declaring the want of title of Balmukand, *pro forma* defendant." It is therefore quite clear from the mode in which this suit was presented in the Court below, that it was a suit based upon the statutory title which the plaintiff alleged he obtained under the Regulation I have already mentioned, and it was for the possession of the property upon the strength of that statutory title. Hence it follows that unless it is clearly and satisfactorily established that the provisions of the 8th clause of Regulation XVII of 1806 were satisfied, the plaintiff cannot succeed in the present suit. The case has taken considerable time in argument, but has not been unnecessarily protracted, because the points that have been raised by the learned counsel for the appellant were well worthy of attention. The first contention was, that the father of Sitla Bakhsh, the appellant, having purchased at an auction-sale held in execution of a decree obtained upon a bond of 1859, which was prior in date to the mortgage or conditional sale-deed upon which the plaintiff claims, he therefore had a prior lien to the plaintiff, and was entitled to remain in possession of the property as being the owner of a prior charge. I have already indicated that in regard to that contention of the learned counsel for the appellant, it appears to me to turn upon a question of fact, namely, whether the purchase by the father of Sitla Bakhsh was made at a sale in execution of a decree passed upon an instrument which created a prior charge to that of the plaintiff. Now, as a matter of fact, it seems to me that the Subordinate Judge was right in the conclusions at which he arrived, and has correctly held that, regarding all the circumstances, the sale at which the appellant's father purchased the share in this very village was a sale in execution of the simple money-decree, which had been obtained by one Har Dayal and some one else against Gulab Rai and Kishen Dayal. I therefore, as regards this contention, was against the [391] learned Counsel for the appellant, and did not require to be addressed on this point by the learned Pandit who appears for the respondent. The next objection taken was that, upon a true construction of this deed of the 13th December 1864, the instrument was not in the nature of a conditional sale, and that it was nothing more nor less than a simple mortgage, which, under certain circumstances, could and would become a usufructuary mortgage. Of course, if this construction is a well-founded one, it is obvious that this suit, which is a suit for possession of the property under a title created by the foreclosure proceedings of 1882, cannot succeed, and that we have no power to decree possession to the plaintiff as a usufructuary mortgagee. I think, however, it will be best for me, assuming for the purpose that the document constituted a conditional sale, to deal with the case in reference to the third contention of the appellant's learned counsel, which is based upon the informality or rather invalidity of the foreclosure proceedings taken by the plaintiff. I adopt this course in order to avoid the possibility of conflict between two Division Benches of this Court as to the construction to be placed upon the instrument of the 13th December 1864, for though I do not wish to commit myself definitively to the opinion, I confess I entertain grave doubts as to whether it was correctly held on a former occasion that that document did amount to a conditional sale. I will, however, not dispose of the case upon that ground, because even assuming it to be the instrument contended for by the plaintiff, I think the suit fails by reason of the conditions precedent of the Regulation XVII of 1806 not having been satisfied. It may be taken as undoubted law, which

their Lordships of the Privy Council have laid down in the most explicit terms in *Norender Narain Singh v. Dwarka Lal Mundur*, I. L. R., 3 Cal., 397 : L.R., 5 Ind. Ap., 18, and *Madho Pershad v. Gajadhar*, I. L. R., 11 Cal., 111 : L.R., 11 Ind. Ap., 186, that the provisions as to the procedure to be followed in taking foreclosure proceedings under Regulation XVII of 1806 are not merely directory, but that strict satisfaction of the prescribed conditions therein laid down precedes the right of the conditional vendee to claim the forfeiture of the conditional vendor's right; and it is clear, not only by these decisions of their Lordships, but by a long course of decisions of this and other Courts in India, that the various requirements of that [392] section have to be strictly observed in order to entitle a mortgagee to come into Court, and upon the basis of the observance of the requirements of that section to assert an absolute title to the property of the mortgagor. In this case there is no evidence that the requirements of the 8th clause of the Regulation have been complied with. First, there is nothing to show, except a recital in the application itself, that any "demand" was ever made upon the mortgagors for payment of the mortgage-debt. As to the necessity of this preliminary demand, there are rulings of this Court to be found in *Behari Lal v. Beni Lal*, I. L. R., 3 All., 408, and *Karan Singh v. Mohan Lal*, I. L. R., 5 All., 9, and an unreported ruling of the late Chief Justice and Mr. Justice DUTHOIT in First Appeal No. 50 of 1884. Next, there is no proof of the "notice" itself having been served upon the mortgagors, which it lay upon the plaintiff to establish. Further, there is nothing to show that the notice which was issued was signed by the Judge to whom the application was made. Indeed, it would seem not to have been, nor is it proved that a copy of the application was forwarded along with the notice to the mortgagors, or that its terms were ever brought to their knowledge. Without referring in detail or dealing at length with the reasons given by their Lordships in the two rulings of the Lords of the Privy Council to which I have referred, it seems to me that, applying the principles of these rulings to the facts before us, we have no alternative but to hold that the provisions of the Regulation have not been satisfied, and that the plaintiff has not fulfilled his obligation, namely, to prove affirmatively that those provisions were strictly followed. These observations are sufficient for the purpose of dealing with this appeal.

Before leaving the matter, however, I must refer to the suggestion made by the learned Pandit for the respondent that we should treat this suit as one instituted under the Transfer of Property Act, and that we should allow his client to obtain such relief as he would be entitled to by that Act.

I cannot adopt this suggestion. To do so would be to countenance an entire change in the nature and character of the suit from the shape in which it was originally instituted, and this I do not think is a course sanctioned by law.

[393] The appeal must be, and is, decreed. The plaintiff's suit will stand dismissed with reference to the interests of Sitla Bakhsh and Musammatt Sonidha Kuar with costs in proportion in this Court and in the lower Court.

Tyrrell, J.—I entirely concur.

Appeal allowed.

NOTES.

[As regards strict compliance with the provisions of Reg. XVII of 1806, see also (1889) 11 All., 164.

As regards the law applicable to mortgages before the T. P. A., 1882, see also (1895) 20 Bom., 759.]

[8 All. 393]

The 16th June, 1886.

PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Champat.....Plaintiff

versus

Shiba and another.....Defendants.*

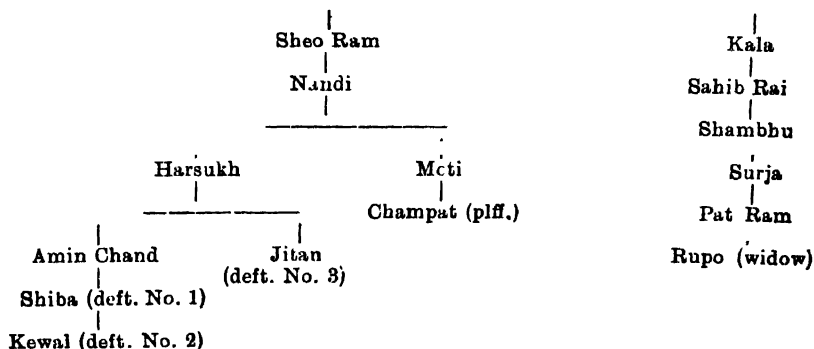
Hindu Law—Stridhan—Succession.

Upon the death of a childless Hindu widow who had been married in one of the four approved forms of marriage, S, one of the collateral relatives of her husband, stating that his minor son had been adopted by her, obtained possession of certain property which had formed her *stridhan*, and mutation of names was effected in the minor's favour in the revenue records. A suit was instituted against S and his son by C. on the allegation that he and J, who were collateral relatives of the widow's husband, were entitled, under the Hindu Law, to succeed in moieties to the properties left by her as her *stridhan*, and claiming recovery of possession of half her property. In defence, the adoption was pleaded, and another plea was that the widow had left a brother, who in the absence of the adoption, would succeed to the property to the exclusion of the plaintiff. The Court of First Instance held that the alleged adoption had not been proved. In the Lower Appellate Court the plea as to adoption was given up.

Held, that, upon the facts found, the plaintiff was the heir of the deceased widow, and as such entitled to succeed to her *stridhan* under the Hindu Law. *Thakoor Deyhee v. Baluk Ram*, 11 Moo. I. A., 135, followed. *Munia v. Puan*, I. L. R., 5 All., 310, distinguished.

THE following table shows the relationship of the parties to this case:—

PURAN



[394] Under a deed of gift dated the 27th April 1875, Surja, who owned the zamindari property in suit, conveyed it to his son's widow Rupo, who died on the 1st February 1884. Thereupon Shiba, defendant No. 1, stating that his minor son Kewal, defendant No. 2, had been adopted by the deceased widow, obtained possession of the property and mutation of names in his favour in the revenue records on the 3rd April 1884. The present suit was instituted by Champat on the allegation that he and Jitan, defendant No. 3,

* Second Appeal No. 1442 of 1885, from a decree of C. W. P. Watts, Esq., District Judge of Saharanpur, dated the 16th July 1885, reversing a decree of Maulvi Syed Tajam-ul Hussain, Munsif of Shandli, dated the 8th December 1884.

were entitled, under the Hindu Law, to succeed in moieties to the properties left by Musammât Rupo as her *stridhan*, she having died without issue. The object of the suit was recovery of possession of half of the property left by the widow.

The suit was resisted by Shiba, defendant No. 1, on behalf of himself and his minor son Kewal, defendant No. 2, on the ground that the latter had been adopted by the widow and was therefore entitled to succeed to the whole of her property. Another plea in defence was, that the widow had left a brother of the name of Kurali, who, in the absence of the adoption, would succeed to the property to the exclusion of the plaintiff.

Jitan, defendant No. 3, did not appear to defend the suit.

The Court of First Instance (Munsif of Shamli) held that the alleged adoption of Kewal by the widow was not proved; that she having been lawfully married to Pat Ram, the plaintiff was a *sapinda* and near relative of her husband, and could therefore maintain the suit, notwithstanding the existence of Kurali, the brother of the deceased widow. Upon these grounds the Munsif decreed the claim.

Upon appeal the District Judge of Saharanpur reversed this decree. The question of adoption was not insisted upon before him; but he held that the property, being *stridhan* of the widow, would devolve upon her death on her brother Kurali to the exclusion of the plaintiff.

From this decree the plaintiff appealed to the High Court. It was contended on his behalf that upon the facts found by the lower Courts, he was the heir of the deceased widow, and as such entitled to succeed to her *stridhan* under the Hindu Law.

[395] Mr. *Habibullah*, Pandit *Ajudhia Nath* and Pandit *Sundar Lai*, for the Appellant.

Lala Juna Prasad and Pandit *Nand Lal*, for the Respondent.

Mahmood, J (After stating the facts as stated above, continued):—I have no doubt that this contention is perfectly sound and must prevail. It has been found by the Munsif that Musammât Rupo was married to Pat Ram in one of the four approved forms of marriage, and this finding was not disturbed in the Lower Appellate Court. Indeed, in the Court of First Instance, no allegation was made on behalf of the defence to the effect that the marriage of Rupo was in an unapproved form; and this being so, the observations of the Lords of the Privy Council in *Thakoor Deyhee v. Baluk Ram*, 11 Moo. I.A., 135, seem to me to dispose of the point raised in this appeal. Their Lordships observed:—"The devolution of *stridhan* from a childless widow is regulated by the nature of the marriage. There is nothing here to show that Choteh Bebe was not married according to one of the four approved forms. In that case her *stridhan* would, according to the *Mitakshara* (chap. ii, s. xi, art. 11), go to the respondents as the collateral heirs of her husband. This view of the law is confirmed by two cases in 2 *Strange's "Hindu Law,"* pp. 411 and 412, and the comments of Mr. *Colebrooke* and others thereon, at p. 175"

This passage leaves no doubt upon the question now before us, and indeed the learned pleaders for the respondents have not contested it, nor have they contended that the marriage of Musammât Rupo was in one of the inferior forms which would render her *stridhan* heritable by her parental family. All that the learned pleaders have asked us on behalf of the respondents is, that we should remand the case to the Lower Appellate Court for a finding as to the adoption of Kewal by Musammât Rupo. But the plea was distinctly given up in the Lower Appellate Court, and, under the circumstances, I do not think we should make a remand for a finding upon the issue, the Munsif, after a

careful consideration of the evidence, having recorded a distinct finding against the alleged adoption.

[396] I would decree this appeal with costs, and, reversing the decree of the Lower Appellate Court, restore that of the Court of First Instance.

But I wish to add that the Full Bench ruling of this Court in *Munia v. Puray*, I. L. R., 5 All., 310, which was referred to at the hearing, is clearly distinguishable from this case, because all that was ruled there was that a woman's *stridhan*, being property over which she had absolute control, her husband's relations have no reversionary interest in such property so as to be entitled to set aside any acts of transfer made by her during her lifetime. There is nothing in that case to warrant the conclusion that upon the death of a widow, when the question of devolution arises, her husband's relations would not be her heirs.

Oldfield, J.—I concur.

Appeal allowed.

NOTES.

[As regards the presumptions regarding the form of marriage, see also 33 Bom., 433; 25 Cal., 354; 19 Mad., 35; 32 Mad., 512]

[8 All. 396]

The 5th April, 1886.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE BRODHURST.

Amir Zama.....Plaintiff

versus

Nathu Mal.....Defendant.*

Set-off—Res judicata—Civil Procedure Code, ss. 13, 111—Court-fee on set-off.

In a suit to recover a sum of money due as wages, the plaintiff alleging that the defendant had engaged him to sell cloth on his account at a monthly salary, the defendant claimed a set-off as the price of cloth which he alleged the plaintiff had sold on his account on commission. It appeared that the defendant had previously sued the plaintiff to recover the same amount as was now claimed by way of set-off, as being due for the price of cloth sold and delivered by the defendant to him; and the plaintiff (then defendant) pleaded that there had been no sale to him, but the cloth had been delivered to him on commission-sale. The suit was dismissed on the ground that there was no proof of a sale of cloth, and the question whether any sum was due for cloth sold on commission-sale was not gone into. The cloth now alleged to have been delivered on commission-sale was the same as that alleged in the former suit to have been actually sold to the plaintiff.

* Reference No. 179 of 1886, under s. 617 of the Code of Civil Procedure, by W. K. Barry, Esq., Judge of the Court of Small Causes at Allahabad.

Held, that the defendant was entitled, under s. 111* of the Civil Procedure Code, to set-off the amount claimed as due for goods sold on commission against the plaintiff's demand; and that the claim for such set-off was not barred under the provisions of s. 13.

Held, also, that the court-fee payable on the claim for set-off was the same as for a plaint in a suit.

[397] THIS was a reference by Mr. W. R. Barry, Judge of the Allahabad Small Cause Court. The facts of the case and the points of law referred were stated by him as follows:—

"The defendant Nathu Mal, on the 13th November 1885, brought a suit against the plaintiff Amir Zama, to recover a sum of Rs. 91-9-9, on the following allegation, namely, that from the 30th November 1884, to the 16th May 1885, the plaintiff (present defendant) sold to the defendant (present plaintiff) goods of the value of Rs. 441-7-3; that part of the said value was paid by the defendant and part of the said goods were returned, and that there remained a balance of Rs. 91-9-9 due from the defendant to plaintiff. At the hearing the defendant pleaded that he did not purchase the goods, but had received them to sell on behalf of the plaintiff on commission, and an issue was joined whether the goods were sold and delivered by plaintiff to defendant. The Court found on the facts that the goods were never sold to defendant as alleged by plaintiff, and the plaintiff's suit was dismissed.

"On the 3rd February 1886, the defendant in the former suit brought a suit against the plaintiff in the former suit for wages, alleging that the defendant had engaged him to sell cloth on his behalf at a remuneration of Rs. 8 per mensem; that the plaintiff had served the defendant accordingly, but the remuneration had not been paid. At the hearing the defendant, among other matters, pleaded a set-off of Rs. 91-9-9 on the averment that he had intrusted certain goods to the plaintiff to be sold by him on behalf of the defendant on commission-sale; that the plaintiff had sold part of the goods and returned others, and that goods of the value of Rs. 91-9-9 had not been accounted for by the plaintiff. The defendant therefore claimed this sum as a set-off. It is admitted by the defendant that the goods which he now avers to have been made over to the plaintiff on commission-sale, are the same that he alleged to have been sold to plaintiff in the former suit. The claim in the former suit for the price of goods sold and delivered and that now made in the set-off, arise out of exactly the same group of facts; the only difference between the two claims is, that in the former the defendant (then plaintiff) alleged an out-and-out sale to the plaintiff (then defendant), while in the [398] latter the defendant alleges that the goods were made over to the plaintiff on commission-sale. The set-off appears to satisfy the requirements of s. 111, Civil Procedure Code, in every respect except one,

[Sec. 111.—If in a suit for recovery of money the defendant claims to set off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, and if in such claim of the defendant against the plaintiff both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, tender a written statement containing the particulars of the debt sought to be set-off.]

The Court shall thereupon inquire into the same, and if it finds that the case fulfils the requirements of the former part of this section, and that the amount claimed to be set-off does not exceed the pecuniary limits of its jurisdiction, the Court shall set off the one debt against the other.

Such set-off shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original and on the cross-claim, but it shall not affect the

lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.]

namely, that the money now claimed is legally recoverable by the defendant from the plaintiff, and on this point I entertain a reasonable doubt.

"The statement in the plaint of the 13th November 1885, that the goods were sold and delivered to the defendant in that suit, is doubtless an admission which is relevant against the present defendant; but this admission is not conclusive proof of the matter admitted unless it operates as an estoppel (Evidence Act, s. 31). Now this admission does not amount to an estoppel under Chapter VIII of the Evidence Act, for the other party has not in any way acted on the admission; nor changed his position in consequence thereof. But the decree in the former suit may operate as *res judicata*, so as to make the claim now advanced inadmissible; or, in the language of the English text-books, the decree may operate as an estoppel by record. The arguments in favour of admitting the set-off appear to be briefly as follows:—

"In the former suit the question that was put in issue and determined was—Were the goods sold and delivered by plaintiff to defendant? There was no finding on the issue—Were the goods intrusted to the defendant to be sold on behalf of the plaintiff on commission-sale? This is the point that is in issue in the present suit, and there was no finding on this point in the former suit. The current of English decisions seem to favour the admissibility of the set-off, and the judgment of Lord WESTBURY in *Hunter v. Stewart*, 31 L. J., Ch., 346, is a strong authority on this side. The allegations and equity of the suit are different from the allegation and equity of the set-off: compare *Broom's Legal Maxims*, 2nd ed., page 250:—If, however it be doubtful whether the second action is brought *pro eadem causâ*, it is a proper test to consider whether the same evidence would sustain both actions, and what was the particular point or matter determined in the former action." It seems clear that the evidence given in the suit, which was directed to prove sale and delivery of the goods, would not sustain the claim made [399] in the set-off, *viz.*, that the goods were intrusted to the plaintiff for sale by him as a commission agent. And numerous other authorities might be adduced in support of this view.

"On the other side—*i.e.*, against the admissibility of the set-off, there are the terms of s. 13, *Explanation II* of the Code of Civil Procedure: 'Any matter which might or ought to have been made the ground of defence or attack in such former suit, shall be deemed to have been a matter directly and substantially in issue in such suit.' It may be urged that in the former suit the plaintiff should have brought forward his whole title and asserted the two claims in the alternative. A strong authority in support of this view is *Woomatara Debia v. Unnopoorna Dassee*, 11 B. L. R., 158, and *Denobundhoo Chowdhry v. Kristomonee Dossee*, 1 L.R., 2 Cal., 152. In the latter of these cases the judgment of PHEAR, J., seems to show clearly that Their Lordships of the Privy Council have deliberately adopted a stricter view than that held by the Courts in England. This view is confirmed by a comparison of the terms of s. 2, Act VIII of 1859 with those of s. 13, Act XIV of 1882. The former section forbids a Civil Court from taking cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties, and this section was in force when the judgments quoted above were passed by the Judicial Committee and the Calcutta High Court. The present section would seem to go further than the old section, and to enact as law the proposition affirmed by the Privy Council.

"It may be argued that these rulings were given in cases in which a plaintiff sought to establish a double title to the same property, and do not

apply to a case like the present, where no title is in issue, and the claim is for money and not for possession of immoveable property; also that the frame of the first suit may be due to mistake or negligence on the part of the plaintiff's pleader, and that the plaintiff should not suffer for the pleader's mistake; and it may be replied that the principle affirmed in *Woomatara Debia v. Unno-poorna Dasse*, 11 B. L. R., 158, is general in its terms, and may well be held to govern cases where the claim is simply for money, and not to establish a title to property; and that if a plaintiff [400] alleges that he sold goods to a defendant when, in point of fact, he did not sell them, but merely intrusted the goods to him for sale on commission, the allegation is one altogether within the personal knowledge of the plaintiff, and it is not unreasonable that he should be precluded from suing on another and altogether different title for the same relief. My own opinion is that, according to the law in force in British India, the set-off of the defendant is inadmissible, because the sum of money claimed therein is not legally recoverable owing to the fact that the claim is *res judicata*. And I would respectfully ask for a decision as to whether, under the circumstances stated above, the suit bars the set-off.

"I would further ask for a decision on the following point:—What Court-fee, if any, is payable on this set-off? I am of opinion that the set-off is chargeable with the same Court-fee duty as if the claim made in the set-off had been made in a separate suit. Section 111, Civil Procedure Code, says:—'Such set-off shall have the same effect as a plaint in a cross-suit;' and if the set-off is to have the effect of a plaint, it seems reasonable that it should be stamped as a plaint under the provisions of s. 6, Act VII of 1870. On the other hand, the Court-Fees Act does not anywhere lay down that a set-off shall be chargeable with stamp duty. A set-off is treated in Chapter VIII of the Civil Procedure Code as of the same nature as a written statement, or even as part of a written statement; and it has been ruled *Cherng Ali v. Kadir Mahomed*, 12 Cal. L. R. 367, that no Court-fee is payable on a written statement, filed by a defendant at the first hearing. It has also been suggested at the Bar that the Court-fee duty on the set-off cannot exceed the duty payable on the sum by which the set-off exceeds the claim. I am aware of no authority in support of this position, and on the grounds of general principle, consider that since the set-off has the same effect as a plaint in a cross-suit, the set-off should pay the same Court-fee duty as if it were a plaint. But as the Court-Fees Act prescribes no fee as payable on a set-off, I have reasonable doubts on the question, and respectfully ask for a decision thereon."

The parties did not appear.

Oldfield and Brodhurst, JJ.—The facts are these. The plaintiff Amir Zama has instituted this suit against the defendant [401] Nathu Mal to recover money due as wages, alleging that the defendant engaged him to sell cloth on his account at a fixed monthly salary.

It appears that the defendant has previously sued the plaintiff to recover Rs. 91-9-9 as due to him for the price of cloth sold and delivered by the defendant to the plaintiff. In that suit the plaintiff (then defendant) pleaded that there was no sale to him of any cloth, but the cloth had been delivered to him on commission-sale. The suit was dismissed on the ground that there was no proof of a sale of cloth, and the question whether any sum was due for cloth sold on commission-sale was not gone into. Now the defendant claims a set off of Rs. 91-9-9 against the plaintiff's claim, on the ground that out of it Rs. 87-5-0 are due to him as the price of cloth which the plaintiff had sold on his account on commission, - the rest due for cloth which the plaintiff purchased. In our opinion, under the circumstances stated, the answers to the reference

should be (i) that the defendant is entitled, under s. 111, Civil Procedure Code, to set-off this sum of Rs 87-5-0 claimed as due for cloth sold on commission against the plaintiff's demand, as it is an ascertained sum claimed to be due with reference to the same contract under which the plaintiff's demand arises; (ii) that the claim for the set off of Rs 87-5-0 is not barred under the provisions of s. 13, Civil Procedure Code. The former suit was brought by the defendant for the price of goods sold and delivered by the defendant to the plaintiff, whereas the defendant's present claim is for money payable by the plaintiff to him for money received by the plaintiff for his (defendant's) use, and as the price of cloth belonging to defendant and sold on his account by plaintiff.

The two claims are founded on different titles, and the issue raised by the latter was not in issue in the former suit, and was not heard and decided. The set-off as to Rs 4-4-0 price of cloth alleged to have been sold to plaintiff, is not entertainable. Our reply to the remaining question is, that the Court-fee payable on the claim for set-off should be the same as for a plaint in a suit.

NOTES.

[As regards Court fees, this was followed in (1889) 13 Bcn , 672 ; (1891) 15 Mad , 29 but dissented from in (1908) 8 C W N , 174. See also (1908) P R , 85 , (1905) 32 Cal , 654.

It is pointed out by Hukm Chund in his Civil Procedure Vol I (1900) at p 790 that the observations in this decision, extending to ascertained sums the restrictions applicable to unascertained sums, were only *obiter dicta*]

[402] *The 20th April, 1886*

PRESENT.

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, AND
MR. JUSTICE BRODHURST.

Samar Ali.....Plaintiff.
versus

Karim-ul-lahDefendant.*

Mortgage—Usufructuary mortgage—Redemption—Regulation XXXIV of 1803.
ss 9, 10—Act XXVIII of 1855—Act XIV of 1870—Act IV of 1882
(Transfer of Property Act), s 2.

A deed of usufructuary mortgage executed in 1846, under which the mortgagee had obtained possession, contained the following conditions —“ Until the mortgage-money is paid, the mortgagee shall remain in possession of the mortgaged land, and what profits may remain after paying the Government revenue are allowed to the mortgagee, and shall not be deducted at the time of redemption. At the end of any year, the mortgagors may pay the mortgage-money and redeem the property. Until they pay the mortgage-money, neither they nor their heirs shall have any right in the property.” In 1884, a representative in title of one of the original mortgagors sued to redeem his share of the mortgaged property, upon the allegation that the principal amount and interest due upon the mortgage had been satisfied from the profits, and that he was entitled to a balance of Rs 45. It was found that from the profits, after deducting Government revenue, the principal money with interest at the rate of 12 per cent per annum had been realized, and that the surplus claimed by the plaintiff was due to him. The Lower Appellate Court dismissed the suit, on the ground that under s 62 (b) of the Transfer of Property Act (IV of 1882), and with reference to the terms

* Second Appeal No 1254 of 1885, from a decree of H. G. Pearse, Esq., Additional Judge of Moradabad, dated the 1st May 1885, reversing a decree of Maulvi Muhammad Mazhar Husain, Munsif of Nagina, dated the 24th December 1884.

of the deed of mortgage, the plaintiff was not entitled to recover the property until he paid the mortgage-money.

Held, that, although the word "interest" was not specifically used, the natural and reasonable construction of the deed was that it was arranged that the mortgagee should have possession of the property and enjoy the profits thereof, until the principal sum was paid, in lieu of interest.

Held, that the provisions of ss. 9 and 10 of Regulation XXXIV of 1803, which was in force when the deed of mortgage was executed, were not affected or abrogated by Act XXVIII of 1855 or Act XIV of 1870 or Act IV of 1882; that these provisions were incidents attached to the mortgagor's rights of which he was entitled to have the benefit; and that the contract of mortgage being subject to these provisions, the charge would have been redeemed as soon as the principal mortgage-money with twelve per cent. interest had been realized by the mortgagee from the profits of the property.

THE plaintiff in this suit claimed to recover possession of one-sixth of certain mortgaged land. The mortgage was for Rs. 100, with possession, and the deed, which was dated the 20th September 1846, contained the following conditions:—

"The conditions are these:—Until the mortgage-money is paid, the mortgagee shall remain in possession of the mortgaged [403] land, and what profits may remain after paying the Government revenue are allowed to the mortgagee, and shall not be deducted at the time of redemption. At the end of any year the mortgagors may pay the mortgage-money and redeem the property. Until they pay the mortgage-money neither they nor their heirs shall have any right in the property."

The plaintiff represented in title one of the original mortgagors, who owned one-sixth of the land. The equity of redemption of the remaining five sixths had been purchased by the defendant the mortgagee. The plaintiff alleged that the mortgage-money in respect of one-sixth of the property was Rs. 16-10-8, that is, one-sixth of Rs. 100, and that the defendant had received more than this sum together with interest at the rate of 12 per cent. per annum from the property, but notwithstanding this he would not restore the land. The defendant set up as a defence, *inter alia*, that with reference to s. 62 (b) of the Transfer of Property Act and the terms of the mortgage deed, the mortgagor had not a right to recover the property until he paid the mortgage-money.

The Court of First Instance held that the mortgage in question was not governed by the provisions of s. 62 of the Transfer of Property Act, and that, having regard to the provisions of Regulation XXXIV of 1803, if an account showed that the principal money, together with interest at 12 per cent. per annum, had been paid from the profits, the plaintiff had a right to recover the property. The Court having taken an account, found that from the profits of the property, after deducting Government revenue, the principal money together with interest at the rate mentioned above had not only been realized, but a surplus of Rs. 45 was due to the plaintiff; and it gave the plaintiff a decree for joint possession of the property and for Rs. 45.

On appeal by the defendant the Lower Appellate Court held that the Regulation relied on by the first Court was not applicable, and the plaintiff was not entitled to recover the property until he paid the mortgage-money as provided by the deed of mortgage, and dismissed the suit.

The plaintiff appealed to the High Court, contending that the decision of the first Court was correct, and the Lower Appellate Court had improperly dismissed the suit.

[404] Mr. G. E. A. Ross, for the Appellant.

Mr. C. Dillon Munshi Hanuman Prasad and Munshi Madho Prasad, for the Respondent.

Straight, Offg. C. J.—This is a suit for the redemption of a mortgage dated the 20th September 1846. The mortgage was of a usufructuary character, and admittedly under it the mortgagee obtained possession of the property. The plaintiff, who is the representative of the interest of the mortgagor to the extent of a sixth, comes into Court and seeks to redeem his share, upon the allegation that the principal amount and interest due upon the mortgage have been satisfied by enjoyment of profits, and he is entitled to a balance of Rs. 45 over and above what was sufficient to discharge the mortgage. The plaintiff's case is, that both upon the construction of the document and by the law which regulates and affects the operation of that instrument, the amount of money which the defendant derived by way of profits from the property was sufficient to pay off the mortgage-money and its interest at twelve per cent. per annum.

Now the terms of that document have been read to me by Mr. Ross, and the learned counsel for the respondent has conceded that they have been accurately rendered. It seems to me that the arrangement between the parties was, that the mortgagee should have possession of the property, and that he should enjoy the profits thereof, so long and until the principal sum was paid, in lieu of interest. It is true that the word "interest" was not specifically used; but it appears to me that this is the natural and reasonable construction of the deed; and such being the nature of the instrument, its effect was to place the mortgagee in possession of the profits of this property, which would enable him to realize annually a larger amount of interest than twelve per cent. per annum. By the Regulation issued by the Governor-General in Council, No. 34 of 1803, it was provided in ss. 9 and 10 that the rate of interest to be allowed to the mortgagee was not to exceed twelve per cent. per annum; and that no matter whether the parties made a contract for the payment of a larger amount of interest, the law would not recognize any contract for payment of a larger amount than twelve per cent. Now this Regulation is applicable to this mortgage [405] contract of 1846, which is before us, if its provisions have not been disturbed by the operation of any subsequent legislation. If they have not, the matter stands now as it did in 1846, and we are bound by the rules mentioned in that Regulation. The question then to be considered is, whether by Act XXVIII of 1855, or by Act IV of 1882, the provisions of ss. 9 and 10 of Regulation XXXIV of 1803 have been affected or abrogated. Now I do not think that it can be seriously denied that one of the rights affecting the contract of mortgage is the right of the mortgagor to redeem the property mortgaged. Now, as I have said, the contract of mortgage in the present case being subject to the provisions of the Regulation, the charge would have been redeemed as soon as the principal mortgage-money with twelve per cent. interest had been realized by the mortgagee from the profits of the property. I think that those provisions of the Regulation of 1803 were incidents attached to the mortgagor's right, of which he was, and is, entitled to have the benefit. By Act XXVIII of 1855 all the rights conferred by this Regulation were specifically saved, and the same may be said of Act XIV of 1870.

Then with regard to Act IV of 1882, s. 2 of that Act specifically provides that "rights and liabilities arising out of a legal relation constituted before this Act comes into force" shall be saved. This being the view I take of the matter, the appeal must be allowed, and the decree of the Judge being reversed, the case is remanded under s. 562 to the Court below for disposal on the merits.

The costs hitherto incurred in the litigation are to be costs in the cause.
 Brodhurst, J.—I am of the same opinion.

Appeal allowed.

[8 All. 405]

The 20th April, 1880.

PRESENT :

MR. JUSTICE TYRRELL AND MR. JUSTICE MAHMOOD.

Khuda Bakhsh.....Plaintiff

versus

Sheo Din and another.....Defendants.*

*Lease—Lease from year to year—Act VIII of 1871 (Registration Act),
 s. 17 (4)—Act III of 1877 (Registration Act), s. 49.*

In a suit for possession of a piece of land, and for rent of the same, the plaintiff produced in support of his claim two *sarkhats* or *kabuliyats* purporting to be [406] executed in his favour by the defendants, and dated respectively in January 1875, and June 1876. These documents were not registered. The first after reciting that the executant had taken the land from the plaintiff, on a specified yearly rent, and promised to pay the same yearly, proceeded as follows:—“If the owner of the land wishes to have it vacated, he shall give me fifteen days’ notice, and I will vacate without making objection: if I delay in vacating the land, the owner can realize, by recourse to law, rent from me at the rate of Rs. 8 per annum.” The second *sarkhat*, after reciting that the executants had taken the land from the plaintiff on a yearly rent specified, for six years, and promised to pay the same year by year, proceeded thus:—“And if the said Shaikh wishes to have the land vacated within the said term, he shall first give us fifteen days’ notice, and we will vacate it without objection.” The lower Courts held that the *sarkhats* were not admissible in evidence, as they required registration under s. 17 (4) of the Registration Act, VIII of 1871, being leases of immoveable property from year to year or reserving a yearly rent.

Held, that the two *sarkhats* created no rights except those of tenants-at-will, inasmuch as the clause common to both, to the effect that at any time, at the will of the lessor, the lessees were to give up the land at fifteen days’ notice, governed all the previous clauses, and the defendants could be asked to quit at any time before the lapse of the term at fifteen days’ notice.

Held therefore, that the leases did not fall under s. 17 (4) of Act VIII of 1871; that their registration was not compulsory; and that they could not be excluded from evidence under s. 49 of Act III of 1877, which governed the question of admissibility, while Act VIII of 1871 governed the question whether registration was or was not compulsory.

THE plaintiff in this case, Khuda Bakhsh, sued three persons—Sheo Din, Thakur Daval, and Sital. *Akhrs* by caste—for possession of certain land, and for rent of the same, from the 26th June 1880, to the 22nd May 1884, and

* Second Appeal No. 1154 of 1885, from a decree of F. E. Elliott, Esq., District Judge of Allahabad, dated the 13th June 1885, confirming a decree of Pandit Iddar Narain, Munsif of Allahabad dated the 5th November 1885.

for the removal of a "*charahi*," a place for feeding cattle. The defendants set up as a defence to the suit, among other things, that the land did not belong to the plaintiff.

The plaintiff produced, in support of his title to the land and his claim for rent, two "*sarkhats*" or "*kabuliyats*," one purporting to be executed in his favour by Sital, son of Sheo Din, and the other by Sheo Din and Thakur Dayal, the former bearing date the 18th January 1875, and the latter the 26th June 1876. These documents were not registered.

The first document, after reciting that Sital had taken the land on a yearly rent of Rs. 4 and 4 sers of milk, for a place to live on, and for tethering cattle, from Khuda Bakhsh, set forth the following conditions :—" I promise and agree to pay the Rs. 4 and the 4 sers of milk yearly to the owner of the land without objection, [407] and will cause the receipt thereof to be indorsed on the *sarkhat* : any objection as to payment which is not so indorsed shall be unlawful * * * . If the owner of the land wishes to have it vacated, he shall give me fifteen days' notice, and I will vacate without making objection : if I delay in vacating the land, the owner can realize, by recourse to law, rent from me at the rate of Rs. 8 per annum, and I will pay rent at the rate of Rs. 8 per annum without objection."

The second document, after reciting that Sheo Din and Thakur Dayal were in need of land for tethering cattle, and that they had taken the land in front of the door of Khuda Bakhsh, owned and possessed by him, on a yearly rent of eight annas, for six years, set forth the following conditions :—" We promise and agree to pay the rent year by year, without objection, to the said Shaikh Khuda Bakhsh, and will cause the receipt thereof to be indorsed on the *sarkhat*. Except payments indorsed on the *sarkhat*, we will claim no other payments, and if we do, it will be invalid and unlawful * * * and if the said Shaikh wishes to have the land vacated within the said term, he shall first give us fifteen days' notice, and we will vacate it without objection."

The Court of First Instance gave the plaintiff a decree for possession of the land, but dismissed the claim for rent and the removal of the "*charahi*," holding that the defendants had acquired by prescription a right to maintain the "*charahi*," on the land. It refused to take the "*sarkhats*" in evidence, holding that under s. 17 (4) of the Registration Act, VIII of 1871, they were leases from year to year and therefore required to be registered, and not being registered, were not admissible in evidence. On appeal by the plaintiff, the Lower Appellate Court affirmed the decree of the first Court, concurring with it in its view in respect to the "*sarkhats*."

- The plaintiff appealed to the High Court.

Pandit Sundar Lal, for the Appellant.

Mr. J. Simeon and Mir Zahur Husain, for the Respondents.

Mahmood, J.—I am of opinion that this appeal must prevail, and the decree of the Lower Appellate Court be set aside, and the case be remanded for disposal on the merits. My reasons for this [408] view are, that the suit was one for possession of a piece of land and for demolition of a "*charahi*" situate thereon. Both the lower Courts have found that the land belongs to the plaintiff, but that the defendants have acquired a right of easement to keep their "*charahi*" thereon. The learned District Judge has expressly stated that the two *kabuliyats*, dated the 18th January 1875, and 26th June 1876, were not admissible in evidence, as they needed registration under s. 17 (4) of Act VIII of 1871, being leases of immoveable property from year to year or reserving a yearly rent. Both these documents are in the Hindustani language, and I have read

them to my brother TYRRELL, and we both look upon these leases as creating no rights except those of tenants-at-will. I speak of them as "leases," because of the definition of that word in s. 3 of the Act of 1871. There is, indeed, a statement in the early part of these leases, that the land was given for more than a year; but the most important clause in them is one common to both of them, namely that *at any time*, at the will and mere wish of the lessor, the lessees were to give up the land only at fifteen days' notice. According to the well-understood rules of construction, this latter clause governs all the previous clauses. This being so, the defendants could be asked to quit at any time before the lapse of the term. It did not create even the usual lease from month to month, but the lessees could be ejected at fifteen days' notice, which is the ordinary term of notice probably required by the law, even previous to the passing of the Transfer of Property Act, and the principle of which has been incorporated in ss. 106 and 111 of that Act. The leases therefore do not fall under s. 17 (4) of the Registration Act, VIII of 1871, which was in force when the leases were executed. The clause (which corresponds to s. 17 (d) of the present Registration Act, (III of 1877) is thus worded: "Leases of immoveable property from year to year or reserving a yearly rent." The leases before us do not answer this description, and no other clause of the section is pointed out under which they would fall. Their registration was therefore not compulsory, and they could not be excluded from evidence under s. 49 of Act III of 1877. The question whether registration was compulsory is governed by the registration law in force at the time that the deeds [409] were executed; but the question of admissibility being a matter of procedure, would be governed by the present law. The Judge has altogether excluded from his consideration the two leases, which are the most important evidence in the case, and without which the merits of the case cannot be considered. We ask him to admit these leases, and re-consider the whole case upon the evidence, and to record a fresh judgment under s. 574, Civil Procedure Code. I would decree this appeal, and setting aside the decree of the Lower Appellate Court, remand the case to that Court, leaving costs to abide the result.

I may add that in support of the view taken by me of the leases in this case, our attention has been called by the learned pleader for the appellant to an unreported judgment of the Full Bench of this Court, (since reported, *Weekly Notes*, 1886, p. 115, which supports the view taken by me, though the interpretation of the law in that case related to the old Registration Act of 1864.

Tyrrell, J.—I am of the same opinion.

Case remanded.

NOTES.

[See also (1889) 14 Bom., 319; (1894) 19 Bom., 150; (1895) 9 C.P.L.R., 88; (1895) 9 C.P.L.R., 57 which were cases of yearly tenancies the registration whereof was deemed compulsory.]

[8 All. 409]

The 21st April, 1886.

PRESENT :

MR. JUSTICE TYRRELL AND MR. JUSTICE MAHMOOD.

Karamat Khan.....Plaintiff

versus

• Sami-ud-din and others.....Defendants.*

Act IV of 1882 (Transfer of Property Act), ss. 41, 148—Transfer by ostensible owner—sir-land— Act XII of 1881 (N.-W. P. Rent Act), s. 7—

Meaning of "held"—Statute, construction of—Retrospective

effect—Mortgage of sir-land before passing of Act

XVIII of 1873 (N.-W. P. Rent Act)—Sale

of mortgagor's proprietary rights while

that Act was in force—Right

of mortgagee.

In 1869, *A* and *J*, two co-sharers of a moiety of a ten biswas share in a village (*F* and *W* being also co-sharers in the same moiety), joined with *H*, the holder of the other moiety, in giving to *K* a usufructuary mortgage of 87 bighas of land, being the whole of the *sir-land* appertaining to the ten biswas share. The deed of mortgage authorized the mortgagee to retain possession of the land until payment of the mortgage-money, and to receive profits in lieu of interest; and he obtained possession accordingly. In 1872, *F*, *W* and *A* gave to other persons a usufructuary mortgage of their five biswas share, together with a moiety of the 87 bighas of *sir-land*; and it was stated in the deed that half the mortgage-money due to *K* on the mortgage of 1869 was due by the executants, and that they accordingly left the same with the mortgagees in order that the latter might redeem. In [410] November 1876, *H*'s five biswas share, together with *sir-land*, was sold in execution of a decree. Subsequently, *K*, alleging that the mortgagees under the deed of 1872, and the purchasers under the execution-sale of 1876 had dispossessed him, and that his mortgage-debt had not been paid, sued to recover possession of the 87 bighas of *sir-land*, by virtue of his mortgage-deed of 1869. The Court of First Instance held that the plaintiff was not entitled to enforce his mortgage in respect of *F*'s and *W*'s share in the 87 bighas, because they were not parties to the deed of 1869. The Lower Appellate Court further held that from the date of the execution-sale of November 1876, *H* became an ex-proprietary tenant of his *sir-land*, and that to give the plaintiff possession thereof would be contrary to the provisions of s. 7 of Act XVIII of 1873 (N.-W. P. Rent Act).

Held, that inasmuch as it was clear that at the time when the mortgage-deed of 1869 was executed, *F* and *W* were aware of the transaction which made *K* the mortgagee, under the deed, of the whole property, and that, knowing this, they allowed the possession of *A*, *J*, and *H* to appear as if covering the entire zamindari rights in the ten biswas share of the *sir-land*, and inasmuch as the statements contained in the mortgage-deed of 1872 were an admission on the part of *F* and *W* that the mortgage of 1869 was executed with their consent, the equitable doctrine contained in s. 41 of the Transfer of Property Act applied to the case, and *F* and *W* had no defence, either in law or in equity, to the plaintiff's suit, with reference to their shares, and for the purpose of obviating the lien of 1869. *Ramcoomar Koondoo v. McQueen*, 11 B. L. R., 46, referred to.

* Second Appeal No. 1266 of 1885, from a decree of W. R. Barry, Esq., Additional Judge of Aligarh, dated the 22nd July 1885, modifying a decree of Maulvi Muhammad Samiullah Khan, Subordinate Judge of Aligarh, dated the 28th March 1884.

Per MAHMOOD, J., with reference to the effect of the execution-sale of November 1876, in regard to the provisions of s. 7 of Act XVIII of 1873, that the general rule that statutory provisions have no retrospective operation did not apply to the case; that, by reason of the sale, *H*, who had proprietary rights in the mahal, and held the five biswas share of the *sir* as such (the word "*held*" as used in s. 7 of the Rent Act not being confined to manual or physical holding), lost his proprietary rights, and so became an ex-proprietary tenant of the land belonging to him at that time; that although the mortgage of 1869 must not be so affected as to deprive the mortgagees of all his rights, yet by the terms of s. 7 of Act XVIII of 1873, and by virtue of the sale, his means of benefiting by the mortgage were necessarily changed; that neither the preamble nor s. 1 of the Act contained any saving clause which would justify the interpretation that all the conditions included in a usufructuary mortgage are to be exempted from the operation of the Act, or of s. 7 in particular, merely because the mortgage was a subsisting one; that under these circumstances possession must be given to the plaintiff of such rights as *H* had at the time of the mortgage subject only to *H*'s rights as an ex-proprietary tenant; that the rights of the purchaser of *H*'s share under the sale were subject to the mortgage of 1869; and that, by virtue of the rule enunciated in s. 48 of the Transfer of Property Act, the rights of the mortgagees under the deed of 1872 must give way to the incidents of the prior deed of 1869, both mortgages being usufructuary. *Tulshi v. Radha Kishan*, Weekly Notes, 1886, p. 74, referred to.

Per TYRRELL, J., that in 1876, by reason of the execution sale, the *sir* rights and interests of *H*, mortgaged by him in 1869, as such went out of existence, and [411] assumed a different character; that over that tenure in its altered character the plaintiff, though he still had his mortgage charge, had not, in the existing state of the law, a right to physical possession of the actual land; and that, subject to this new right of *H*, the plaintiff retained his mortgage charge of 1869 over the zamindari interests in the portion of the land acquired by *H*'s vendees.

THE facts of this case were as follows:—In August 1869, Fida Husain, Ata Husain, and Jamal Husain, sons, and Wahid-un nissa, widow, of Ahmad Husain deceased, were co-sharers in a moiety of a ten biswas share of a certain village, and Himayat Husain was the holder of the other moiety. The *sir*-land appertaining to this ten biswas share was 87 bighas. On the 2nd August 1869, Ata Husain, Jamal Husain, and Himayat Husain gave Karamat Khan, the plaintiff in this case, a usufructuary mortgage of the whole 87 biswas of this *sir*-land. The deed of mortgage authorized the mortgagee to retain possession of the land until payment of the mortgage money, and to receive the profits in lieu of interest. On the 17th April 1872, Fida Husain, Wahid-un-nissa, Ata Husain and Jamal Husain, gave a usufructuary mortgage of their 5 biswas share together with a moiety of the 87 bighas of *sir*-land to Sami-ud-din, Hidayat Ali, and Inayat Ali. In the deed of mortgage it was stated that half of the mortgage-money due to the plaintiff on the mortgage of the 2nd August 1869, was due by the executors, and that they accordingly left the same with the mortgagees in order that they might redeem. On the 20th November 1876, Himayat Husain's five biswas share with its *sir*-land was sold in the execution of a decree. The plaintiff, alleging that the mortgagees under the mortgage of the 17th April 1872, and the purchasers under the execution-sale of the 20th November 1876, had dispossessed him, and that his mortgage-debt had not been paid, sued to recover possession of the 87 bighas of *sir*-land by virtue of his mortgage-deed of the 2nd August 1869.

The Court of First Instance gave him a decree for possession of the 87 bighas. On appeal, the Lower Appellate Court held that the plaintiff was not entitled to enforce his mortgage in respect of the share in the 87 bighas of land in suit of Fida Husain and Wahid-un nissa, because these persons were not parties to the mortgage-deed. With regard to the *sir*-land appertaining to the 5 biswas share of Himayat Husain, the Lower Appellate Court held that

from [412] the date of the execution-sale of the 20th November 1876, Himayat Husain became an ex-proprietary tenant of his *sir*-land, and to give the plaintiff possession of such land would be to enforce a transfer prohibited by Act XVIII of 1873 (N.-W. P. Rent Act). The Court therefore modified the decree of the first Court, by dismissing the plaintiff's suit in respect to the shares in the 87 bighas of land claimed of Fida Husain, Wahid-un-nissa and Himayat Husain.

The plaintiff appealed to the High Court on the grounds (i) that Fida Husain and Wahid-un-nissa were estopped from disputing the plaintiff's title as mortgagee to their shares of the mortgaged property; (ii) that the mortgage to him was executed by Ata Husain, Jamal Husain, and Himayat Husain for themselves and as agents of Fida Husain and Wahid-un-nissa, and (iii) that the share of Himayat Husain in the mortgaged property was still liable for the mortgage-debt.

Mr. *Amir-ud-din*, for the Appellant.

Mr. *J. Simeon*, for the Respondents.

Mahmood, J.—I have been asked by my brother TYRRELL to deliver judgment in this case, which, in consequence of the course that has been taken by the learned counsel for the appellant and the learned pleader for the respondents, and also in consequence of the manner in which the Lower Appellate Court has interfered with the first Court's decision, is not very simple. It is therefore advisable briefly to recapitulate the facts, to show what the real questions are which we have to determine in second appeal. It appears that certain property, over 87 bighas of *sir*-land, is situated in the village of certain co-sharers. Among others, one Kazi Ahmad Husain held *sir*-land in proportion to his 5 biswas share of the village, and Himayat Husain, who is said to have been related to Kazi Ahmed Husain, held in proportion to the other 5 biswas share of the zamindari. Upon the death of Ahmad Husain, the *sir*-land, to the extent of his share, would devolve, according to the Muhammadan law, upon his sons Fida Husain, Ata Husain and Jamal Husain and his widow Wahid-un-nissa. The devolution would be in certain proportions which it is unnecessary to describe. It appears that on the 2nd August 1869, Ata Husain, Jamal Husain, and Himayat [413] Husain, executed a deed of usufructuary mortgage in favour of the present plaintiff, Karamat Khan, and it has been found that they placed him in the entire possession of the 87 bighas representing their *sir* in the village. It has been found that the mortgagee was placed in full possession of the whole area, and one difficulty in dealing with the case arises from the admitted fact that in that area were included the shares of Fida Husain and Wahid-un-nissa, whose names were not put to the mortgage-deed of the 2nd August 1869. On the 17th April 1872, Fida Husain and Wahid-un-nissa joined with Ata Husain in executing a usufructuary mortgage in favour of three persons named Sami-ud-din, Hidayat Ali and Inayat Ali—Hidayat Ali being now represented by his daughter Ali-un-nissa and his sister Nasib-un-nissa. Another circumstance which should be mentioned is, that on the 20th November 1876, in the course of certain execution-proceedings, the zamindari rights of Himayat Husain, one of the mortgagors under the deed of the 2nd August 1869, were sold by auction and were purchased by Wazir Khan, Amin-ud-din and Inayat Ali, who was one of the mortgagees under the deed of the 17th April 1872. It has been found that it was not until October 1879, that Karamat Khan, the plaintiff-appellant, who obtained possession as mortgagee under the deed of 1869, was dispossessed of the land by the various defendants upon various allegations of right and repudiations of his rights under that deed. The

object of the present suit is to recover possession of all the lands comprised in the mortgage of 1869, and the parties impleaded as defendants are the executants of that mortgage, also Fida Husain and Wahid-un-nissa, also the mortgagees under the deed of 1872, also the purchasers of Himayat's rights at the auction-sale of the 20th November 1876. The suit has been resisted upon various pleas which need not be described, except that Fida Husain and Wahid-un-nissa repudiated the mortgage on which the suit was brought, on the ground that they were not parties to it, and it was not binding on them. This plea related only to a $2\frac{1}{2}$ biswas share of the *sir*-land which is in suit. The other plea was that raised by Himayat Husain, who admittedly was a party to the mortgage of 1869, and whose rights had been sold in the auction-sale of the 20th November 1876. The Subordinate Judge has decreed the whole suit, except certain money-claims, [414] regarding mesne profits, which are not now the subject of appeal, and in reference to which no argument has been addressed to us. The various defendants appealed to the District Judge, and he, in a judgment which went fully into the facts, arrived at a conclusion which, in my opinion, is unsound in law. First, with reference to the $2\frac{1}{2}$ biswas share of the *sir*-land which would be the share of Fida Husain and Wahid-un-nissa, he dismissed the claim on the ground that they were not parties to the mortgage of 1869. But it is clear from the findings of the Courts below, that at the time when that document was executed, Fida Husain and Wahid-un-nissa were aware of the transaction which made Karamat Khan the mortgagee, under the deed, of the whole property. It is also clear that, knowing this, they allowed the possession of Ata Husain, Jamal Husain and Himayat to appear as if covering the entire zamindari rights in the 10 biswas share of the *sir*. Under these circumstances this case appears to me to be one to which the equitable doctrine reproduced by s. 41 of the Transfer of Property Act applies. That section runs thus:—"Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property, and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith." This rule, which in principle is the same as that on which s. 115 of the Evidence Act is based, does no more than reproduce the *dicta* of the Privy Council in *Ramcoomar Koondoo v. McQueen*, 11 B.L.R., at p. 52, where their Lordships observed:—"It is a principle of natural equity, which must be universally applicable, that, where one man allows another to hold himself out as the owner of an estate, and a third person purchases it, for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something that amounts to constructive notice, of the real title; or that there existed circumstances which ought to have put him upon an inquiry that, if [415] prosecuted, would have led to a discovery of it." Now the circumstances of this case furnish grounds for the application of this doctrine, and, so far, there is force in the argument of Mr. *Amir-ud din* for the appellant, that the action of Fida Husain and Wahid-un-nissa, in allowing his clients to obtain a mortgage of the whole 10 biswas share of *sir*, amounted to making the mortgagee alter his position by the omission of these two persons, and that they cannot now turn round and say that at the time of the mortgage of 1869, the apparent parties to that transaction had no authority to mortgage the $2\frac{1}{2}$ biswas. But the case does not rest here: for only three years after the deed of 1869 these two persons, Fida Husain and Wahid-un-nissa, executed a mortgage, dated the 17th April 1872, in favour of strangers, a mortgage which, being

usufructuary, would clash with the rights of Karamat Khan under the mortgage of 1869. It is unnecessary to consider the exact terms of that mortgage, but it contained a distinct statement by Fida Husain and Wahid-un-nissa that, although their names did not appear in the mortgage of 1869, yet they had mortgaged to him through or in the names of Fida Husain's brothers and Wahid-un-nissa's sons—Ata Husain and Jamal Husain. This deed further represents the amount of the money due in respect of their share as a charge which was to be paid off by the second mortgagee. This admission, so solemn and deliberate, not only shows that the second mortgagees of 1872 had notice of the prior mortgage of 1869, but is an admission, the best evidence in such cases, that the mortgage of 1869 was executed with the consent of Fida Husain and Wahid-un-nissa. It therefore appears that these two persons have no defence, either in law or equity, to the plaintiff's suit, with reference to their shares, and for the purpose of obviating the consequences of the lien of 1869.

Then, with reference to the 5 biswas share of zamindari rights in the *sir*, that is, of Himayat Husain, the question is what was the effect of the auction-sale of the 20th November 1876, in regard to the provisions of s. 7 of Act XVIII of 1873. That is to say, did Himayat, by reason of those provisions, acquire any right of the nature therein described so as to prevent Karamat Khan from getting physical possession of the land now in suit, in derogation of the occupancy-right? Mr. *Amir-ud-din's* argument at first struck [416] me as a plausible one. He contended that by the general rule of construction — *nova constitutio futuris formam imponere debet, non præteritis*—statutory provisions have ordinarily no retrospective effect. This, I concede; but the question is, does the rule apply to the present case? The argument is that Karamat Khan's rights were acquired under the deed of 1869; that he got actual possession of the land; and that, inasmuch as his rights originated in 1869, they cannot be vitiated by the Rent Act of 1873. Another rule is that where rights are taken away or impaired, the Court must place as strict a construction as they are in the habit of applying to penal statutes. This rule is discussed at pp. 160-161 of Wilberforce's work on *Statute Law* and in Maxwell on the *Interpretation of Statutes*, pp. 257-258. It does not, however, apply to the present case. In India, since 1859, the Legislature has interfered in the interests of the agricultural population, by giving tenants the right of occupancy. In Lower Bengal this has been done recently even in a more extensive sense, but in these Provinces it was first effected by Act X of 1859, and this was afterwards replaced by the Rent Act of 1873, which was in force when Himayat's proprietary rights in the zamindari mahal were sold. At that time there was no such ex-proprietary right as is provided by s. 7 of that Act, and is maintained in the present Act (XII of 1881). Now it is a rule of interpretation that when the Legislature changes the law, the change itself is an indication of the intentions of the Legislature, and is an element in the construction to be placed upon the later statute (Wilberforce, p. 108). Applying this rule, and reading this section carefully, I am of opinion that the statute operates to a certain extent in derogation of the rights of Mr. *Amir-ud-din's* clients under the deed of 1869, and effects the advantages which he would otherwise derive thereunder. Section 7 is in the following terms:—"Every person who may hereafter lose or part with his proprietary rights in any mahal shall have a right of occupancy in the land held by him as *sir* in such mahal at the date of such loss or parting, at a rent which shall be four annas in the rupee less than the prevailing rate payable by tenants-at-will for land of similar quality and with similar advantages. Persons having such rights of occupancy shall be called 'ex-proprietary tenants,' and shall have all rights of occupancy [417]

tenants." It appears to me that the most important word in the section in connection with the present case is "hereafter." The statute was passed on the 22nd December 1873. The rights of Himayat, were sold on the 20th November 1876, so there can be no doubt that Himayat, who had proprietary rights in the mahal in question, and held *sir* as such, did lose his proprietary rights, and therefore the case comes within the first portion of s. 7. The next important word is "held," which Mr. *Amir-ud-din* argues denotes, actual possession. A short time ago, in the case *Tulshi v. Radha Kishan*, Weekly Notes, 1886, p. 74, the present learned Chief Justice laid down, with my concurrence, that the word "held" in this section must not be rigidly construed to refer to manual or physical holding, but land possessed and belonging to a person as his *sir*. I am glad to find that my brother TYRRELL approves of this interpretation. There can be no doubt that Himayat "held" the 5 biswas share of the *sir*. Then, the question is, what is the effect of this view of the law? Although the mortgage of 1869 must not be so affected as to deprive the mortgagee of all his rights, yet by the terms of s. 7, and by reason of the sale of the 20th November 1876, the nature of his means of benefiting by the mortgage were necessarily changed. Neither the preamble nor s. 1 of the Act contains any saving clause which could justify the interpretation that all the conditions included in a usufructuary mortgage are to be exempted from the operation of the Act, or of s. 7 in particular, merely because the mortgage was a subsisting one. If we were so to hold, in some cases where usufructuary mortgagees are in possession, no such rights as are created by s. 7 could come into existence for sixty years. Moreover, such mortgages may possibly never be redeemed; and if the fact that a mortgage, such as that of 1869 in the present case, is subsisting, were sufficient to prevent the operation of the statute, the result would be that the object aimed at by the Legislature would be defeated in respect of all *sir*-lands situate in villages which may at that time be in the hands of mortgagees. Such could not have been the intention of the Legislature, and I may add that the interpretation which I have placed is supported by the construction of similar phrases in English statutes, of which illustrations are given by Mr. Wilber-**[418]** force at p. 165 of his work. In the result, I hold that Fida Husain and Wahid-un-nissa did mortgage their rights, or rather rendered their rights subject to the deed of 1869. Secondly, Himayat, by the operation of s. 7 of the Rent Act, became an ex-proprietary tenant of the land belonging to him at the time of the sale of the 20th November 1876. Under these circumstances, the possession must be given to the plaintiff-mortgagee under the deed of 1869 of such rights as Himayat had at the time of the mortgage, subject to Himayat's right as an ex-proprietary tenant. So far as the purchasers of Himayat's share, under the sale of 20th November 1876, are concerned, their rights are of course subject to the mortgage of 1869. Again, the rights of the mortgagees under the deed of 17th April 1872, fall under the rule of the law of mortgage, which constitutes the essence of the rule of priority, and which has been best enunciated in s. 48 of the Transfer of Property Act. Here the mortgage of 1869, and that of 1872, being both usufructuary, the latter must give way to the incidents of the former. I would give effect to these views in the decree of this Court. The first Court gave a decree for possession without qualification as to the statutory rights of Himayat. The Lower Appellate Court modified the decree. I am of opinion that the decree of this Court should be that the appeal succeeds in part, the Lower Appellate Court's decree being reversed, and that of the first Court being restored, with this qualification, that the possession which the plaintiff will get under this decree will be subject to such ex-proprietary tenant rights as Himayat may have had in his portion of the *sir*-land. With reference to costs, we propose to exercise

the discretionary power given to us by s. 220 of the Civil Procedure Code by apportioning the costs as follows:—The plaintiff will recover his costs in all Courts as against Fida Husain and Wahid-un-nissa to the extent of his claim against them. The decrees as to costs in reference to the other defendants will be the same. As regards Himayat Husain, he and the plaintiff will respectively bear their own costs in all Courts, and, with reference to the costs of the other defendants, they will bear their own costs to the extent of their shares.

Tyrrell, J.—I agree that Musammat Wahid-un-nissa and her son Fida Husain, by their acts and omissions in 1869, as well as [419] by their express admissions in 1872, have furnished sufficient grounds to justify the first Court's finding that they made themselves liable to the appellant in respect of the obligations and liabilities created by the persons who executed the mortgage to the appellant of 1869.

And, as to the question of the retrospective application of the rule of s. 7 of Act XVIII of 1873, I doubt if it be really involved in this case. Himayat Husain mortgaged his *sir* in 1869, and in 1876, his *sir* rights and interests, as such, went out of existence under the operation of the law of 1873 and assumed a different character. Over that tenure in its altered character the appellant still has his mortgage charge, but he has not, in the existing state of the law, a right to physical possession of the actual land, which was formerly Himayat Husain's *sir*, but is now his occupancy tenure.

Subject to this new right of Himayat Husain, the appellant retains his mortgage charge of 1869 over the zamindari interests in this portion of the land acquired by Himayat Husain's vendee. But as the present claim of the appellant is for possession only, it is unnecessary to go further into this aspect of the question.

NOTES.

[See also (1902) 24 All., 538.]

[8 All. 419]

The 14th May, 1886.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Jokhu Ram and others.....Judgment-debtors

versus

Ram Din and another.....Decree-holders.*

Execution of decree—Civil Procedure Code, s. 230—Twelve years' old decree—Statute, construction of—General words—Retrospective effect.

The holder of a decree bearing date the 15th June 1872, applied for execution thereof, on the 9th February 1885, the previous application being dated the 27th November 1883.

Held, that the application for execution was not barred by s. 230 of the Civil Procedure Code. *Musharraf Begam v. Ghalib Ali*, 1. L. R., 6 All., 189, followed. *Goluck Chandra*

* Second Appeal No. 23 of 1886, from an order of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 16th February 1886, reversing an order of Shah Ahmad-ullah Khan, Subordinate Judge of Gorakhpur, dated the 11th August 1885.

Mytes v. Harapriah Debi, I. L. R., 12 Cal., 559; *Bhawani Das v. Daulat Ram*, I. L. R., 6 All., 388, and *Sreenath Goocho v. Yusoof Khan*, I. L. R., 7 Cal., 556, referred to. *Tufail Ahmad v. Sadho Saran Singh*, Weekly Notes, 1885, p. 193, discussed and dissented from by MAHMOOD, J.

[420] *Per* MAHMOOD, J.—The rule of construction being that a limited meaning can only be given to general words in a statute where the statute itself justifies such limitation the words “any decree” in the proviso to s. 230 of the Civil Procedure Code must not be construed as confined to such decrees as would be barred on the date of the Code coming into force, inasmuch as no reason for so restricting the meaning of those words can be found in the Code or is suggested by the legislative policy upon which clauses such as the proviso in question are based. This policy is to prevent a sudden disturbance of existing rights in consequence of new legislation; but it is beyond its object and scope to revive rights or remedies which have already expired before the new Act comes into operation, and although the Legislature may revive such rights or remedies, it can only do so by express words to that effect.

THE decree of which execution was sought in this case was a decree for money bearing date the 15th June 1872. The decree-holder applied for execution on the 9th February 1885, the previous application being dated the 27th November 1883. The Court of First Instance held, relying on *Tufail Ahmad v. Sadho Saran Singh*, Weekly Notes, 1885, p. 193, that the application was barred by limitation, under the provisions of s. 230 of the Civil Procedure Code, 1882. On appeal by the decree-holders the Lower Appellate Court held, with reference to *Musharraf Begam v. Ghalib Ali*, I. L. R., 6 All., 189, that the application, being the first which had been made under s. 230 of the Civil Procedure Code, 1882, after the decree became twelve years old, was within time. The Court refused to follow *Tufail Ahmad v. Sadho Saran Singh*, I. L. R., 6 All., 189, as that case was, in its opinion, opposed to *Musharraf Begam v. Ghalib Ali*, Weekly Notes, 1885, p. 193, which was a decision of the Full Bench.

The judgment-debtors appealed to the High Court.

Mr. C. H. Hill and Munshi Hanuman Prasad, for the Appellants.

Babu Jogindro Nath Chaudhri, for the Respondents.

Oldfield, J.—This is an appeal against the order of the Lower Appellate Court granting an application to execute a decree dated the 15th June 1872. Applications for executing the decree had been made and granted at numerous dates down to that dated the 27th November 1883, and the application of the 9th February 1885, which is the subject of this appeal.

[421] The Lower Appellate Court has held, following the Full Bench decision of this Court—*Musharraf Begam v. Ghalib Ali*, I. L. R., 6 All., 189—that this last application is not barred by s. 230 of the Civil Procedure Code.

It is clear that the present application of the 9th February 1885, was made after the expiry of twelve years from the date of the decree, and after twelve years from all the dates mentioned in s. 230. The last paragraph of this section, giving it the interpretation of the Full Bench ruling referred to, cannot be a bar to the application, because it was made within the three years from the coming into operation of the present Code; and though the application would be barred by s. 230 of Act X of 1877, yet that section, under the Full Bench ruling, is not applicable. Under these circumstances the order of the Lower Appellate Court must be upheld, and this appeal, as well as Nos. 22, 24 and 25 of 1886, must be dismissed with costs.

Mahmood, J.—I have arrived at the same conclusion as my brother OLDFIELD, and sitting here as a Division Bench of the Court, we have no

alternative but to follow the decision of the majority of the Judges in the Full Bench case of *Musharraf Begam v. Ghalib Ali*, I. L. R., 6 All., 189. I was not a party to that ruling, and I should probably find it difficult to agree with the prevailing opinion in that case, for I have long entertained views which are in accord with those expressed by my brother OLDFIELD in his dissentient judgment in that case. Those views have since been unhesitatingly accepted by a Division Bench of the Calcutta High Court in *Goluck Chandra Mytee v. Harapriah Debi*, I. L. R., 12 Cal., 559; but, as I said before, I am not at liberty to form my own opinion upon the matter on account of the opinion of the majority in the Full Bench case. Soon after that ruling, however, I had occasion in *Bhawani Das v. Daulat Ram*, I. L. R., 6 All., 388, to draw a distinction between the Full Bench ruling and cases in which the decree had already become barred, and as such, incapable of execution, before the Civil Procedure Code of 1882 became law. That ruling has since been followed in many cases. That ruling, however, does not apply to this case, because the decree here had not become [422] incapable of execution before the present Civil Procedure Code.

The decree with which we are concerned was passed on the 15th June 1872, and calculating twelve years from that date, it was alive when the present Civil Procedure Code came into operation. After numerous executions, an application for execution was made on the 27th November 1883, which was granted under the present Code, and the present application was made on the 9th February 1885, that is, more than twelve years after the decree, but within three years of the passing of the present Code. The question then is, whether, under such circumstances, the execution of the decree is barred; and the question must be answered in the negative with reference to the Full Bench ruling above cited. The exact effect of that ruling is twofold:—

First—that the phrase “the law in force immediately before the passing of this Code” in the proviso to s. 230 of the present Code does not include the limitation provisions of s. 230 of the Civil Procedure Code of 1877.

Secondly—that the holder of a decree which was not more than twelve years old when the present Code was passed is entitled, under the proviso, to have, after the decree has become older than twelve years, “one opportunity, and only one, to execute it, whether he succeeds in obtaining satisfaction of it or not.”

For this second point the learned Judges of the majority of the Full Bench relied upon the ruling of the Calcutta High Court in *Sreenath Goocho v. Yusoo Khan*, I. L. R., 7 Cal., 556, and I understand the effect of this to be that execution of a decree older than twelve years can be “granted” only once under the proviso to s. 230 of the present Code.

Now, I need say nothing as to whether, speaking for myself, I am prepared to accept either of these conclusions, for, as I said before, it is my duty to apply them to the present case. Then what we have here is that the decree of the 15th June 1872, was less than twelve years old when the present Code came into operation, and it became twelve years old on the 15th June 1884, and is not affected by the twelve years’ rule contained in s. 230 [423] of the Code of 1877. Then the present application for execution, being dated the 9th February 1885, is the first application made after the decree became older than twelve years, and must be entertained as the only opportunity to execute his decree, which must be allowed to the decree-holder, within the second conclusion of the Full Bench ruling as already indicated by me.

I should have ended my observations here but for the circumstance that a case has been cited by the learned pleader for the appellant as favouring his

contention, and it does support his contention. It is the case of *Tufail Ahmad v. Sadhu Saran Singh*, Weekly Notes, 1885, p. 193, which, I frankly confess, has caused me no small amount of surprise. In that case PETHERAM, C.J., laid down a rule of law which is in conflict not only with the Full Bench ruling in *Musharraf Begam's Case*, I. L. R., 6 All., 189, and my ruling in *Bhawani Das*, I. L. R., 6 All., 388, but also with some of the most important rules of interpretation which have always been adopted by the Courts of Justice, whether in England or in India. A profound respect for so learned and eminent an authority forces me to examine carefully this ruling, in order to ascertain whether I can possibly adopt the *ratio decidendi* upon which it proceeded. The learned Chief Justice in that case observed :—

"It appears that the decree sought to be executed was passed on the 15th September 1870, and the present application for execution was made on the 14th March 1884. From these figures it is clear that the application for execution was made after the expiration of twelve years from the date of the decree. Now s. 230 of the Civil Procedure Code provides that no application for execution of the decree shall be granted after the expiration of twelve years from the date of the decree. The present application would be barred by s. 230, unless it came within the proviso to that section. That proviso is to the effect that, 'notwithstanding anything herein contained, proceedings may be taken to enforce any decree within three years after the passing of this Code, unless when the period prescribed for taking such proceedings by the law in force immediately before the passing of the Code shall have expired before the completion of the said three years.' Now the [424] meaning of this rule is that inasmuch as it would be a hardship that a decree which was capable of execution should, by the operation of the twelve years' rule, become incapable of execution on the passing of the Code, a further period of three years was allowed to enable the decree-holder to execute the decree."

So far I concur with the learned Chief Justice; but then he goes on to say what seems to me inconsistent with the passage which I have already quoted from his judgment. He goes on to say :—"This proviso applies to those decrees which would be barred on the date of the Code coming into force, and does not apply to those decrees which were not barred by the twelve years' rule when the Code came into force, by reason of the fact that the period of twelve years had not expired from the date mentioned in s. 230. Now the Code came into force in June 1882, and the decree-holder could have availed himself of the three months up to September 1882, when the twelve years expired. Under these circumstances the proviso is inapplicable, and the execution of the decree is barred by limitation. The Full Bench ruling brought to our notice is not applicable to the point which arises in this appeal."

Now, I am anxious to see what this passage actually enunciates. It may be summarized thus :—

First—that the proviso to s. 230 is confined to decrees which would be barred by the twelve years' rule "on the date of the Code coming into force; that is, on the 1st June 1882 (*vide* s. 1 of the Code);

Secondly—that the proviso does not apply to, or benefit, decrees which would be not so barred;

Thirdly—that in the case of the latter class of the decrees, all the period that they would be entitled to for execution, is the remaining portion of the twelve years upon the Code coming into force;

Fourthly—that by the application of these rules in the case before the learned Chief Justice, the decree-holder was entitled to only three months after the Code came into force; and

[425] *Fifthly*—that the case before him was distinguishable from the Full Bench ruling of this Court in *Musharraf Begam v. Ghalib Ali*, I. L. R., 6 All., 189. "

Now, if this enunciation of the law is sound, there can be no doubt whatever that the appellant in this case must succeed; because, with reference to the first two points of the ruling of PETHERAM, C. J., the proviso to s. 230 would not benefit the decree, it being less than twelve years old when the Code came into force; and with reference to the third and fourth points of that ruling, the respondent here could execute his decree only up to the 15th June 1884, when it became twelve years old; and it would therefore follow that the execution sought to be obtained on the 9th February 1885, would be barred by the twelve years' rule. But I respectfully think that all the various points laid down in that ruling are erroneous and opposed to all that has ever been ruled as to the meaning of s. 230 of the Code. I know that this is a strong statement to make in respect of the judgment of so distinguished a legal authority as PETHERAM, C. J., and the deference due to him from the Court of which he was till lately the Chief Justice requires that I should, with due respect, explain my reasons more fully than would otherwise be necessary. I will therefore take each of the points ruled by PETHERAM, C. J., in the order in which he ruled them, and in which I have stated them.

Taking the first and second points then, I have to ask what reason is there for holding that the phrase "*any decree*" which occurs in the proviso to s. 230 of the Code is limited to decrees older than twelve years, and does not include decrees less than twelve years' old? The expression is, as I understand the English phrase, a general one, and to use the words of Mr. Wilberforce in his excellent work on *Statute Law* (p. 172), "it is clear that a limited meaning can only be given to general words, where the Act itself, or the legitimate methods of interpreting it, show that such was the intention of the Legislature." Again, Sir WILLIAM GRANT says in *Beckford v. Wade*, 17 Ves., at p. 91:—"General words in a statute must receive a general construction, unless you can find in the statute itself some ground for limiting and restraining their meaning by reasonable construction, and not by arbitrary [426] addition or retrenchment." Again, we have the *dictum* of Lord Chief Justice COCKBURN in *Twycross v. Grant*, L. R., 2 C. P. D., at pp. 530, 531:—"I take it to be a sound canon of construction in the application of a statutory enactment that full effect should be given to general terms, unless from the context, or other provisions of the statute, a limitation on the general language must necessarily be implied, more especially when had such a limitation been intended it might reasonably have been expected to be expressed." And further authority upon the same point which Mr. Wilberforce quotes is the judgment of WILLIAMS, J., in *Garland v. Carlisle*, 4 Cl. and Fin., at p. 726, where the learned Judge observes:—"When the words of the Act are general and comprehensive and the object clear, nothing short of gross and manifest inconsistency with that object, or plain and palpable injustice which must inevitably ensue from such a construction, can authorize Courts of Law in giving a more confined and limited meaning to such general expressions than they ordinarily and naturally import and bear. What else is restraining by inference or varying by interpretation but to a certain extent recasting and remodelling the statute, or, in other words, invading the province of the Legislature itself?"

Such, then, being the undoubted rule of construction, there must be some reason to be found in the Code itself which would justify limiting the general expression "*any decree*" only to "those decrees which would be barred on the date of the Code coming into force." PETHERAM, C. J., in so restricting the

meaning of the general phrase, has not stated any reasons, and speaking for myself, I fail to discover any in the Code. On the contrary, the legislative policy, upon which clauses such as the proviso to s. 230 are based, suggests no such restriction. "If the Legislature of a State should pass an Act by which a *past* right of action shall be barred, and without any allowance of time for the institution thereof *in future*, it would be difficult to reconcile such an Act with the express constitutional provisions in favour of the rights of private property. So if in a State, where six years, for instance, may be pleaded in bar to an action of *assumpsit*, a law should be passed declaring that contracts already in existence, and not barred by the statute, should be construed to be within it, such law, with-
[427] out doubt, would be deemed unconstitutional" [Angell on Limitation, (4th ed.) p 17]. No wise Legislature ignores these fundamental principles of legislation, and we have in India another illustration of their application in the saving-clause in s. 2 of the Limitation Act (XV of 1877), in regard to suits for which the period prescribed by the Act is shorter than that prescribed by the superseded Limitation Act, 1871. Now, it is perfectly clear from the very nature of such saving-clauses, that the object of the Legislature is to prevent a sudden disturbance of existing rights in consequence of the new legislation, and to achieve that object the Legislature, in altering the law, allows a period of grace within which existing rights may be enforced without being affected by the new law. In other words, during the period of grace so allowed, the operation of the new law is suspended, so far as it would operate in derogation of existing rights, and the law having given due notice of the change, expects those whose rights would be adversely affected to enforce those rights before the period of grace expires. But it is necessarily beyond the object and scope of such saving-clauses to revive rights or remedies which have already expired and become defunct before the new Act comes into operation. That the Legislature may so revive rights and remedies is undoubtedly true, but the general rule is contained in the maxim of construction: "*Nova constitutio futuris formam imponere debet, non præteritis*," and an equally well-recognised rule of construction requires express words in statutes before they can be construed as taking away existing rights, or reviving those which have already expired before the new enactment comes into operation. No such express words exist in the proviso to s. 230 as would have the effect of reviving barred decrees, and it was upon this principle that my ruling in *Bhawani Das v. Daulat Ram*, I. L. R., 6 All., 388, proceeded. The ruling of PETHERAM, C. J., however, lays down the very opposite doctrine, because, according to him, the "proviso benefits only such decrees as would be *barred* on the date of the Code coming into force, and does not apply to those decrees which were not barred by the twelve years' rule when the Code came into force, and which could have been executed on the Code coming into force by reason of the fact that the period of twelve years had not expired from the date men-
[428] tioned in s. 230." This amounts to saying that decrees which were already barred under the Code of 1877 were revived by the new Code—a conclusion which, in the absence of express words in the Code, I am unable to accept.

I now proceed to consider whether I can accept what I have enumerated as the third and fourth points of the learned Chief Justice's ruling. Now, I must observe, in the first place, that the Full Bench ruling of this Court in *Musharraf Begam v. Ghalib Ali*, I. L. R., 6 All., 189, which the learned Chief Justice was bound to follow as much as I am, leaves us no room for holding that the phrase "law in force immediately before the passing of this Code" had any reference to the limitation provisions of s. 230 of the Code of 1877, which provided, for the first time in the Indian law, a period of twelve years as

the duration for execution of decrees. This being so, I entirely fail to understand how any decrees coming within the purview of the proviso could be restricted to twelve years from this date, if the twelve years expired before the completion of the three years' grace allowed by the proviso. But, as I have already said, the view of the learned Chief Justice was, that the proviso applied only to decrees older than twelve years; and inasmuch as the decree before him—to use his own words—was one of “those decrees which were not barred by the twelve years' rule when the Code came into force,” he held, in logical consistency with this view, that the decree before him could be executed only during the three months intervening between the date “when the Code came into force” and the date “when the twelve years expired.” But I confess I find it difficult to understand how these *three months* allowed in the case can be reconciled with the *three years* to which the learned Chief Justice referred in an earlier part of the judgment, when he said:—“That inasmuch as it would be a hardship that a decree which was capable of execution should, by the operation of the twelve years' rule, become incapable of execution on the passing of the Code, a further period of three years was allowed to enable the decree-holder to execute the decree.” Indeed, the only way to reconcile the various portions of the learned Chief Justice's judgment seems to be to say that he held that, whilst a decree, which would be barred by the twelve years' rule on the [429] passing of the Code, would have the benefit of the proviso to s. 230, and would thus be entitled to a further period of full three years for the purposes of execution, a decree which, on that date, was eleven years, eleven months, and twenty-nine days old, would be allowed only one day for execution. I have put the matter in this strong light because such, indeed, is the effect of the ruling which I am now considering. How the learned Chief Justice distinguished the case before him from the Full Bench ruling of this Court is a matter upon which his judgment is totally silent, and, speaking for myself, I am wholly unable to see any distinction. And this is all I wish to say upon what I have enumerated as the fifth point of the learned Chief Justice's judgment.

But I must add that I have regarded it as my duty to consider the ruling in *Tufail Ahmad v. Sadhu Saran Singh*, Weekly Notes, 1885, p. 193, not only out of the deference which is due by this Court to its late learned Chief Justice, but also because, if I had felt disposed to follow that ruling, I should have asked my learned brother OLDFIELD to allow this case to go before the Full Bench. But, for the reasons which I have already stated, I respectfully decline to regard the ruling either as sound law in itself or as consistent with the Full Bench ruling which we are bound to follow. My order then is the same as that of my brother OLDFIELD.

Appeal dismissed.

NOTES.

[See also (1886) 8 All., 536 at 538.]

[8 All. 429]

The 20th May, 1886.

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE AND
MR. JUSTICE MAHMOOD.

Sachit and another.....Defendants

versus

Budhua Kuar.....Plaintiff.*

Hindu widow—Decree against widow—Fraud—Reversioner.

Upon the death of *R*, a Hindu, who was separate from his brother *S*, his widow *G* became life-tenant of his estate, and his daughter *B* became entitled to succeed after *G*'s death. In 1882, a suit was brought by *S* and *G* against *V*, to recover the value of a branch of a mangoe tree wrongfully taken by the defendant, and for maintenance of possession over the grove in which the tree was situate. The suit was dismissed, and it was decided that *R* was not the owner of the grove, nor was *G* the owner. In 1885 *B* brought a suit against *G*, *S*, *V* and *A*, to whom *V* had sold some of the trees, claiming a declaration of her right and possession of the grove, upon the allegation that the proceedings of 1882 were carried on in [430] collusion between *S* and *G* on the one hand and *V* on the other, for the purpose of improperly preventing her from asserting her rights.

Held, that if the suit of 1882 was a genuine suit and was properly contested by the then plaintiffs, though *S* might have been improperly joined as plaintiff any decision then passed against *G* would be binding upon the present plaintiff, and estop her again litigating questions which were then decided.

Held, also, that if the plaintiff's specific allegation of fraud and collusion in the proceedings of 1882 were established, and even if the decree of 1882 did dispose of the question now sought to be reopened, the decision in that suit would not be binding on the plaintiff under the circumstances.

Held, also, that if it should turn out that there was fraud and collusion in the proceedings of 1882, and an attempt to interfere with the plaintiff's right as reversioner to the grove on the death of her mother, she would be entitled in the present suit to claim not only a declaration of her right, but also to have the grove reduced into the possession of the life-tenant; and that such relief could be given upon this form of plaint.

Katama Natchiar's Case, 9 Moo. I. A., 543; *Adi Deo Narain Singh v. Dukharan Singh*, I. L. R., 5 All., 532, and *Sant Kumar v. Deo Saran*, ante, p. 365, referred to.

THE plaintiff in this case was the daughter of one Ramphal Pande, deceased, and his wife Gulabi Kuar. She alleged in her plaint that her father always lived separately from his brother Salik Ram; that he died about seven years before the institution of the suit, and on his death Gulabi Kuar came into possession of his property; that Ramphal owned and possessed a certain grove of mangoe trees with which Salik Ram and one Sachit had no concern, that the plaintiff's mother and Salik Ram, having colluded with Sachit, brought a suit against the latter for the grove and caused a decision to be passed against themselves, in default of prosecution, on the strength of which Sachit had wrongfully taken possession of the grove in July 1882; that Sachit had sold some trees to one Ramphal Kuar; that the plaintiff was heir to Ramphal Pande and, as Gulabi Kuar was not in possession of the grove, was

* Second Appeal No. 1598 of 1885, from a decree of Rai Raghunath Sahai, Subordinate Judge of Azamgarh, dated the 20th June 1885, reversing a decree of Munshi Sheo Sahai, Second Munsif of the city of Gorakhpur, dated the 11th January 1885.

entitled to possession thereof; and that her cause of action arose in June 1883, when she became aware of what had happened. On these allegations she claimed a declaration of her right and possession of the grove, making Gulabi Kuar, Salik Ram, Sachit and Ramphal Kuar defendants to the suit.

The defendants Sachit and Ramphal Kuar defended the suit on the ground that the grove belonged to Sachit and not to Ram-[431]phal Pande, and on the ground that the question whether it belonged to Sachit or Ramphal Pande had become *res judicata* by reason of the decision passed against the plaintiff's mother in the suit referred to in the plaint.

It appeared that that suit was brought by Gulabi Kuar and Salik Ram against Sachit, and the claim was to recover the value of a branch of a mango tree wrongfully taken by Sachit and for maintenance of possession over the grove. That suit was dismissed by the Court of First Instance on the 8th February 1882, and the decree was affirmed by the Appellate Court on the 8th July 1882. It was decided in that suit that the plaintiff's father was not the owner of the grove, nor was Gulabi Kuar the owner.

The Court of First Instance held that the plaintiff's suit was barred by the decision in the former suit. On appeal by the plaintiff the Lower Appellate Court held that the suit was not barred by that decision, on the ground apparently that the same had not been fairly obtained against Gulabi Kuar the plaintiff's mother; and, finding that the grove belonged to Ramphal Pande, gave the plaintiff a decree declaring her right, but refusing to give possession on the ground that the plaintiff's mother was still alive.

The defendants Sachit and Ramphal Kuar appealed to the High Court on the ground (i) that the suit was barred by s. 13 of the Civil Procedure Code; (ii) that the plaintiff was bound by the acts of her mother and could not question the same; and (iii) that the plaintiff's claim for a declaratory decree while her mother was alive was not maintainable, and the decree given her was bad.

Mr. J. E. Howard and Lala Lalta Prasad, for the Appellants.

Shah Asad Ali, for the Respondent.

Straight, Offg. C.J.—This is an appeal preferred by the defendant Sachit under the following circumstances:—The suit was brought by the plaintiff-respondent to recover possession of a grove from the defendant by a declaration of the plaintiff's title as reversioner, on the allegation that Sachit had made a sale of certain trees to the second defendant Ramphal Kuar. The plaintiff was the daughter of one Ramphal Pande, who died seven years ago, leaving a widow, Gulabi Kuar, a brother, Salik, and a daughter, [432] who is the plaintiff in this case. Ramphal was separate from his brother Salik, and his estate therefore was inherited, first, by his widow Gulabi Kuar, who became life-tenant, and the plaintiff is entitled to succeed to the estate upon her mother's death. In 1882 a suit was brought by Salik and Gulabi Kuar against Sachit for declaration of right and possession of the grove to which the present suit relates, and apparently after contest, the suit was decreed in favour of Sachit, and the claim of Salik and Gulabi Kuar was dismissed. If that was a genuine suit and was properly contested by the then plaintiffs, though Salik may have been improperly joined as plaintiff, still any decision then passed against Gulabi Kuar would be binding upon the present plaintiff, and estop her again litigating questions which were then decided. The authority for this view is the case of *Katama Natchiar*, 9 Moo. I. A., 543, and the portion of the judgment in that case to which I more particularly refer, will be found at page 608 of the report. The same principle was also recognized by myself in *Adi Deo Narain Singh v. Dukharan Singh*, I. L. R., 5 All., 532. The plaintiff

now comes into Court impeaching a transfer of certain trees by Sachit to the other defendant, Musammat Ramphal Kuar, and is met by Sachit with the plea that the question of proprietary title to the grove has already been determined by the suit of 1882 against Gulabi Kuar, the decision of which is binding upon the plaintiff and she cannot re-open it now. The Munsif was of opinion that this plea was good. The Subordinate Judge took a contrary view. But it appears to me that in doing so he has stated very inadequate grounds for his conclusions, and has also lost sight of the real nature of the plaintiff's claim and the language of the plaint. He has apparently not noticed the most essential point in the plaint, namely, that the plaintiff alleges that the proceedings of 1882 were fraudulent and collusive, and were got up between Salik and Gulabi on the one hand and Sachit on the other, and carried on for the purpose of improperly preventing the plaintiff from asserting her rights. This is a specific allegation of fraud and collusion, and if it is established, and even if the decree of 1882 did dispose of the question now sought to be re-opened, the decision in that suit would not be binding on the present plaintiff under the circumstances [433] I have mentioned. This being so, it appears to me that the Judge has not tried the two main issues, which must be clearly determined before it is possible for us to dispose of this appeal. Before remanding these issues to the lower Court under s. 566 of the Civil Procedure Code, I may observe that, in my opinion, the principle which I enunciated in the case of *Adi Deo Naram Singh v. Dukhuran Singh*, 1. L. R., 5 All., 532, should be applied to the present claim, and if it should turn out that there was fraud and collusion in the proceedings of 1882, and an attempt to interfere with the plaintiff's right as reversioner to the grove on the death of her mother, she will be entitled in this suit to claim, not only a declaration of her right, but also to have the grove reduced into the possession of the life tenant. It appears to me that we are competent to give such relief upon this form of plaint. I would therefore remand the following issues for determination by the Lower Appellate Court under s. 566 of the Code -

1. Did the suit of 1882 finally determine the question of the proprietary title to the grove now in suit between Gulabi Kuar and the present defendant Sachit?

2. Was such suit a genuine and *bona fide* proceeding, contested and litigated honestly from beginning to end?

The findings, when recorded, will be returned to this Court, with ten days allowed for objections from a date to be fixed by the Registrar.

Mahmood, J. I am of the same opinion. It appears to me that the case cannot be disposed of finally without ascertaining the two points which the learned Chief Justice has just formulated. The main point would be the conduct of Gulabi Kuar in the litigation of 1882, and whether her action was induced by collusion or other fraudulent motives, or by undue influence, the result would be the same. As regards the rule applicable to cases of this kind, I may refer to the judgment in *Sant Kumar v. Deo Saran*, ante, p. 365, in which the ruling of the Privy Council, to which the learned Chief Justice has referred, was applied. I also agree with what the learned Chief Justice has said in reference to the nature of the plaint in this case

[Issues remitted]

NOTES

[See the notes to 8 All., 365 *supra*]

[434] The 1st June, 1886.

PRESENT :

• MR. JUSTICE OLDFIELD AND MR. JUSTICE TYRRELL.

Muhammad Hasan.....Plaintiff

versus

Munna Lal and another.....Defendants.*

Pre-emption—Wajib-ul-arz—Evidence of contract and custom—Act XIX of 1873 (N.-W. P. Land Revenue Act), s. 91—Regulation VII of 1822, s. 9, cl. (i).

The *wajib-ul-arz* of a village is a document of a public character, prepared with all publicity, and must be considered as *prima facie* evidence of the existence of any custom which it records. Its record of the existence of a custom of pre-emption is sufficiently strong evidence to cast on those denying the custom the burden of proof; and in the same manner, when it records a contract of pre-emption between the shareholders, there is a presumption that it is binding on the share-holders. Looking to the public character of the document, and the way it is prepared, and that all shareholders, whether signing it or not, must be presumed to have assented to its terms, the inferences to be deduced from it cannot be disregarded except when they are rebutted by evidence of an opposite character.

A suit to enforce the right of pre-emption, which was based on contract and custom, as evidenced by the *wajib-ul-arz* of a village, was dismissed by the lower Courts on the ground that any contract which might be founded on the *wajib-ul-arz* was not binding on the vendor defendant, as that document did not bear his signature, and the Lower Appellate Court attached no weight to the *wajib-ul-arz* as proof of the custom of pre-emption, because it was drawn up when Regulation VII of 1822 was in force, and at that time there was no legal presumption of its accuracy. The claim was dismissed on the ground that the plaintiff's evidence did not prove the existence of a custom of pre-emption in the village.

Held, that the Lower Appellate Court had erred in dealing with the evidence, and that although this particular *wajib-ul-arz* was made before Act XIX of 1873 came into force, yet the weight which should attach to its entries, both as proof of the contract as well of custom was very strong. *Isri Singh v. Ganga*, 1 L. R., 2 All., 876, referred to.

THE plaintiff in this case sued to enforce the right of pre-emption in respect of the sale of a piece of *muafi* land situate in Kasba Koil, zila Aligarh. The vendor defendant acquired the property by purchase at an execution-sale on the 24th August 1871, and he sold it to the vendee-defendant by a deed dated the 24th June 1883. The plaintiff was a co-sharer in the mahal, and he claimed on the basis of contract and custom, as evidenced by the following entry in the *wajib-ul-arz* :—"Every sharer may transfer his share as he pleases, but he must offer it to the sharers of his own family; then [435] to other sharers; and if these all refuse, he may transfer it to any one he pleases."

The defendants set up as a defence that the *wajib-ul-arz* was not binding on them, as it had not been attested by the vendor, and that the custom of pre-emption did not exist in Kasba Koil, the vendor denying its existence absolutely and the vendee as affecting *muafi* land. The Court of First Instance dismissed the suit, holding that the entry in the *wajib-ul-arz* relating to the right of pre-emption did not apply to *muafi* land, and that even if it did, the entry was not binding on the vendor and vendee, as the vendor had not signed

* Second Appeal No. 1233 of 1885, from a decree of W. R. Barry, Esq., Additional Judge of Aligarh, dated the 31st July 1885, confirming a decree of Babu Ganga Prasad, Munsif of Koil, dated the 18th September 1884.

the *wajib-ul-arz*. On appeal by the plaintiff, the Lower Appellate Court held that the entry was not binding on the vendor and vendee as an agreement by the former, as it was not signed by the former, and that the custom of pre-emption in Kasha Koil had not been proved. It was of opinion that, as regards custom, there was no presumption as to the truth of the entry, such as s. 91 of Act XIX of 1873 (N.-W. P. Land Revenue Act) created in respect of such entries, inasmuch as the *wajib-ul-arz* in question had been framed before that Act came into force. On this part of the case it observed as follows :—

“ The entry in the *wajib-ul-arz* is no doubt a pretty strong piece of evidence in proving the existence of the custom ; but it was drawn up and attested in 1872, before Act XIX of 1873 came into force. Some witnesses have deposed in general terms that the custom of pre-emption exists in the mahal, but no specific instances have been given in which the custom has been acted on or asserted.

“ The inevitable conclusion seems to be that the custom is not proved, unless it can derive assistance from s. 91, Act XIX of 1873, or some corresponding clause in the corresponding enactment which was in force when the record-of-rights was drawn up. A reference to the official settlement report shows that the settlement of the Aligarh district which is now current began from 1868. The operations were begun shortly after that date and the enactment on the subject then in force was Regulation VII of 1882. This enactment, by s. 9, cl. (i), directed the officer who was making the settlement to make a detailed investigation, [436] and draw up a record of the landed tenures, rights, interests and privileges of the various classes of the agricultural community. The section goes on to specify the heads of information required, and then enacts that the information be so arranged as to admit of an immediate reference by Courts of Judicature, it being understood and declared that all decisions *on the demands of zamindars* shall be regulated by the rates of rent and modes of payment avowed and ascertained at the settlement, etc. This section seems not wide enough to cover the present claim. The object of the section is clearly to fix and determine the right of zamindars and *tenants*, and the record is not *per se* sufficient to make the entry in it conclusive proof of the existence of a custom of pre-emption.

“ It remains to consider whether the entry can derive any confirmation from s. 91, Act XIX of 1873. The record was drawn up and attested in 1872, and the officers which drew it up were acting under Regulation VII of 1822. The settlement was not reported to the Board of Revenue for sanction till 1874, and was not confirmed by the Government till a later date. But when confirmed it took effect from 1868, the year in which the former settlement expired. This record must be taken to be prepared under Regulation VII of 1822, and cannot derive force or validity from an enactment which came into force after it was drawn up.”

The plaintiff appealed to the High Court on the ground (i) that the *wajib-ul-arz* was binding on all co-sharers, and among them on the vendor, and the fact that it was prepared before Act XIX of 1873 was passed did not affect the question ; (ii) that the indorsement on the *wajib-ul-arz* by the settlement officer showed that it was attested by all the co-sharers, and it was for the respondent to show that he had not attested it ; and (iii) that the vendor had acquiesced in the terms of the *wajib-ul-arz* for fourteen years, and was thereby precluded from objecting to the term thereof.

Pandit Ajudhya Nath and Pandit Sundar Lal, for the Appellant.
Babu Jagindro Nath Chaudhri, for the Respondents.

Oldfield, J.—This suit has been brought to enforce a right of pre-emption in respect of certain property sold by the defendant Baldeo Das to the defendant Munna Lal. The suit has been dismissed in the Court of First Instance, and that dismissal has been [437] affirmed by the Lower Appellate Court. The suit is based on contract and custom as evidenced by the *wajib-ul-arz*; and the only ground on which the lower Courts have dismissed the suit is, that any contract which may be founded on the *wajib-ul-arz* is not binding on the vendor-defendant, as it does not bear his signature; and so far as the *wajib-ul-arz* was relied on as proof of the custom of pre-emption, the Judge attached no weight to it, because it was drawn up when Regulation VII of 1822 was in force, and at that time there was no legal presumption of its accuracy. He dismissed the plaintiff's claim on the ground that the evidence adduced by him did not prove that pre-emption existed in the village by custom. The Judge appears to me to have erred in dealing with the evidence. Although this particular *wajib-ul-arz* was made before Act XIX of 1873 came into force, yet the weight which should attach to its entries, both as proof of the contract as well as the custom is very strong, and the observations made by this Court on this subject in the Full Bench case of *Isri Singh v. Ganga*, I. L. R., 2 All., 876, are as applicable here as in that case. The *wajib-ul-arz* is a document of a public character, prepared with all publicity, and must be considered as *prima facie* evidence of the existence of any custom which it records. Its record of the existence of a custom of pre-emption is sufficiently strong evidence so as to cast on those denying the custom the burden of proof; and in the same manner, when it records a contract of pre-emption between the share holders, there is a presumption that it is binding on the shareholders. Looking to the public character of this document and the way it is prepared, and that all shareholders, whether signing it or not, must be presumed to have assented to its terms, the inferences to be deduced from it cannot be disregarded except when they are rebutted by evidence of an opposite character. The grounds, therefore, on which the Judge disposed of the appeal before him are not valid. He must re-try the question of the binding effect of this *wajib-ul-arz*, both as to contract and custom as regards pre-emption, and also the other issues that arise.

The case is therefore remanded for re-trial. The costs of this appeal will abide the result.

Tyrrell, J.—I concur.

Case remanded.

NOTES.

[As regards the admissibility and weight of entries in the *wajib-ul-arz*, see also 28 All., 488 P. C.; 23 All., 37 P. C.; 26 Cal., 81 P. C.; 15 Cal., 20 P. C.; 31 All., 347; 25 All., 90; 26 All., 549; 4 O. C., 71; 8 O. C., 94; 12 All., 234.]

[438] FULL BENCH.

The 16th June, 1886.

PRESENT.

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, MR. JUSTICE BRODHURST,
MR. JUSTICE OLDFIELD, MR. JUSTICE TYRRELL AND
MR. JUSTICE MAHMOOD

Amanat Begam and another.Plaintiffs

versus

Bhajan Lal and othersDefendants

*Mortgage—Joint mortgage—Suit for redemption—Jurisdiction—Court-fee—
Valuation of suit—"Subject-matter in dispute"—Act VII of 1870
(Court-Fees Act), s. 7, art. 1x—Act VI of 1871 (Bengal Civil Courts
Act), s. 20—Statute, construction of*

A deed of mortgage was executed by P, T and S for Rs. 4,000. A, the purchaser of the share of S, brought a suit for recovery of possession of one-third of the mortgaged property against the mortgagees, who had purchased the shares of P and T the other mortgagors.

Held, by the Full Bench with reference to s. 7, art. 1x of the Court-Fees Act (VII of 1870), that the defendants-mortgagees having bought up the equity of redemption of two of the mortgagors and *pro tanto* extinguished their mortgage-debt, and so by their own act empowered the plaintiff to sue for redemption of one-third of the property, the principal money now secured as between them and the plaintiff must now be regarded as one-third of the original mortgage amount, namely, Rs 1,333-5-4, more particularly as fiscal enactments should, as far as possible, be construed in favour of the subject *Balkrishna Dhondo v Nagveskar*, 1 L. R., 6 Bom., 324, referred to.

Held, also, with reference to the terms of s. 20 of the Bengal Civil Courts Act (VI of 1871), that the subject-matter in dispute in suits of this kind was the amount of the mortgage debt and the mortgagee's rights which were sought to be paid off, that from the terms of the plaint it was obvious that in the present case the subject-matter in dispute was Rs 1,333-5-4, the one-third of the original mortgage sum of Rs. 4,000; and that it was therefore beyond the limits of the Munsif's pecuniary jurisdiction.

Per MAHMOOD, J.—It is a rule of construction that while in cases of taxation everything must be strictly construed in favour of the subject, in questions of jurisdiction, the presumption is in favour of giving jurisdiction to the highest Court.

Observations by MAHMOOD, J., as to the subject-matter of suits for the redemption of mortgages, and the mode in which the value of such subject-matter should be calculated for purposes of jurisdiction.

THIS was a reference to the Full Bench by PETHERAM, C.J., and STRAIGHT, J. The facts of the case were as follows:—

The plaintiffs sued to recover possession of certain property which had been mortgaged by a deed dated the 1st September [439] 1863. It appeared that three persons named Pan Kuar, Takht Singh, and Maidan Singh, on the 1st September 1863, mortgaged one-third of the 20 biswas of a village called Mav for Rs. 4,000, for a term of five years. The mortgage deed provided *inter alia* that the profits should, during the term of the mortgage,

* Second Appeal No. 801 of 1885, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Shahjahanpur, dated the 21st February 1885, reversing a decree of Maulvi Muhammad Ismail, Munsif of Bissuli, dated the 23rd December 1884.

be appropriated in payment of Rs. 1,000 of the principal money, and the mortgagors should be entitled to redeem at the end of the term on payment of Rs. 3,000. Three persons named Mohan Singh, Chandan Singh, and Dham Singh became the mortgagees of the property by virtue of a decree for pre-emption. Subsequently to this the rights of these persons under the mortgage were sold to persons named Gopi, Sham Sundar, Ram Prasad, Bhola Nath, and Makund Ram. Ram Prasad, Bhola Nath, and Makund Ram then purchased the equity of redemption of two of the mortgagors, Pan Euar and Takht Singh, and on the 13th January 1884, the third mortgagor, Maidan Singh, sold his equity of redemption to the plaintiffs. The plaintiffs brought the present suit against the heirs of Ram Prasad and Makund Ram, and Gopi, Sham Sundar and Bhola Nath, to recover one-third of the mortgaged property, that is to say, the 2 biswas 4 biswansis and 7 kachwansis share of Maidan Singh, on payment of Rs. 1,000, one-third of the principal money due at the end of the mortgage-term. The suit was instituted in the Court of the Munsif of Bisau'i, zila Shahjahanpur. The plaintiffs paid an *ad valorem* court-fee on Rs. 1,000 in respect of the plaint. The defendants set up as a defence, amongst other things, that, having regard to the principal amount secured by the mortgage, that is to say, Rs. 4,000, the suit was not cognizable by the Munsif. The Munsif held that as the plaintiffs claimed to redeem on payment of Rs. 1,000, the suit was cognizable by him, and in the event gave the plaintiffs a decree. On appeal by the defendants the Subordinate Judge of Shahjahanpur held that the suit was not cognizable by the Munsif, the value of the subject-matter of the suit being Rs. 1,333-5-4, one-third of Rs. 4,000, the principal amount secured by the mortgage; and he also held that such value was the value for the purposes of the Court-Fees Act (VII of 1870), s. 7, art. ix, and the plaint was insufficiently stamped. He made an order directing the plaint to be returned to the plaintiffs to be presented to the proper Court.

[440] The plaintiff appealed to the High Court, contending that the suit had been properly valued at Rs. 1,000, one-third of the principal money due at the end of the mortgage-term, both for the purposes of jurisdiction and court-fees.

The appeal came for hearing before PETHERAM, C. J., and STRAIGHT, J., who referred the following questions to the Full Bench:—

- "(i) Had the Munsif jurisdiction to hear and determine the suit? and
- (ii) On what amount should the court-fees be calculated both in the Court of First Instance and in the Court of Appeal?"

Pandit *Nand Lal*, for the Appellants.—The amount secured by the mortgage-deed is Rs. 3,000, and as the suit relates to one-third of the mortgaged property, it must be taken that one-third of that amount, namely Rs. 1,000, is the amount secured, within the meaning of s. 7, art. ix, Court-Fees Act—*Balkrishna Dhondo v. Nagcekar*, I. L. R., 6 Bom., 326. For the purposes of jurisdiction, the value of the subject-matter in dispute is also Rs. 1,000. The subject-matter in dispute is the mortgage-debt and the mortgagee's right which is sought to be paid off, which is Rs. 1,000. He cited *Gobind Singh v. Kallu*, I. L. R., 2 All., 778; *Bahadur v. Jawab Jan*, I. L. R., 3 All., 822; *Kubair Singh v. Atmi Ram*, I. L. R., 5 All., 322; *Cottrell v. Straiton*, L. R., 17 Eq., 543; *Krishnama Charari v. Srinivasa Ayyangar*, I. L. R., 4 Mad., 339.

Pandit *Ajudhia Nath* (with him, *Babu Ratn Chand*), for the Respondents.—The mortgage is a joint one, and the principal amount secured by it is Rs. 4,000, and court-fees should be paid on the whole of that amount—*Umar Khan v. Mahomed Khan*, I. L. R., 10 Bom., 41. If the "subject-matter in

dispute" is the mortgage-money, it is the whole amount of the mortgage-money. In a suit for redemption the subject-matter in dispute is the property itself, and not the amount in respect of which redemption is claimed.

Straight, Offg. C. J.—(After stating the facts and the questions referred to the Full Bench, continued)—These questions have been argued before the Full Bench in inverse order, and it [441] will therefore be most convenient to deal with them in the order in which they have been argued by the learned pleader for the appellants. The first contention urged by the learned pleader is as to the construction to be placed on the instrument of the 1st September 1863, which he urges was only a mortgage for Rs. 3,000. We have had, by the assistance of my brother MAHMOOD, the advantage of hearing a literal English translation of the language of the instrument in question, and I entertain no doubt that by it the property was mortgaged for Rs. 4,000, and not Rs. 3,000, and that the mere conditions as to the mode in which Rs. 1,000 of the amount was to be liquidated, did not affect its original character as a mortgage for Rs. 4,000.

The next question relates to s. 7 of the Court-Fees Act; but before considering the precise terms of that section, I may observe that this suit is brought by one of three mortgagors to redeem a particular portion of the mortgaged property. Under ordinary circumstances, this would not only be contrary to all principle, but it would also be contrary to an express rule of law now contained in the Transfer of Property Act. The reason, however, why the plaintiff is entitled to sue for redemption of a portion of the property is that the mortgagees, themselves having become purchasers of a portion of the mortgaged property, that is to say, they having bought up the equity of redemption of two of the mortgagors, have, *pro tanto*, extinguished their mortgage-debt. For by their purchase they cannot make the residue of the mortgaged property responsible for the entire mortgage-debt, nor can they prejudice the right of the other mortgagors to redeem their proportionate share of the mortgaged property. The mortgagees having broken up the integrity of the mortgage, the plaintiff is entitled to assert his equity of redemption, upon payment of so much as represents his interest under the mortgage. This being so, we have to look at art. ix, s. 7, of the Court-Fees Act, which is as follows:—"In suits against a mortgagee for the recovery of the property mortgaged, and in suits by a mortgagee to foreclose the mortgage, or, where the mortgage is made by conditional sale, to have the sale declared absolute," the court-fee is to be calculated "according to the principal money expressed to be secured by the instrument of mortgage." Of course, if we [442] are to interpret this language strictly, it is difficult to say that the instrument in question in the present case expresses as secured any other sum than Rs. 4,000, and the extreme contention urged by Pandit *Ajudhia Nath* was that we must make the plaintiff pay court-fees upon that sum. But it appears to me that the defendants-mortgagees, having broken up the mortgage, and so by their own act having empowered the plaintiff to sue for redemption of one-third of the property, that the principal money now secured as between them and the plaintiff must be regarded as one-third of the original mortgage amount, namely, Rs. 1,333 5 4, more particularly when it is borne in mind that fiscal enactments should, as far as possible, be construed in favour of the subject. My brother MAHMOOD reminds me of the observations of MELVILL, J., in *Balkrishna Dhondo v. Nagvekar*, I. L. R., 6 Bom. 324, where the same principle was adopted. They are as follows:—"In cases in which it is competent to the mortgagor to sue to recover a portion of the mortgaged property, the debt must be regarded as distributed over the whole property; and as regards the portion of property

sued for 'the principal money expressed to be secured,' must betaken to be the proportionate amount of the debt for which such portion of the property is liable."

This ruling I adopt and approve, and applying it to the present case, I am of opinion that the court-fee payable by the appellant is payable on Rs. 1,333-5-4, as mentioned in the judgment of the Subordinate Judge.

So much as to the question of court-fee. And now with reference to the first of the two questions referred to the Full Bench, namely, the jurisdiction of the Munsif to try the suit, which depends upon the construction to be placed on the words "subject-matter in dispute" in s 20 of the Bengal Civil Courts' Act. In the plaint what is alleged is that the plaintiff comes into Court to redeem one-third of the mortgage, for Rs. 4,000, and such is the case, as I have already said, he is entitled to make. There is a long current of rulings in this Court to the effect that "the subject-matter in dispute" in suits of this kind is the amount of the mortgage-debt and the mortgagee's rights which are sought to be paid off; and whether these rulings are right or wrong, they represent a long current of authority from which, for my own part, I should hesitate to depart. According to the rule of "*stare decisis*," I must assume that they are right, and follow them; and this being so, it follows that the subject-matter in dispute in the present suit is the mortgage-debt and the rights of the mortgagees which the plaintiff seeks to clear off. It is therefore obvious from the terms of the plaint, that in this the subject-matter in dispute was Rs. 1,333-5-4, the one-third of the original mortgage sum of Rs. 4,000. Without basing my judgment therefore upon the reasons stated by the Subordinate Judge, who appears to have mixed up fiscal considerations with those relating to jurisdiction, I think that he was right in his conclusion that Rs. 1,333-5-4 was the value of the mortgagee's interest and the subject-matter of the suit, and that it was therefore beyond the limits of the Munsif's pecuniary jurisdiction. The order of the Subordinate Judge that the plaint should be returned for presentation to the proper Court was correct. My answer to this reference is in the sense indicated by the foregoing observations.

Oldfield, Brodhurst and Tyrrell, JJ., concurred.

Mahmood, J.—The judgment of the learned Chief Justice makes it unnecessary for me to say much, for I have arrived at the same conclusions. He has shown that the exigencies of the case do not require us to rule what I may call the major hypothesis upon which Pandit *Ajudhia Nath's* argument proceeded, namely, that in all suits for redemption, the subject-matter is not the amount which the plaintiff offers to pay to the defendant, the mortgagee in possession, but the suit must be regarded as a claim for possession of immovable property, to which claim there is a plea resisting such possession. But though we are not bound to decide this large question, I cannot help, with due respect for the rulings cited by Pandit *Nand Lal* doubting their accuracy. For I am inclined to think that a suit for redemption against a mortgagee in possession, is, on principle, a suit by an owner having for its object the realisation of the incidents of ownership, and the plea of a subsisting mortgage amounts to seeking to establish a qualification of that ownership; and in such a dispute the scope of the subject-matter, for purposes of [444] jurisdiction, would seem to be the plaintiff's ownership of the property, and not the qualification which the defendant seeks to set up as a limitation upon that ownership. Again, the allegation of the plaintiff as to the extent of the limitation upon his ownership, would seem to be equally inconclusive as to the pecuniary extent and value of the dispute, for, whilst on the one hand, he may be met by a plea that the mortgage charge is far higher than that stated

by him, on the other hand, I think that the learned Pandit for the respondents put the matter very forcibly, when he said that there may be cases in which the plaintiff offers to pay nothing at all, because the whole amount of the mortgage-money has been paid either from the usufruct or otherwise. I have called this last argument forcible, because, if the extent of the money which the plaintiff-mortgagor offers to pay is to regulate the value of the subject-matter in dispute, in the case contemplated there would be no standard for any calculation of the value. Perhaps a more plausible theory would be to say that the value of the subject-matter of a redemption suit is the value of the property *minus* the mortgage charge, that is, the difference between the two. But then the difficulty would arise how to determine the amount of such difference without going into the merits of the defendant-mortgagee's allegation as to the extent of his incumbrance. And of course, apart from the question of the mortgage-money, a redemption suit may be met by the plea that either on account of foreclosure or prescription, the right of redemption no longer exists,—and it is obvious that in such a dispute the whole *corpus* of the property would be at stake, whilst the question of jurisdiction lies at the threshold, and must be disposed of before the real merits of the litigation are entered upon. These observations have been made by me only to illustrate the nature of the considerations which lead me to doubt the rulings upon which Pandit *Nand Lal* relied, and in this I am supported by an unreported judgment of this Court in *Muhammad Dilawar Khan v. Arikur Gardener* [S. A. No. 1039 of 1877, decided on the 18th January 1878] in which TURNER and SPANKIE, JJ., held that the property mortgaged was the subject-matter in dispute, and, as the *corpus* of the property in that case largely exceeded the Munsif's jurisdiction, they held that he was not competent to try the suit. [445] I must, however, not be understood as laying down any definite rule upon this point, for, as I have already said, the observations of the learned Chief Justice satisfy the exigencies of this particular case.

The question of valuation for purposes of court-fees rests upon very different considerations, for, as pointed out by the Lords of the Privy Council in *Lekraj Roy v. Kanhya Singh*, L. R., 1 Ind. Ap., 317, "the stamp duties imposed for fiscal purposes are calculated on a certain rule, fixed by law, but the right of appeal depends on the value, which is a matter of fact." This distinction of principle must never be lost sight of. In the case of *Cotterell v. Stratton*, L. R., 17 Eq., 543, cited by Pandit *Nand Lal*, the judgment of MALINS, V. C., is entitled to high respect; but all that he there ruled was that, for purposes of law taxation, a certain standard should be taken as the amount of the subject-matter. No question of jurisdiction was before the Court in that case, and it is therefore not applicable, because, while in cases of taxation everything is to receive a strict construction in favour of the subject, in questions of jurisdiction the presumption is in favour of giving jurisdiction to the highest Court—a view which is in keeping with the principles upon which the Full Bench ruling of this Court in *Nidhi Lal v. Mazhar Husain*, I. L. R., 7 All., 230, proceeded. Therefore, as to the valuation for purposes of court-fees, I agree in all that has fallen from the learned Chief Justice, and I also readily adopt the views of MELVILL, J., in the case to which the learned Chief Justice has referred. But then the learned Pandit on behalf of the respondent has referred to another case—*Umar Khan v. Mahomed Khan*, I.L.R., 10 Bom., 41,—which, he contends, has the effect of laying down the rule that in a case such as the present the plaintiff-appellant should be made to pay the court-fees upon the *whole* mortgage-money expressed to be secured by the mortgage-deed. There may be some difficulty in reconciling

the case with the ruling of MELVILL, J., and I might, perhaps, with due respect, say that it keeps out of sight the salutary rule of construction adopted by the Courts in England, namely, that statutes imposing burdens upon the subject must, in every case of doubt, be interpreted in favour of the subject. But I think it is [446] unnecessary for me to say anything definite as to whether I concur in, or dissent from, the ruling, because BIRDWOOD, J., who laid down the rule, distinguished it from cases such as the present, where the decree has not been split up or made the subject of more than one appeal.

The ruling, therefore, is not on all fours with the present case, and I need say nothing more about it here.

For these reasons I concur in the answers proposed by the learned Chief Justice to both the questions before the Full Bench.

NOTES.

[As regards the valuation of redemption suits for purposes of jurisdiction, see also (1908) 31 All., 44; (1908) 11 O. C., 154 (foreclosure); (1903) 6 O. C., 130; (1901) 14 C.P.L.R., 154; (1908) 23 T.L.R., 123.]

[8 All. 446] APPELLATE CIVIL.

The 22nd April, 1886.

PRESENT :

MR. JUSTICE TYRRELL AND MR. JUSTICE MAHMOOD.

Gangadhar and another.....Plaintiffs
versus

Zahurriya and another.....Defendants.*

*Landholder and tenant—Suit for the removal of trees—Act XV of 1877
(Limitation Act), sch. ii, No. 32—Jurisdiction—Civil and Revenue
Courts—Act XII of 1881 (N.-W.P. Rent Act), s. 93 (b).*

Held, that a suit by a landholder for the removal of certain trees planted by the defendants upon land held by them as the plaintiff's occupancy-tenants was cognizable by the Civil and not by the Revenue Court. *Deodat Tewari v. Gopi Misr*, Weekly Notes, 1882, p. 102, referred to.

• *Held*, also, that No. 32†, sch. ii, of the Limitation Act (XV of 1877), applied to the suit. *Raj Bahadur v. Birmha Singh*, I. L.R., 3 All., 85; *Amrit Lal v. Balbir*, I. L.R., 6 All., 68 and *Kedarnath Nag v. Chetturpaul Sritirutno*, I. L.R., 6 Cal., 34, referred to.

* Second Appeal No. 1313 of 1885, from a decree of C.W.P. Watts, Esq., District Judge of Saharanpur, dated the 3rd July 1885, confirming a decree of Maulvi Muhammad Tajammul Husain, Munsif of Shamli, dated the 15th January 1885.

†† Art. 32 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
Against one who, having a right to use property for specific purposes perverts it to other purposes.	Two years.	When the perversion first becomes known to the person injured thereby.]

THE plaintiffs in this case sued the defendants for the removal of certain trees planted by the latter on land held by them as occupancy-tenants, the plaintiffs being the landholders. The suit was instituted in the Court of the Munsif of Sharni, zila Saharanpur. The defendants set up among other defences the defence that the suit was not cognizable in the Civil Courts, under the provisions of s 93 (b) of the N.-W. P. Rent Act (XII of 1881). The Court of First Instance allowed this defence, relying on *Deodat Tiwari v. Gopi Misr*, Weekly Notes, 1882, p. 102. It found also that the trees, the removal of which was sought, had been planted some eight years [447] before the suit was brought; and that the plaintiffs had acquiesced in the planting of the trees when it became known to them. On appeal by the plaintiffs the Lower Appellate Court (District Judge of Saharanpur) expressed no opinion on the question of jurisdiction, having regard to the provisions of s. 207 of Act XII of 1881, but held that the suit was barred by limitation, applying No. 32, sch. ii of the Limitation Act (XV of 1877). It found that the trees had been planted more than two years before the suit, but did not find when the planting first became known to the plaintiffs.

The plaintiffs preferred a second appeal on the ground that the suit was not governed by No. 32, sch. ii of the Limitation Act.

For the defendants it was objected that the suit was not cognizable in the Civil Courts.

Pandit *Sundar Lal*, for the Appellants.

Babu *Rutan Chand*, for the Respondents.

Tyrrell, J.—This was a very simple suit brought by the plaintiffs-appellants, who are admittedly zamindars of the land in suit, against the defendants, who are occupancy-tenants of the land, seeking to restrain the defendants from converting arable land into a grove or wood. The Courts below have concurred in holding that the suit is barred by limitation. They have applied art. 32, sch. ii of Act XV of 1877, and in my opinion the article has been rightly applied. They have held broadly that some of the trees were planted some seven years ago, and some were planted within a year from the date of the suit. These findings alone are not sufficient for the disposal of the case. The lower Courts have not determined the *terminus a quo* of the period from which the limitation begins to run. Under that clause the limitation begins to run from the date "when the perversion first becomes known to the person injured thereby." It is therefore necessary to have this point determined. And I would therefore remit the following issue for determination by the Court below:—

When did the plaintiff first become aware of the perversion of the land?

The finding when made will be returned to this Court, and ten days will be allowed for objections from a date to be fixed by the Registrar.

[448] **Mahmood, J.**—I concur in the order proposed by my brother TYRRELL, but I wish to add a few words. The learned pleader for the respondent has contended that the suit was one cognizable by the Revenue Courts, and has relied upon the case of *Deodat Tiwari v. Gopi Misr*, Weekly Notes, 1882, p. 102. The judgment of the Court in that case was delivered by my brother BRODHURST, and I concurred in that judgment. Now, s. 93 (b) of Act XII of 1881 provides that "suits to eject a tenant for any act or omission detrimental to the land in his occupation, or inconsistent with the purpose for which the land was let" lie in the Revenue Court. It was under this section that my brother BRODHURST and myself held in that case that that suit was cognizable by the Revenue Court. I have carefully examined the remnants of the record that remain in this Court, namely, the judgments of the two Courts in that

case, but in the absence of the plaint it is impossible to say how far that ruling applies to this case.

Now, the plaint in this case is not for the ejectment of the tenant, but virtually seeks an injunction, directing the tenant to remove the trees in question. This relief cannot be granted by the Revenue Courts, and the suit is therefore cognizable by the Civil Court. The learned pleader for the appellant has drawn my attention to two rulings of this Court in *Raj Bahadur v. Birmha Singh*, I. L. R., 5 All., 85, and *Amrit Lal v. Balbir*, I. L. R., 6 All., 68. The first of these cases is a Full Bench ruling, and I agree with the learned pleader in thinking that the principle of the rulings in those cases applies to this case. I agree with my brother TYRRELL in holding that art. 32, sch. ii of Act XV of 1877, applies to this case, and that the limitation runs from the date "when the perversion first becomes known to the party injured thereby."

The learned pleader for the appellant has also called my attention to a ruling of the Calcutta High Court in the case of *Kedarnath Nag v. Khetturpaul Sritirutno*, I. L. R., 6 Cal., 34. I have carefully considered the judgment in that case. The portion which deals with the point now raised occurs at the end and is as follows:—"As to the limitation, we think with the Lower Appellate Court that art. 32 does not apply to this case. It seems to us to fall under art. [449] 120, which gives a period of six years." No doubt the learned Judges in that case had very good reasons for coming to that conclusion, but I have not had the advantage of considering them, as the report gives no reasons upon this point. Under the circumstances I agree with my brother TYRRELL in remanding the case as proposed by him.

Issue remitted.

NOTES.

[This was overruled in (1901) 23 All., 486. See also, (1899) 26 Cal., 564 ; (1888) 10 All., 634 ; (1992) 12 A.W.N., 45 ; (1898) 20 All., 519 ; (1907) 10 O. C., 188.]

[8 All. 449]

The 5th May, 1886.

PRESENT :

MR. JUSTICE OLDFIELD, AND MR. JUSTICE MAHMOOD.

Jawahar Singh.....Plaintiff

versus

Mul Raj.....Defendant.*

Arbitration—Powers of arbitrators—Payment by instalments—

Appeal—Civil Procedure Code, ss. 518, 522.

The arbitrators to whom the matters in difference in two suits for money were referred to arbitration made an award for payment to the plaintiff of certain sums by the defendant, and further directed that these sums should be paid by certain instalments. The plaintiff preferred objections to the award in so far as it directed payment by instalments, and the Court,

* Second Appeals Nos. 1483 and 1484 of 1885, from decrees of C. W. P. Watta, Esq., District Judge of Saharanpur, dated the 29th May 1885, modifying decrees of Maulvi Muhammad Maksud Ali Khan, Subordinate Judge of Saharanpur, dated the 27th February 1885.

holding that the arbitrators had no power to make such a direction, modified the award to that extent, under s. 519 of the Civil Procedure Code. On appeal, the District Judge, while allowing the power of the arbitrators to direct payment by instalments, reduced the number of instalments which had been fixed.

Held, that the decree of the first Court not being in accordance with the award, an appeal lay to the Judge, with reference to s. 522* of the Code.

Held, also, that as it was clear that the reference to arbitration gave the arbitrators full powers not only as to the amount to be paid, but also as to the manner of payment, the Lower Appellate Court was wrong in reducing the number of instalments which had been fixed.

Per MAHMOOD, J.—The word "award" used in the last sentence of s. 522 of the Code must be understood to mean an award as given by the arbitrators, and not as amended by the Court under s. 518. The words "in excess of, or not in accordance with, the award," used in s. 522 were intended to enable the Court of Appeal to check the improper use of the power conferred by s. 518.

THE appellant in these cases, Jawahar Singh, brought two suits against the respondent, Mul Raj, one being to recover Rs. 1,316 due for profits and Government revenue and the other for Rs. 2,687-14 due on a bond. The parties referred the matters in dispute in these suits to arbitration. The majority of the arbitrators, [450] in the suit for profits and Government revenue, awarded the plaintiff Rs. 1,021-9, and in the suit on the bond, Rs. 1,778-7, and directed that both these amounts should be paid by certain instalments, and that each party should pay his own costs in both suits. The plaintiff preferred objections to the award in so far as it directed payment by instalments, and each party to bear his own costs. The Court of First Instance accepted the award, except in so far as it directed payment by instalments of the sums, holding that the arbitrators had no power to make such a direction. The defendant appealed from the decree of the first Court in both cases with reference to the question of payment by instalments, and the plaintiff preferred objections to the decree in both cases, under s. 561 of the Civil Procedure Code, with reference to costs.

The Lower Appellate Court held that the arbitrators were empowered to direct payment by instalments, but it was of opinion that they had not exercised this power with discretion, and it reduced the number of instalments. It dismissed the plaintiff's objections, holding that the arbitrators had full power to make the order they did relative to costs.

The plaintiff appealed to the High Court in both cases, contending that the decree of the first Court was not appealable; that the arbitrators had no power to order payment by instalments; and that the Lower Appellate Court had improperly dismissed his objections relative to costs. The defendant preferred an objection under s. 561 of the Civil Procedure Code, to the effect that "the Lower Appellate Court was wrong in amending the award passed by the arbitrators as to the time fixed for the payment of the instalments."

Munshis Hanuman Prasad and Madho Prasad, for the Appellant.

* [Sec. 522:—If the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and if no application has been made to set aside the award, or if the Court has refused such application,

the Court shall, after the time for making such application has expired, proceed to give judgment according to the award,

or, if the award has been submitted to it in the form of a special case, according to its own opinion on such case.

Upon the judgment so given a decree shall follow, and shall be enforced in manner provided in this Code for the execution of decrees. No appeal

Decree to follow. shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.]

Mr. Cărapiet, for the Respondent.

Oldfield, J.—In this case the plaintiff sued to recover a sum of money due for profits and Government revenue. In the Court of First Instance the dispute was referred to arbitration, and the majority of the arbitrators gave an award in favour of the plaintiff for Rs. 1,021-9, payable by instalments. The first Court, under s. 518 of the Code, modified the award, so far as it related to the payment of instalments, on the ground that this was not a [451] matter which was referred to arbitration. The defendant appealed to the District Judge; and the Judge, though allowing the power of the arbitrators to settle the manner of payment of the instalments, reduced the number of the instalments that had been fixed. From this decision the plaintiff has appealed, and the defendant has filed objections. The plaintiff's plea that no appeal lay to the Judge is bad, with reference to s. 522 of the Code, which disallows appeals "except in so far as the decree is in excess of, or not in accordance with the award." I am of opinion that the decree of the first Court not being in accordance with the award, an appeal lay to the Judge. With regard to the defendant's objection, it has force. The question before the Judge was, whether the first Court had rightly modified the award under s. 518 of the Code, and from the terms of the reference to arbitration, it is clear that it gave the arbitrators full powers, not only as to the amount to be paid, but also as to the mode of payment. Under these circumstances, it appears to me that the plaintiff's appeal must be dismissed, and the defendant's objection allowed, and a decree will be passed in the terms of the award. Each party will bear their own costs. The defendant will have the costs in this Court.

In the connected case, S. A. No. 1484 of 1885, I am of opinion that the plaintiff's appeal fails, because there was an appeal to the Judge, and as no objections have been taken here to the Judge's decree, it is sufficient to say that the appeal must be dismissed with costs in this Court.

Mahmood, J.—I concur in my learned brother OLDFIELD's judgment in both cases. In S. A. No. 1483 of 1885, the submission to arbitration, dated the 19th November 1884, refers all the disputes involved by the suit between the parties; in other words, "the reference of a cause" and "of all matters in difference in a cause" means exactly the same thing, and only gives the arbitrators power to decide on the questions raised by the pleadings, which are necessary for the determination of the cause" (Russell on Arbitration, p. 117). This shows that the arbitrators cannot go beyond the scope of the suit. Now, in this case, the claim is one for money, and a large part of the argument of the learned Munshi on behalf of the appellant was to the effect that the arbitrators exceeded their powers in fixing the instalments. Again, [452] at p. 391, of Mr. Russell's work, it is said:—"An arbitrator may in general fix the time and place at which payment is to be made, though he need not do so unless he think fit. It seems he may award one party to give the other a promissory note payable at a future day, for that is the same thing in effect as awarding the payment of the money at the future day. So he may order one party to execute a bond for the payment to the other of an ascertained sum of money at a specified time. He may direct payment to be made by instalments. He may add that if the sum awarded be not paid by the appointed day, the party shall pay a larger sum by way of penalty; or when the payment is to be by instalments, that if one be overdue the whole amount shall be payable at once." This is the general rule which is observed in England, and I see no reason why it should not equally be followed in this country. With reference to the remarks of my learned brother as to s. 518 of the Code, I agree that the word "award," used in the last sentence of s. 522, must be understood

to mean an award as given by the arbitrators, and not as amended by the Court under s. 518. The words "in excess of, or not in accordance with, the award," used in the former section, were intended to enable the Court of appeal to check the improper use of the power conferred by s. 518, and, in the absence of such a check, a Court of First Instance, professing to act under s. 518, might pass a decree far in excess of the powers given by that section.

Under these circumstances I agree with the orders proposed by my learned brother OLDFIELD in both cases.

NOTES.

[This was followed in (1908) 12 O. C., 23 ; (1894) P. R., 74.]

[8 All 452]

The 21st May, 1886.

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, AND MR JUSTICE MAHMOOD.

Mahram Das.....Plaintiff

versus

Ajudhia.....Defendant.*

Act IV of 1882 (Transfer of Property Act), ss. 10, 11—Vendor and purchaser—Contemporaneous "ikrar-namah"—Condition restraining alienation—Restriction repugnant to interest created—Lambardar and co-sharer—Collection of rents by co-sharer—Suit by lambardar for money had and received—Costs—Suit to recover costs by way of damages.

M, a co-sharer in a village, transferred to *A*, another co-sharer, a two annas share, by deed of sale. Upon the same date, *A* executed an *ikrar-namah* in which [453] he agreed that he would not collect the rents of the two annas transferred to him, that he would not ever demand partition of that share, and that he would not alienate or mortgage it or otherwise exercise proprietary rights over it. It was further provided that in the event of *A* committing any breach of covenant the sale should be avoided, and the proprietary rights in the two annas share should re-vest in *M*. A suit was subsequently brought by *M*, upon the allegations that, in breach of the covenants of the *ikrar-namah*, *A* had collected the rents of the share; that he had sought to obtain partition of the same by certain proceedings in the Revenue Court; that, in consequence of his action in collecting the rents, the plaintiff had been compelled to sue the tenants; that in these suits the tenants exhibited receipts given by *A*, on the basis of which the suits were dismissed; and that he had been subjected to various costs and expenses. He therefore claimed, by way of damages from *A*, the amount of these costs and expenses, and also to recover certain sums of money realized by *A* as rent from the tenants, and further, by reason of the *ikrar-namah*, to avoid the sale-deed which preceded it.

Held that the deed of sale and the *ikrar-namah* must be regarded as retarding one single transaction, i.e., they must be read together as stating the nature of the transaction entered into upon that date between the plaintiff and the defendant, which, on the face of

* Second Appeal No. 1640 of 1885, from a decree of J. Tiston, Esq., Deputy Commissioner of Lalitpur, dated the 2nd June 1885, confirming a decree of J. Greenwood, Esq., Extra Assistant Commissioner of Lalitpur, dated the 14th April 1885.

it, professed to be a sale of a two annas share to the other by the former; and that, in this view, it was clear from the *ikrar-namah* that the proprietary title created by the sale-deed was cut down to nil, and limitations placed upon it which rendered it useless as a proprietary right. *Sital Purshud v. Luchmi Purshad*, I. L. R., 10 Cal., 30, referred to.

Held, that provisions of this kind which absolutely debar the person to whom the proprietary rights have passed from exercising these rights, impose conditions which no Court ought to recognize or give effect to; that a covenant in a sale-deed the effect of which is to disable the vendee from either alienating or enjoying the interest conveyed to him, is not only contrary to public policy, but in violation of the principle of ss. 10 * and 11 of the Transfer of Property Act; and that, therefore, as the agreement on the basis of which the plaintiff asked for relief was one which no Court should assist him in enforcing, the suit must fail.

Colman v. Johnson, 1 Cowper, 543, quoted in Leake on Contracts, 970; *Anantha Tirtha Chariar v. Nagmuthu Ambalagaren*, I. L. R., 4 Mad., 200; *Bradley v. Peizoto*, Tudor's Leading Cases on Real Property, 968, and *Hussain Khan Bahadur v. Nateri Srinivasa Charlu*, 6 Mad. H. C. Rep., 356, referred to. *Balaji J. Rahalkar v. Narayanbhat*, 6 Bom. H. C. Rep. A. C., 63, distinguished.

Held by MAHMOOD, J., with reference to the sums realized by the defendant as rent, that whatever may be the rights of a lambardar in reference to the collection of rents, the defendant, being a co-sharer in the village, and having, though perhaps irregularly, realized sums of money from the tenants, could not, in a Civil Court and in a suit of this nature, be made to repay the lambardar; and the latter's only remedy was to deduct the items when the *bujharat* or rendition of accounts between the co-sharers and himself took place.

Held by MAHMOOD, J., with reference to the costs incurred by the plaintiff in the Revenue Court, that such Court in the former suit was entitled to deal [454] with the question of costs, and dealt with it, and the costs could not be made the subject-matter of fresh litigation, and therefore could not be claimed in this suit by way of damages. *Chengulvu Raya Mudali v. Thangakht Ammal*, 6 Mad. H. C. Rep., 192; *Jalam Punja v. Khoda Jawra*, 8 Bom. H. C. Rep., A. C., 29; *Kabir v. Mahadu*, I. L. R., 2 Bom., 360, and *Pranshankar Shivshankar v. Govindlal Parbhudas*, I. L. R., 1 Bom., 467, referred to.

THE facts of this case are sufficiently stated for the purposes of this report in the judgments of the Court.

Munshi Sukh Ram, for the Appellant.

Babu Ratan Chand, for the Respondent.

Straight, Offg. C.J.—This was a suit brought by plaintiff-appellant under the following circumstances:—The plaintiff is the owner of a nine annas and six pies share in a village, in which the defendant is the owner of a four annas share. Prior to 1880, the defendant sold his four annas share to the plaintiff. On the 24th August 1880, the plaintiff re-transferred two annas out of the four to the defendant for Rs. 50. This sale was effected by a sale deed of that date. Concurrently with the sale-deed an *ikrar-namah* or agreement was executed by the defendant, in which, among other things, the defendant undertook that he would not collect the rents of the two annas transferred to him, that he would not ever demand partition of that share, and would not alienate or mortgage it, or otherwise exercise proprietary rights over it. It was further

*[Sec. 10:—Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those

claiming under him:

provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.]

provided that in the event of the defendant committing any breach of these covenants of the agreement, the sale should be avoided, and the proprietary rights in the two annas should re-vest in the plaintiff. This suit, has been brought by the plaintiff on the allegations that, in breach of the covenants of the agreement, the defendant has collected the rents of the share; that he has sought to obtain partition thereof by certain proceedings in the Revenue Court; that, in consequence of his action in collecting the rents, the plaintiff has been compelled to sue the tenants; that in those suits the tenants have exhibited receipts given by the defendant, on the basis of which his suits have been dismissed; and that he has thus been subjected to various costs and expenses. He therefore claims, by way of damages, from the defendant the amount of these costs and expenses as having been incurred by him in consequence of the defendant's action. He further claims, by reason of [455] the *ikrar-namah* of the 24th August 1880, to avoid the sale-deed which preceded it. The Courts below have dismissed the claim on the ground of limitation, the Lower Appellate Court holding that art. 91 of the Limitation Act was applicable, and the suit, having been brought beyond five years from the date of the plaintiff's obtaining knowledge of the defendant's breach of the covenants, was barred by time. It appears to me that neither of the Courts have dealt with the case upon the correct footing. The sole ground upon which I propose to dispose of this appeal and the suit is this: I think, in the first place, that the two instruments of the 24th August 1880, must be regarded as recording one single transaction. That is to say, they must be read together as stating the nature of the transaction entered into upon that date between the plaintiff and the defendant, which, on the face of it, professed to be a sale of a two annas share to the defendant by the plaintiff. In this view, it is clear from the *ikrar-namah* that the proprietary title in the share conferred on the defendant and created by the sale-deed is thereby cut down to *nil*; in other words, limitations are placed upon it which render it useless as a proprietary right. Now the principle embodied in s. 11 of the Transfer of Property Act has been recognised time out of mind by Courts, both of law and equity, in dealing with such agreements; and as the reason for it I do not think that I can do better than refer to the observations of Lord MANSFIELD in *Holman v. Johnson*, 1 Cowper, 543, quoted in Leake on Contracts, 970. He says:—"The objection that a contract is immoral or illegal as between the plaintiff and the defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff."

As I understand it, provisions in a contract of the kind before me, which absolutely debar the person to whom the proprietary rights have passed, from exercising those rights, impose conditions which no Court ought to recognise or give effect to; and that a covenant in a sale-deed, the effect of which is to disable the vendee for ever from either alienating or enjoying the interest conveyed to him, is not only contrary to public policy, but in violation of [456] the principle enunciated in ss. 10 and 11 of the Transfer of Property Act. The agreement, therefore, on the basis of which the plaintiff in this case asks for relief, is one which no Court should, in my opinion, assist him in enforcing, for, as I have already remarked, the sale-deed and *ikrar-namah* must be read as one instrument and as recording a single transaction. I therefore, uphold the decision of the Lower Appellate Court, but on grounds different from those which that Court has given, as, upon the point of limitation, I think the Deputy Commissioner was wrong. I am of opinion that the suit failed, the

plaintiff not being entitled to have the relief prayed by him, and that this appeal must be, and it is, dismissed with costs.

Mahmood, J.—I have arrived at the same conclusions as the learned Chief Justice, but as both of the judgments of the Courts below have dealt with the case in an unsatisfactory manner, I am anxious to recapitulate the important facts essential to the determination of the question of law involved. I have read the original record and it appears to me that the case cannot properly be disposed of upon the ground of limitation, as it has been by both the lower Courts. I need say nothing further as to the point of limitation, because I think with the learned Chief Justice that, upon the merits, the suit is unmaintainable. The facts of the case are, that in a village called Dasui, there was a nine annas and six pies share of Mahram Das, the plaintiff in this case, and a four annas share owned by Partab and Ajudhia, the former of whom was the father of the latter, who is the defendant. Early in the year 1880, a sale-deed was executed jointly by Partab and Ajudhia, conveying the four annas share to Mahram Das. Under this deed an area of 15 acres was specially reserved for the vendors. It appears that when *dakhil-kharij* was to be effected in the revenue records, the vendors did not, as required by the rules, consent to express their concurrence, and no *dakhil-kharij* was carried out. So matters stood when the vendee Mahram Das, on the 24th August 1880, executed a deed of sale, whereby he conveyed a two annas share out of the four annas previously purchased by him from Partab and Ajudhia, to the latter. This deed contained a clause to the effect that the covenant as to the 15 acres contained in the former sale-deed was null and void, and that the rights of [457] the parties should in future be governed by the new sale-deed. Contemporaneously with this deed, Ajudhia executed an *ikrar-namah* of the same date in favour of the plaintiff Mahram Das, containing certain specific conditions, which were a reproduction of some of the most important terms of the sale-deed itself. Now, I concur with the learned Chief Justice that these two documents should be treated as if they recorded one and the same transaction, and should be read together in order to ascertain the intention of the parties. If any authority is required for this view, the reports are full of cases on the point in connection with the *bye bil-wafa* form of mortgages. The Courts in this country have ruled to this effect, when it appears that the deed of absolute sale is accompanied by a contemporaneous *ikrar-namah* by a mortgagee or conditional vendee, providing for the re-conveyance of the property to the mortgagor on payment of the price the mortgagee has paid. This view is borne out by the principle on which the judgment of the Privy Council in *Sital Purshad v. Luchmi Purshad*, I. L. R., 10 Cal., 30, proceeded. Reading the two documents as one, there is every reason to say that if any part of either is such as the law disallows, it must be treated as invalid to that extent. The sale-deed, after reciting that Mahram Das was the owner of a nine annas and six pies share, and had purchased four annas, sets forth conditions which I need not mention, because they are more fully stated in the *ikrar-namah* executed by Ajudhia upon the same dates. The chief points in the *ikrar-namah* are—(i) that the vendee Ajudhia would never sell or mortgage what he had purchased, and if he did, it would be to Mahram Das himself only, for the same price as he had paid; (ii) the executant Ajudhia would never have the right to ask for partition of his share, and was bound to keep it joint, and Mahram Das was entitled to collect rent therefrom; (iii) the property purchased was to remain in the possession of the vendee, and devolve upon his natural or adopted heirs; but in case neither were alive, no other person could succeed to the property under the ordinary law. There were other

conditions as to the rent payable by the vendee for the land cultivated by himself, and the condition as to the 15 acres in the old sale-deed was set aside. Then comes an important clause to the effect that if the vendee should act in breach of the terms of the agreement, the sale-deed of the two [458] annas share executed by Mahram Das to Ajudhia should be treated as "waste paper." Further, the *ikrar-namah* says that this purchase of two annas shall be free from all attachments and sales in execution of decrees, and that if any person should attach the share, then Mahram Das would have the right to pay in Rs. 50, and such person might not bring to sale the property purchased by Ajudhia. The learned Chief Justice has said that the Courts of Equity and of Law in England have never allowed such a transaction, and this rule is based upon fundamental principles of public policy.

After the execution of the two documents, there was a litigation between Mahram Das and Ajudhia in connection with partition. There was a partition by some other co-shareis in the village, and Ajudhia having joined with them, succeeded on the 21st June 1882, and an order was passed by the Deputy Commissioner that the partition proceedings should go on. On the 8th December 1884, Ajudhia, in contravention of another condition of the *ikrar-namah*, realized two small items from tenants as rent. In consequence of this the plaintiff, Mahram Das, on the 12th December 1884, brought a suit in the Rent Court against the tenants for the recovery of rent from them as lambardar. His suit was dismissed on the 14th January 1885, in consequence of the tenants having proved that they had paid their rents to Ajudhia. Upon this the plaintiff prayed for three reliefs,—first, the cancelment of the deed of sale of the 24th August 1880, on the ground that, by reason of his breaches of covenant, namely, his action regarding the partition and the collection of rents, the defendant had ceased to be owner; secondly, that the defendant had wrongly received Rs. 30 and again Rs. 10 from the tenants, against the terms of the *ikrar-namah*, and was liable to repay the same to the plaintiff as lambardar, as money had and received to his use; thirdly, a sum of Rs. 9-2, which represented costs incurred by the plaintiff in his unsuccessful litigation in the Revenue Court, and was now claimed by way of damages. I will deal separately with each of the reliefs claimed. As to the nature of the rule formulated by the Legislature in s. 11 of the Transfer of Property Act, I need only say that while at one time it might have been doubtful whether the rule was applicable to transfer by way of sale, or was limited to [459] grants short of absolute transfer, the mode in which the doctrine has been dealt with by the Legislature is applicable alike to transactions of both kinds. In other words, the principle of s. 11 applies as much to mortgages or leases as to gifts or sales. Among the cases on the subject, perhaps the best authority is the judgment of MUTTUSAMI AYYAR, J., in *Anantha Tirtha Chariar v. Nagmuthu Ambalagaren*, L.L.R., 4 Mad., 200, and particularly where it is said:—"It appears to us to be a general rule of jurisprudence that where an estate in fee is given, a condition in restraint of alienation is a condition repugnant to the nature of the grant, and, as such, inoperative. We think there can be no doubt on general principles that, when property is transferred absolutely, it must be transferred with all its legal incidents, and that it is not competent to the grantor to sever from the right of property incidents which the law inseparably annexes to it, and thereby to abrogate the law by private agreement. The introduction of a condition against alienation in a grant absolute in its terms has been declared to be equivalent to introducing an exception of the very thing which is of the essence of the grant." These views are in pursuance of the rule laid down in *Bradley v. Peixoto*, Tudor's Leading Cases on Real Property, 968,

and is consistent with many other English cases. The same rule obtains in the Muhammadan law. In the case of *Hussain Khan Bahadur v. Nateri Srinivasa Charlu*, 6 Mad. H. C. Rep., 356, HOLLOWAY, J. said that the rule of justice and equity in these cases was universal, and that where the main object of the grant is clear, conditions clearly inconsistent with that object cannot be held valid. There are two ways of dealing with a question of this kind. The first is to regard it as a question of construction, and to ask what the parties mean by first saying that ownership is to be transferred, and then saying that what is transferred is not ownership in the proper sense. Of course, in such a case every attempt to reconcile these statements should be made, but where no reconciliation is possible, the Courts say that, under these circumstances, the main object of the parties must be kept in view, and that provisions inconsistent therewith must be treated as void. So the matter stands in this case. The case is not like that with which COUCH, C. J., had to deal in *Balaji J. Rahalkar v [463] Narayanbhat*, 3 Bom. H. C. Rep., A. C., 63, in which the terms of the document were distinctly capable of being interpreted to the effect that there was "no grant of any interest in the land, except of the personal use of it for the particular purpose specified," and that "it must have been intended by the parties to the grant that it was to expire when the grantee and his kinsmen ceased to occupy the house themselves." In the present case there is no doubt that the deed of sale purports to be a conveyance of ownership, and therefore all provisions inconsistent with that purpose are null and void. For these reasons I concur with the learned Chief Justice in holding that Ajudhia is not bound by any covenant which derogates from the ordinary legal incidents of ownership.

The second question is, whether the Rs. 30 and Rs. 10 realized by Ajudhia as rent can be recovered in a suit of this kind. It must be observed that, whatever may be the rights of a lambardar in reference to the collection of rents, the defendant in this case, being a co-sharer in the village and having, though perhaps irregularly, realized sums of money from the tenants, he cannot, in a Civil Court and in a suit of this nature, be made to re-pay the lambardar. The only remedy of the latter is to deduct the items when the *bugharat* or rendition of accounts between himself and the co-sharers takes place.

The third point relates to the sum of Rs. 9-2, the costs of litigation in the Rent Court. Upon this point I am anxious to state the reasons for my conclusions, because there exists some conflict of authority. In the case of *Chengulva Raya Mudali v. Thangakhi Ammal*, 6 Mad. H. C. Rep., 192, the Full Bench of the Madras High Court laid down the rule that an action lies in a Small Cause Court for the recovery of costs incurred by the plaintiff in a suit to compel registration of a document. The *ratio* of this ruling, and in particular of the judgments of SCOTLAND, C. J., and HOLLOWAY, J., was that, inasmuch as the Registration Act omitted to provide for costs incurred by a party in the course of obtaining registration, therefore the ordinary Courts were entitled to deal with such costs as ordinary damages. Opposed to this view is a decision of the Bombay High Court in *Jalam Punja v. Khoda Jarra*, 8 Bom. H. C., Rep., A. C., 29, in which WESTROPP, C. [461] J., held that no action lies for the recovery of costs incurred by a defendant in defending himself in a possessory suit brought against him in a Mamlatdar's Court under Bombay Act V of 1864. So also in *Kabir v. Mahadu*, I. L. R., 2 Bom., 360, where a more reasonable view was adopted. It was there held that an action brought to recover costs of proceedings held under Act XX of 1864, is not maintainable when the Court before which such proceedings were taken has made no order as to the payment of such costs. A similar view was taken in *Pransankar Shivshankar v. Govindal Parbhudas*,

I. L. R., 1 Bom., 467, where it was ruled that no action is maintainable for damages occasioned by a civil action, even though brought maliciously and without reasonable and probable cause, nor will it lie to recover costs awarded by a Civil Court. This no doubt shows some conflict of authority. My own view is, that the real principle is not limited to damages in tort. Wherever a Court has jurisdiction, and a civil suit is brought for the recovery of costs which might have been dealt with in the former litigation, the question may be made the subject of a plea *in limine* upon a matter of procedure. Section 13 of the Civil Procedure Code lays down the general rule of *res judicata*, and it is possible that this rule would in such a case be applicable by analogy. * But whatever view may be adopted, the *ratio* depends upon the same principles. Where a Court has jurisdiction and orders costs, that order is final and binding. But where the former Court is not entitled to order costs, and costs are incurred, they may, in my opinion, be made the subject of consideration as to damages in a subsequent suit.

In the present case the Rent Court in the former suits was entitled to deal with the question of costs, and dealt with it, and they cannot be made the subject-matter of fresh litigation. I am therefore of opinion that the costs cannot be claimed in this suit. For these reasons I concur in the order proposed by the learned Chief Justice.

Appeal dismissed.

NOTES.

[As regards costs, this was followed in (1837) 9 All., 474. See also (1908) 5 A. L. J., 140. As regards restrictions against alienation, see also (1909) 10 C. L. J., 476 (covenants in a lease).]

[462] *The 25th May, 1886.*

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Sheobharos Rai and others.....Defendants

versus

Jiach Rai and others.....Plaintiffs*

Pre-emption—Sale to a co-sharer and stranger—Specification of interest sold to stranger and of price—Right of pre-emption of vendee-co-sharer.

The principle of denying the right of pre-emption except as to the whole of the property sold, is that by breaking up the bargain the pre-emptor would be at liberty to take the best portion of the property and leave the worst part of it with the vendee. The rule applies only to those transactions which, while contained in one deed, cannot be broken up or separated. It should be limited to such transactions, and the reason of it does not exist where the shares sold are separately specified, and the sale to the stranger is distinct and divisible, though contained in the same deed as the sale to the co-sharer.

The *ratio decidendi* of *Bhawani Prasad v. Damru*, I. L. R., 5 All., 197, explained. *Sheodyal Ram v. Bhyro Ram*, N.-W. P.S. D. A. Rep., 1860, p. 53, distinguished. *Guneshee Lal v. Zaraut Ali*, N. W. P. H. C. Rep., 1870, p. 343, and *Manna Singh v. Ramadhin Singh*, I. L. R., 4 All., 252, dissented from.

* Second Appeal No. 1568 of 1885, from a decree of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 1st July 1885, confirming a decree of Munshi Sheo Sahai, Munsif of Muhamadabad Gohna, dated the 12th January 1885.

A co-sharer in a village conveyed by deed of sale certain land to four persons, three of whom were co-sharers in the same *patti* as the vendor. The deed contained a specification of the interests purchased and the considerations paid by the co-sharers and the stranger vendees respectively. In a suit for pre-emption by certain co-sharers of the same *patti* as the vendor, the Lower Appellate Court held that although the co-sharers-vendees had a pre-emptive right of the same degree as the plaintiff, nevertheless they, having joined a stranger with them in purchasing the property, had forfeited their right, and could not resist the claim even in respect of such portions as they had purchased under the sale-deed.

Held that this view was erroneous, and that inasmuch as the deed of sale contained an exact specification of the shares purchased by the co-sharers-vendees, who had an equal right of purchase to that of the plaintiffs in respect of such shares, and as the shares purchased and the consideration paid by the stranger vendee were also exactly specified, the lower Court should not have decreed the claim for pre-emption as to that portion of the property which had been purchased by the co-sharers.

THE facts of this case are stated in the judgment of the Court.

Munshis *Hanuman Prasad* and *Madho Prasad*, for the Appellants.

Munshi *Sukh Ram*, for the Respondents.

[463] **Mahmood, J.**—The facts of this case may be recapitulated here in order to indicate the point of law which has to be determined.

Tilak Rai (defendant No. 5) executed a deed of sale on the 2nd October 1884, whereby he conveyed certain specific plots of land constituting an area of 15 bighas 14 biswas and 18 dhurs to—(i) Sheobharos, (ii) Sheo Bhik, (iii) Parkash, (iv) Bali, in lieu of Rs. 250 mentioned in the deed. The deed also conveyed a house No. 1044, which belonged to the vendor, but the covenant of sale expressly states that the conveyance was made according to the specification contained in a schedule at the foot of the deed. That schedule shows that out of the area of cultivated land, plots Nos. 707, 1001 and 1002, constituting 2 bighas 5 biswas and 13 dhurs, was sold to Bali, and the rest of the plots to the other three vendees. As to the house, there is no express mention; but the schedule shows that the price paid by Bali in lieu of all that he purchased under the deed was Rs. 49, whilst the remaining sum, of Rs. 201 was the amount of the consideration paid by the other three vendees for what they took under the sale.

The suit from which this appeal has arisen was instituted by Jiach Rai and others, co-sharers of the same *patti* as the vendor Tilak Rai, and as such entitled to pre-emption under the terms of the *wajib-ul-arz* in respect of the sale above-mentioned. The Lower Appellate Court has found that, with the exception of Bali, the other three vendees are sharers in the same *thok* as the vendor Tilak, and therefore entitled to a pre-emptive right of the same degree as the plaintiffs. But notwithstanding this finding, the learned Judge has upheld the decree of the Court of First Instance, decreeing the claim in respect of the whole property covered by the sale-deed, on the ground that the three co-sharers of the *thok* having joined Bali, a stranger, in purchasing the property, they had forfeited their pre-emptive right, and could not resist the plaintiffs' suit, even in respect of such portion as they had bought under the sale.

From this decree the three vendees, Sheobharos and others, who have been found to be co-sharers of the *thok*, have preferred this appeal, and the learned Munshi, who has appeared on behalf of the appellant, has confined his argument to the contention that [464] upon the findings of the Lower Appellate Court itself the suit should have been dismissed, so far as the portion of the property purchased by the appellants is concerned. On the other hand, the learned pleader for the respondent has relied upon certain rulings which I shall presently deal with.

I am of opinion that the contention pressed upon us by the learned pleader for the appellants has force, and that this appeal must prevail. In the case of *Sheodyal Ram v. Bhyro Ram*, N.-W. P. S. D. A. Rep., 1860, p. 53, it was held by three learned Judges of the late Sudder Dewany Adalat of these provinces, that the sale of a share of an estate to a stranger jointly with a co-sharer of the village was in violation of the terms of the *wajib-ul-arz*, the express object of which was to prevent the intrusion of strangers, and that as the sale was one and indivisible, the claimant of pre-emption was entitled to a decree in respect of the whole property sold. Then in the case of *Guneshee Lal v. Zaraut Ali*, N.-W. P. H. C. Rep., 1870, p. 343, a Division Bench of this Court carried the rule further by applying it even to a sale-deed in which the shares purchased by the strangers were separately specified, and the latter ruling was again followed in *Manna Singh v. Ramadhin Singh*, I. L. R., 4 All., 252, where it was held that even an express specification of the shares purchased by each vendee could not alter the joint nature of the sale transaction, or permit of its being broken up and treated as involving separate contracts, so as to entitle the co-sharer who has purchased along with a stranger to resist the pre-emptive suit, even in respect of his own specific share.

The first two of these rulings were referred to by me in *Bhawani Prasad v. Damru*, I. L. R., 5 All., 197, not with the object of agreeing or dissenting from the rule therein laid down, but simply to point out the analogy with the point which was then before me. The exact question with which I had to deal in that case was that a plaintiff-pre-emptor who, in claiming pre-emption, joins a stranger in the suit, cannot succeed, because the very nature of his claim violates the fundamental principle of the pre-emptive right. And because the lower Courts in this case have misunderstood a portion of what I said in that case in giving expression to my *ratio decidendi*, I wish to explain my meaning in saying that a pre-emptor [465] "who, in purchasing property himself, joins a stranger in such purchase," could not subsequently "resist the claim of other pre-emptors, who in suing for pre-emption vindicate the policy of the right." All that I meant by the words which I have emphasized was, that the nature of the joint purchase should be such as to make it as impossible to ascertain the interests acquired by each of the joint purchasers as it would be in the case then before me to ascertain how much the pre-emptor was claiming, and how much of the pre-emptive interests he had made over to the stranger whom he had joined in instituting the joint suit. That in such cases the sale, on the one hand, and the suit on the other, cannot be subjected to a division of interests, is obvious; and an illustration of this is to be found in the recent case of *Karan Singh v. Muhammad Ismail Khan*, I. L. R., 7 All., 860, in which PETHERAM, C.J., laid down a rule which, in the result, has the same effect as the rule laid down by me in *Bhawani Prasad v. Damru*, I. L. R., 5 All., 197. And I wish to add that nothing which I said in the latter case should be so understood as to lay down the broad rule that in every case, regardless of the nature and incidents of the transaction of sale, the mere fact of a stranger having acquired rights under the same sale-deed as a co-sharer entitled to pre-emption under the *wajib-ul-arz*, would entitle the other co-sharers to pre-empt even the separately specified portion of property purchased by a co-sharer entitled to an equal pre-emptive right.

In the present case the sale-deed contains an exact specification of the shares purchased and the price paid by the vendees-appellants, and it contains also an exact specification of the shares purchased and the price paid by the vendee-defendant Bali. The case of *Sheodyal Ram v. Bhyro Ram*, N.-W. P. S. D. A. Rep., 1860, p. 53, is not in point, because the three learned Judges who

decided that case adopted as their *ratio decidendi* that the shares sold and sought to be pre-empted were not capable of division, and were not separately specified. In the case of *Guneshee Lal v. Zaraut Ali*, N.-W.P. H. C. Rep., 1870, p. 443, I respectfully think the rule was carried too far, and so also in *Manna Singh v. Ramadhin Singh*, I. L. R., 4 All., 252. With neither of these rulings am I prepared to agree, because the principle or *ratio decidendi* of denying the right of [466] pre-emption, except as to the whole of the property sold, is that by breaking up the bargain the pre-emptor would be at liberty to take the best portion of the property and leave the worst part of it with the vendee. In the two last-mentioned cases, the shares are separately specified, and where such shares are separately specified, and the sale to the stranger is distinct and divisible, although contained in one deed, the reason of the rule does not exist. The rule applies only to those transactions which, while contained in one deed, cannot be broken up or separated; and the rule should be so limited, for it would be a very great hardship if the vendee, by the association of a stranger in respect of a small but specified portion of the property purchased, should have to forfeit his entire right of purchase in favour of a sharer having equal but not preferential rights. Indeed, where the share of each purchaser, and the price which he had paid for it are distinctly specified in the sale-deed, there is really no breaking up of the bargain, as understood in the law of pre-emption, if the purchaser is ousted from the specific share which he has individually purchased along with others under the same deed of sale. Moreover, even under the strict rule of the Muhammadan law of pre-emption, the pre-emptor, in dealing with a sale under which more persons than one have purchased, is entitled to say that he objects to the intrusion of only one of the purchasers, and wishes to exclude him by pre-empting the specific share which such purchaser has individually acquired. And the principle in its application to the present case shows that the exclusion of the purchaser Bali is all that the pre-emptive terms of the *wajib-ul-arz* necessitate, and he would be subjected to no hardship, such as the breaking up of a single bargain implies, if he has to give up all that he has purchased, and receives the price which he individually paid for his specific share of the property.

For these reasons I hold that the Lower Appellate Court in dealing with this case should not have decreed the claim for pre-emption against the present appellants, who are co-sharers in the same *thok* as the vendor and as such had an equal right of purchase to that of plaintiffs in respect of the shares specified in the deed of the 2nd October 1884, as purchased by them.

I would decree this appeal and set aside the decrees of both the lower Courts, so far as they decree the claim of the plaintiffs- [467] respondents to that portion of the property which was purchased by the appellants, and to the extent of the claim which has been successfully resisted by defendants, the plaintiffs will pay costs in all the Courts. The plaintiffs will be entitled to a decree in respect of the share purchased by Bali against the vendor-defendant and Bali, defendant, with costs, to that extent, incurred in the Court of First Instance, on condition of the plaintiffs depositing in that Court the sum of Rs. 49 for payment to Bali, defendant, within one month from the date when this decision reaches that Court, otherwise the suit in this respect also will stand dismissed with costs.

The decree will be prepared in the above terms with reference to s. 214 of the Civil Procedure Code.

Oldfield, J.—I concur.

Appeal allowed.

NOTES.

[This was approved in (1896) 19 All., 148.]

[8 All. 467]

The 26th May 1886.

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, AND MR. JUSTICE MAHMOOD.

Deoki Nandan.....Defendant

versus

Dhian Singh.....Plaintiff.*

Sir land—*Ex-proprietary tenant—Nature of the right of occupancy—Act XII of 1881 (N.-W. P. Rent Act), s. 7—Trees.*

In a suit for recovery of possession of zamindari property conveyed by a sale deed, including certain plots of land which were the defendant-vendor's *sir*, the lower Courts held with reference to s. 7 of the North-West Provinces Rent Act (XII of 1881), that the defendant was entitled to hold possession of the said plots as ex-proprietary tenant, but as it appeared that they had fruit and other trees upon them, the Courts awarded the plaintiff possession of these trees on the ground that the nature of an ex-proprietary tenures did not entitle the holder to resist a claim of this kind as to the trees upon the land forming the area of such tenure.

Held that this decision was erroneous, and that the plaintiff's claim to possession of the trees upon the plots in question must be dismissed.

Per MAHMOOD, J., that the principle of the maxim *cujus est solum ejus est usque ad coelum* was applicable to the case by way of analogy, and that an ex-proprietary tenant had all the rights and incidents assigned by jurisprudence to the ownership of land, subject only to the restriction imposed upon the occupancy-tenure by the statute which created it, and that hence he would be entitled to the trees on the land, and to use them as long as the tenure existed. *Bibee Sohondia v. Smith*, 12 B.L.R., 82, *Narendra Narain Roy Chowdhry v. Ishan Chundra Sen*, 13 B.L.R., 274, *Gopal Pandey v. [468] Parsotam Das*, I.L.R., 5 All., 121, *Goluck Ram v. Nuba Soonauree Dassee*, 21 W. R., 344, *Shaikh Mahomed Ali v. Bolakee Bhuggut*, W.R., 830, *Ram Baran Ram v. Satig Ram Singh*, I.L.R., 2 All. 896, and *Debi Prasad v. Har Dyal* I. L. R., 7 All., 691, referred to.

Also per MAHMOOD, J., that it would be impossible to give effect to the lower Courts' decrees without disturbing the ex-proprietary tenant's rights, for if the plaintiff were entitled to possession of the trees, he would be entitled to enter upon the land to get at the trees, because when the law gives a right, it must be understood to allow everything necessary to give that right effect.

THE plaintiff in this case sued the defendant for *inter alia* possession of three plots of garden land and the trees thereon situated in a village called Thawau. These plots were numbered in the village papers 1021, 1024, and 1039. He claimed by virtue of the purchase from the defendant, under a sale-deed, dated the 13th September 1883, of the defendant's proprietary rights in the village to the extent of an 8 gandas share, together with the trees, groves, and all the rights and interests thereto appertaining. The defence to the suit was that the land was the defendant's *sir*-land at the time of the sale to the plaintiff,

* Second Appeal No. 1682 of 1885, from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 12th June 1885, confirming a decree of Pandit Indar Narain, Munsif of Allahabad, dated the 5th November 1884.

and he was entitled to retain possession of it, as also of the trees, as an ex-proprietary tenant, under the provisions of s. 7 of the North-Western Provinces Rent Act (XII of 1881). The Court of First Instance (Munsif of Allahabad) held that plots Nos. 1021 and 1039 were the defendant's *sir*-land at the time of the sale, and that therefore he was entitled to the possession of these plots, as an ex-proprietary tenant, under the law mentioned above, but that the plaintiff was entitled to the possession of the trees, as the defendant had sold all the trees, and trees did not come within the operation of s. 7 of the Rent Act. The Court accordingly dismissed the plaintiff's claim for possession of lands Nos. 1021 and 1039, but directed that "the plaintiff should be put in possession of the trees."

The defendant appealed, and the Lower Appellate Court (District Judge of Allahabad) held that the defendant was not entitled to retain the trees, having sold them to the plaintiff.

The defendant preferred this second appeal on the ground that the land being *sir*, and being occupied by the trees in dispute, he was entitled to retain possession of such trees as long as they existed.

[469] Lala Jokhu Lal, for the Appellant.

Munshi Hanuman Prasad and Munshi Madho Prasad, for the Respondent.

Mahmood, J.—In this case I think it is necessary to recapitulate the essential facts in order to indicate the point of law which we are called upon to determine.

The defendant was the owner of a twelve-ganda share of the zamindari interests in a village. Out of that property he, on the 13th September 1883, executed a sale-deed as to an eight-ganda share, which he conveyed to the present plaintiff with all rights appertaining thereto, including *sir*-lands and *sayar* items, in consideration of Rs. 800. It appears, as stated by the plaintiff, that the latter, under the sale-deed, obtained possession on the 30th March 1884. It is alleged that after this the defendant ousted the plaintiff, this being the cause of the present suit. The object of the suit was the recovery of possession of the whole property conveyed by the deed, including three plots, Nos. 1021, 1026, and 1039, on the ground that these also were included in and covered by the deed.

The Court of First Instance framed two issues as to these plots in reference to a plea by the defendant to the effect that these plots were his *sir*, and that he was entitled, under s. 7 of the Rent Act, to hold them as an ex-proprietary tenant. The Court held that out of the three plots, Nos. 1021 and 1039 were found to be the defendant's *sir*-lands, and that, as such, the defendant was entitled to hold possession of them as an ex-proprietary tenant. With respect to the remainder, *i.e.*, the larger portion of the suit, the Court decreed the claim; but with respect to the two plots I have mentioned, the provisions of the statute prevailed, and the plaintiff was held not entitled to oust the defendant from possession. At the same time, as it appeared that these two plots had fruit and other trees upon them, the Court decreed the claim in such a manner as to award the plaintiff possession of those trees. The plaintiff does not appear to have appealed, but the defendant did so to the District Judge. The Lower Appellate Court has upheld the findings of the first Court upon grounds stated in the judgment, namely, that the nature of an ex-proprietary tenure [470] does not entitle the holder to resist a claim of this kind as to the trees on the land which forms the area of that tenure. The Lower Appellate Court, therefore, affirmed the first Court's decree, and hence this second appeal has been preferred on the ground thus stated in the memorandum of appeal:—
"The decision of the learned Judge is against the principle of ex-proprietary

tenancy-right, inasmuch as when the land in suit is *sir*, and is occupied by trees, the appellant had a right to retain possession of them while the trees exist." The case, as it has been argued, rests upon this single question, and my conclusion is that the contention has force and the appeal should prevail. It seems to me that the question in the case is one of first impression; that is to say, I am not aware of any decision of this or any other Court in which there is a specific ruling on the subject. I consider it my duty, therefore, to express my views as fully as may be necessary for the purpose of settling the law. In the first place, it is necessary to bear in mind the exact nature of the right of occupancy held by an ex-proprietary tenant in these Provinces. That right is regulated by s. 7 of the Rent Act, which provides as follows:—"Every person who may hereafter lose or part with his proprietary rights in any mahal, shall have a right of occupancy in the land held by him as *sir* in such mahal, at the date of such loss or parting, at a rent which shall be four annas in the rupee less than the prevailing rate payable by tenants-at-will for land of similar quality and with similar advantages. Persons having such rights of occupancy shall be called 'ex-proprietary tenants.'" Here then is a statement in clear terms of what are to be the rights of those who, having once been owners of a mahal in whole or in part, cease to be so; and the section ends by saying that these rights in their *sir*-lands are to be those which are enjoyed by occupancy-tenants. At this point I think it will be useful to trace the history of the occupancy-tenure in the Bengal Presidency. I may first refer to the judgment of PHEAR, J., in *Bibee Sohodwa v. Smith*, 12 B. L. R., 82, in which a question having arisen as to the nature of the occupancy-right, that learned Judge said:—"This right, resting upon legislation and custom alone, is not derived from the general proprietary right given to the zamindar by the Legislature, but is, as I [471] understand, in derogation of, and has the effect of cutting down and qualifying, that right. I may say that in my conception of the matter, the relation between the zamindar's right and the occupancy-ryot's right is pretty much the same as that which obtains between the right of ownership of land in England and the servitude or easement which is termed *profit à prendre*. It appears to me that the ryot's is the dominant and the zamindar's the servient right. Whatever the ryot has, the zamindar has all the rest which is necessary to complete ownership of the land, subject to the occupancy-ryot's right, and the right of the village, if any, to the occupation and cultivation of the soil, to whatever extent these rights may in any given case reach. When these rights are ascertained, there must remain to the zamindar all rights and privileges of ownership which are not inconsistent with or obstructive of them." These observations are fully applicable in principle and by way of analogy to the occupancy-rights existing in these Provinces. The next case I wish to refer to is the decision of the Full Bench of the Calcutta High Court in *Narendra Narain Roy Chowdhry v. Ishan Chandra Sen*, 13 B. L. R., 274, in which, though in some respects differing from the conclusions of PHEAR, J., in the case I have quoted, his *ratio decidendi*, and his views as to the nature of the occupancy-right in Bengal were generally adopted. These rulings are important, because the right of occupancy in these Provinces was created at the same time and by the same legislation as in Bengal. The next case is *Gopal Pandey v. Parsotam Das*, I.L.R., 5 All., 121. I refer to my judgment in that case, because I was in a minority of one, and my observations have not been summarized in the head-note of the report. After referring to the two cases cited above, I said (at p. 131) that "in the case of an occupancy-tenant the right which the Legislature has conferred upon him is such as subject to the limitation prescribed by the statute, prevails against all the world. The subject of the right is the land

held by the tenant, and whatever changes the ownership of that land may undergo, the occupancy-right subsists in, and goes with, the land."

Then, after referring to a ruling of the Sudder Board of Revenue, I went on to say—"I confess I am unable to take any such view. It seems to me to be based upon what, I cannot help feel-[472]ing, is a misconception of the nature of the occupancy-right. I have already endeavoured to show, by introducing a comparison between the occupancy-right of an Indian cultivator and the *emphyteusis* of the Romans, that the right, as now defined by the statute, is, subject to its own limitations, as much a real and subsisting right as any other kind of estate carved out of the full ownership of land." The rest of the judgment refers to other matters with which we are not now concerned. I still adhere to the views which I then expressed, and I incorporate them in my present judgment because, in dealing with questions of this kind, I understand that the Mufassal Courts suppose my judgment to have been dissented from, upon all points, by the other members of the Full Bench. My view, as I was not at that time aware, is also supported by the decision in *Goluck Ram v. Nuba Soonduree Dasse*, 21 W.R., 344, where the Judges again compared one kind of tenure in Bengal to the *emphyteusis* of Roman law. Again, there is the case of *Shaikh Muhomed Ali v. Bolakee Bhuggut*, 24 W.R., 830, in which the ratio of the judgment of MITTER, J., is in keeping with the view which I entertain, for it was there held that the trees were included in the lease relating to the land on which they stood. Again, I may refer to *Ram Baran Ram v. Salig Ram Singh*, I. L. R., 2 All., 896, where the Judges of this Court expressed the view that, by virtue of one incident of the occupancy-right, the trees acceded to the soil, and were liable to be dealt with by the occupancy-tenant, unless something happened to bring his tenure to an end.

No ruling upon the exact point here has been cited before us. The question after all depends mainly upon the interpretation to be placed upon the word "land" in s. 7 of the Rent Act. This is a word which has a very specific legal signification. In the first place, I refer to a passage on p. 420 of Maxwell's work on the "Interpretation of Statutes," where it is said:—"The word 'land' includes messuages, tenements and hereditaments, houses, and buildings of any tenure unless there are words to exclude houses and buildings, or to restrict the meaning to tenements of some particular tenure." In India, we have a definition of the expression "immoveable property" in s. 3 of the Transfer of Property Act, in which timber [473] is excluded from the notion of land—an interpretation which is special to the Act, and which would go to show, if anything, that the word "land" was of wider meaning than the framers of the Act intended should be attached to the term "immoveable property." In the Oudh Rent Act, s. 13, the word "land" is again defined very broadly. Again, s. 2, cl. 5 of the General Clauses Act, defines the term "immoveable property" in a manner which, though it tends to support my view, is not conclusive on the question. This being so, I think myself entitled to decide the question by reference to first principles. At p. 293 of Broom's "Legal Maxims," the following remarks occur:—"Not only has land in its legal specification an indefinite extent upwards, but in contemplation of law it extends also downwards, so that whatever is in a direct line between the surface of any land and the centre of the earth, belongs to the owner of the surface; and hence the word 'land,' which is *nomen generalissimum*, includes not only the face of the earth but everything under it or over it; and, therefore, if a man grants all his lands, he grants thereby all his mines, his woods, his waters, and his houses, as well as his fields and meadows." The author proceeds to say that this general meaning may be varied by special circumstances, such as the terms of a grant.

and, I suppose, equally by the provisions of a statute. The maxim is *cujus est solum ejus est usque ad cælum*. It appears to me that this maxim is based on sound principles, which are fully applicable to this country. •

I must not be understood as holding that the occupancy-rights of an ex-proprietary tenant is such as to render that maxim, which is of peculiar importance in England, fully applicable in a matter of this kind. All I say is that the principle underlying the maxim is applicable to a case like this by way of analogy; and I am prepared to hold that an ex-proprietary tenant has all the rights assigned by jurisprudence to the ownership of land, subject only to the restriction imposed upon the occupancy-tenure by the statute which creates it. The Rent Act, in s. 34, cl. (c) (1) provides that no tenant (and, *a fortiori*, no occupancy-tenant) is to be ejected from his holding for any act or omission "which is not detrimental to the land in his occupation, or inconsistent with the purpose for which the land was let." Then s. 93 (b) provides for [474] "suits to eject a tenant for any act or omission detrimental to the land in his occupation, or inconsistent with the purpose for which the land was let," implying that even a tenant who has an occupancy-right may be ejected. Further, s. 149 provides that "whenever a decree is given for the ejectment of a tenant, or the cancelment of his lease, on account of any act or omission by which the land in his occupation has been damaged or which is inconsistent with the purpose for which the land has been let, the Court may, if it think fit, allow him to repair such damage within one month from the date of the decree, or order him to pay such compensation within such time, or make such compensation within such time, or make such other order in the case as the Court thinks fit; and if such damage be so repaired or compensation so paid, or order obeyed, the decree shall not be executed." So that even if the occupancy-tenant perverts the land, he is not liable to ejectment if he gives compensation.

I refer to these provisions in order to show that the intention of the Legislature was to make the occupancy-tenure as near as possible to full ownership. In support of this view I may refer to my own judgment in *Debi Prasad v. Har Dyal*, I. L. R., 7 All., 691, in which I said that a mortgage of his holding by an occupancy-tenant was not in defeasance of the occupancy-tenure, the words of the statute referring not to dealings of this kind, but to physical misuse of the property. Subject to these restrictions, I hold that the occupancy-tenant practically enjoys the incidents of the ownership of the land, and if so he is entitled to the trees on the land, and to use them as long as the tenure exists.

In the present case, the defendant pretended to convey his *sir-land*. Under s. 9 of the Rent Act the sale would be void so far as it purported to operate in defeasance of the occupancy-right. Under the circumstances the Courts below were wrong in holding that the trees did not form part of his tenure, and in saying that possession might be given to the plaintiff-vendee as proprietor of the trees without disturbing the defendant's ex-proprietary tenure. It would be impossible to give effect to such decree without disturbing the ex-proprietary tenant's rights, because if the plaintiff was entitled to possession of the trees, he would be entitled to enter [475] upon the land to get at the trees, because when the law gives a right, it must be understood to allow everything necessary to give that right effect. Supposing the whole of this land were covered by trees, and possession of the trees was given to the plaintiff, the ex-proprietary tenure would practically be defeated.

For these reasons I would decree the appeal, and direct that the decrees of both Courts be so modified as to dismiss the plaintiff's claim, so far as it

seeks possession of the trees within the two plots Nos. 1021 and 1039, which have been found to be *sir*, and that costs in all Courts, as regards this particular part of the subject-matter, be allowed to the defendant-appellant in proportion to the amount involved. Beyond this I would not disturb the first Court's decree.

Straight, Offg. C. J.—I concur in my brother MAHMOOD's conclusions as to the proper order to be passed in this case.

NOTES.

[This was approved in (1907) 29 All., 484 ; see also (1888) 10 All., 159 ; (1894) 22 Cal., 742 ; (1898) 1 O. C., 231 ; (1899) 2 O. C., 283 ; (1891) 13 All., 571.]

[8 All. 475]

The 27th May, 1886.

PRESENT:

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, AND MR. JUSTICE MAHMOOD.

Mangu Lal and others.....Defendants

versus

Kandhai Lal and another.....Plaintiffs.*

*Act XV of 1877 (Limitation Act), s. 14—" Prosecuting "—" Good faith "—
" Other cause of a like nature "—Limitation Act, construction of.*

In October 1881, an account was struck between *K* and *M*, and a sum of Rs. 1,457 was agreed between them to be the correct balance then due by the latter to the former. Of this amount, a sum of Rs. 885 was paid. In March 1885, *K* sued *M* for the balance of Rs. 600 then due on the account stated. The plaintiff claimed the benefit of s. 14 of the Limitation Act (XV of 1877) as suspending the running of limitation during the pendency of a former suit which he had prosecuted against the defendant in 1884 and 1885, and which had been dismissed on the merits. That was a suit for the redemption of certain zamindari property on which the defendant held a mortgage, and the plaintiff claimed in that suit that the amount of the balance due by the defendant on the account stated should be deducted from the mortgage-money under an oral agreement entered into by the parties in October 1881.

Held, that the plaintiff could not be said to have formerly prosecuted his remedy in respect of the items now claimed in a Court which, for want of jurisdiction, or other cause of a like nature, was unable to entertain it ; that the provisions of s. 14 of the Limitation Act therefore were not applicable ; and that the suit was barred by limitation.

[476] *Per STRAIGHT, OFFG. C.J.*—The former suit was not founded upon the same cause of action as the present, inasmuch as it was founded upon the alleged oral agreement and not upon the account stated.

Per MAHMOOD, J.—The Courts of British India in applying Acts of Limitation are not bound by the rule established by a balance of authority in England, that statutes of this description must be construed strictly. On the contrary, such Acts where their language is ambiguous or indistinct, should receive a liberal interpretation, and be treated as "statutes of repose" and not as of a penal character or as imposing burdens. *Roddam v. Morley*,

* Second Appeal No. 1636 of 1885, from a decree of Mirza Abid Ali Khan, Subordinate Judge of Shahjahanpur, dated the 17th June 1885, reversing a decree of Rai Bahal Rai, Munsif of Shahjahanpur, dated the 18th April 1885.

1 De G. and J. 1: 26 L. J., Ch., 438; *Syed Ali Saib v. Sri Raja Sanyasira Peddabaliyra Simhulu Bahadur*, 3 M. H. C. Rep., 5; *Empress v. Kola Lalang*, I.L.R., 8 Cal., 214; *Bell v. Morrison*, 7 Peters (U.S.) R., 360; *Shah Keramat Hossein v. Golab Koonwur*, 3 W.R., 101 and *Mohammad Buhadoor Khan v. The Collector of Bareilly*, L.R., 1 Ind.Ap., 167, referred to.

The facts of the case are stated in the judgments of the Court.

Munshis *Hanuman Prasad* and *Madho Prasad*, for the Appellants.

Mr. *Abdul Majid* and Pandit *Nand Lal*, for the Respondents.

Straight, Offg. C.J.—This appeal relates to a suit brought by the plaintiffs-respondents under the following circumstances:—The plaintiffs, alleging that on the 12th October 1881, a certain account was struck between them and the defendants, seek to recover the balance of that account, on account of which a certain sum of Rs. 885-15 was then paid, and the cause of action is stated to have arisen on the 24th February 1885. It appears that for some time before the 12th October 1881, there were pecuniary relations between the parties, the plaintiffs having from time to time advanced moneys to the defendants, which were duly entered in the books of the former. On the 12th October 1881, those accounts were, as I have said, made up, and a balance of Rs. 1,457 was found due by the defendants to the plaintiffs, and it was agreed between them that this was the correct balance then due. Rs. 885-15 were paid of this amount, and the debt was reduced in round figures to about Rs. 600, the amount, with interest, which the plaintiffs in this suit seek to recover as upon an account stated. I have remarked that in the plaint there is an allegation that the cause of action arose upon the 24th February 1885, and to explain how this date was arrived at, it is necessary to refer to certain matters in connection with a former suit between the same parties in 1885. It would seem that as far back as 1873, the plaintiffs became the [477] purchasers of the equity of redemption in a zamindari estate, which had been mortgaged to the defendants, and on the 15th November 1884, a suit was brought by the plaintiffs, as purchasers of that equity, against the defendants for redemption of the mortgaged property. In that suit the plaintiffs put their case in this way; that is to say, after stating the amount of the mortgage-debt due from the original mortgagor to the defendants-mortgagees to be Rs. 1,226, they alleged that by an oral arrangement, which had been come to between the defendants and the plaintiffs on the 4th December 1881, it had been settled that whenever the latter should claim redemption of the property, they should be allowed to take credit to the extent of Rs. 885, the balance then due from the defendants on the account stated on the 24th October 1881. I need scarcely point out that this was a very peculiar form in which to present a suit for redemption, though I pronounce no opinion as to its legality; but what it came to was this, that because the defendants owed the plaintiffs the latter sum, they were entitled to redeem the property on paying the difference between Rs. 885 and Rs. 1,226, the amount of the mortgage. The Subordinate Judge decided that suit against the plaintiffs and seems to have given good reasons for his conclusions, their effect being that the agreement set up by the plaintiffs was found not to have been established. Their suit was therefore dismissed to the extent that they were not allowed to redeem except on payment of the whole sum of Rs. 1,226 due upon the mortgage. This dismissal took place on the 24th February 1885. This is how we get at the date which the plaintiff assigns as that on which his present cause of action accrued. That is to say, he treats the Subordinate Judge's dismissal of his claim to be allowed the amount demanded in the former suit as constituting his present right to sue. This, however, is not the true way of looking at the matter; and the real and only plea with which we are now concerned is that of limitation;

because, taking as the starting-point the 12th of October 1881, when the balance of Rs. 885 was left due by payment on account—unless limitation is saved by some rule under the statute—this suit, which was instituted on the 12th March 1885, is barred. The question then is whether by s. 14 of the Limitation Act the running of time was suspended from the date the former suit was instituted to the date of its decision, namely, the 24th February 1885. If we are entitled to make this deduction for him, then the plaintiff is within time.

The contention on behalf of the defendants-appellants before us is, that time is not saved under s. 14 of the Limitation Act, and that the plaintiffs' claim is barred. I have therefore to see whether the provisions of s. 14 are applicable. Reading s. 14 of the Act, the first thing I have to ascertain is whether the time the plaintiffs ask to have excluded, was occupied by them in prosecuting with due diligence another civil proceeding against the defendant. As to this I see no reason to doubt that the plaintiff prosecuted the former suit of 1884 with due diligence and in good faith. It was "another civil proceeding," and the question then, according to the further requirement of s. 14, is, was it founded upon the same cause of action as the present suit? I am of opinion that it was not. That part of the plaintiffs' claim in the former suit which sought to have the Rs. 885 treated as an amount paid by the plaintiffs to the defendants, rested on an agreement alleged to have been made on the 12th October 1881; and it was in virtue of such an agreement that the plaintiffs claimed to be entitled to deduct so much from the redemption-money they would otherwise have had to pay, and not upon the strength of the account stated. Further, the Court which tried the former suit was not unable to entertain it by reason of a defect of jurisdiction. On the contrary, the Court was competent to entertain and did entertain it, and came to a decision adverse to the plaintiffs. Hence it cannot be argued that the case was disposed of for a defect of jurisdiction, or for any cause *cjusdem generis*. It seems to me that it cannot correctly be said that in the former suit the plaintiffs were prosecuting a civil proceeding against the defendants on the same cause of action as that on which they rely in the present suit; and, in my opinion, the rule of s. 14 has no application to the present case. The appeal must be allowed with costs, and the order of the first Court being restored, the suit is dismissed with costs.

Mahmood, J.—The facts of the case, so far as they are necessary for the disposal of this appeal, are these :—

The defendants held a mortgage charged upon certain zamindari interest in mauza Ikhtiarpur, which is said to have amounted [479] to Rs. 1,226, in lieu whereof they were in possession of the mortgaged property. Some time about the year 1873, one Ram Prasad, ancestor of the plaintiffs, purchased the equity of redemption from the original mortgagor, subject to the defendants' lien. It is then stated by the plaintiffs that in respect of certain monetary dealings the defendants were indebted to them for a sum of Rs. 1,457, which, after a statement of account, was found as the balance and signed and acknowledged by the defendants on the 4th December 1881, when they paid Rs. 885-15 towards the debt, thus reducing the balance to about Rs. 600. Subsequently, on the 15th November 1884, the plaintiffs instituted a suit against the defendants for redemption of their zamindari interests in mauza Ikhtiarpur, and in that suit they alleged that the amount of the balance due by the defendants to them should be deducted from the mortgage-money under an agreement entered into by the parties for allowing such deduction. The Court which dealt with that suit did not, however, allow such deduction, and in a judgment

dated the 24th February 1885, held that the alleged agreement was not proved upon the evidence, and the finding appears to have become final.

The present suit was commenced by the same plaintiffs against the same defendants for recovery of the sum due by the latter on the alleged statement of account dated the 4th December 1881, which has been found to be the wrong date—the right date being the 9th Kuar Sudi, 1289 fasli, corresponding to the 12th October 1881. The suit was instituted on the 13th March 1885, and there is no question that it would be barred by three years' limitation under art. 64, sch. ii of the Limitation Act (XV of 1877), unless the period of the pendency of the former suit is deducted in computing the limitation under s. 14 of the Act. The Court of First Instance dismissed the suit as barred by limitation, though it also went into the merits of the suit. The Lower Appellate Court on appeal has reversed the decree, holding the suit entitled to the benefit of s. 14 of the Limitation Act, and finding the merits in favour of the plaintiffs.

The learned Munshi, who has appeared on behalf of the appellants, has argued the case upon the solitary ground that the suit [480] was barred by limitation, not being, under the circumstances, entitled to the benefit of s. 14 of the Limitation Act. I am of opinion that the contention urged before us by the learned Munshi on behalf of the appellants has force, and must prevail. This case, indeed, in the manner in which it has been dealt with by the Lower Appellate Court, affords a good illustration of what has so often come within my notice, namely, that the Mufassal Courts are inclined to regard statutes of limitation as operating in derogation of the rights of the parties by barring investigation of the merits; and in this light they are inclined to place as strict a construction against the operation of the statute as if it belongs to the class of penal statutes encroaching on the rights of, or imposing burdens upon, the subject. And I will take this opportunity of giving expression to views which I have long entertained upon the subject; not only because the present case calls for such a course, but also because some uncertainty seems to exist as to the exact manner in which statutes such as our own Limitation Act should be interpreted.

Mr. Maxwell, in his well-known work on the "*Interpretation of Statutes*," after referring to statutes which encroach on rights, goes on to say (p. 348):—"It would seem statutes of limitation are to be construed strictly. There may not necessarily be any moral wrong in setting up the defence of lapse of time, but it is the creature of positive law, and is not to be extended to cases which are not strictly within the enactment, while provisions which give exceptions to the operation of such enactments are to be construed liberally." This view of the law is enunciated by the author on the authority of a judgment of Lord CRANWORTH in *Roddam v. Morley*, 1 De G. and J., 1: 26 L. J., Ch., 438, and I shall presently have to express my opinion about the rule, because I cannot help feeling that if the rule of liberal interpretation is to be applied to s. 14 of our Limitation Act, I should be inclined to agree with the Lower Appellate Court in holding that the plaintiffs are entitled to the benefit of that section, it being, in the words of Mr. Maxwell, a "provision which gives exception to the operation of such enactments" as our Law of Limitation. But is the rule as stated by Mr. Maxwell free from doubt? We have the following passage in another authority upon the construction of Statute [481] Law—(Wilberforce, p. 232):—"The statutes of limitation have given rise to some conflict of opinion. It is said by HEATH, J., that these statutes always receive a strict construction from the Courts, and the same view is taken by Mr. Sedgwick. On the other hand, DALLAS, C. J., expresses himself thus with regard to the 21 Jac. I,

c. 16.—“I cannot agree in the position that statutes of this description ought to receive a strict construction; on the contrary, I think they ought to receive a beneficial construction with a view to the mischief intended to be remedied; and this is pointed out by the very first words of the statute, which are ‘for quieting of men’s estates and avoiding of suits.’ It is therefore that this statute and all others of this description are termed by Lord KENYON ‘statutes of repose.’ The same phrase has been employed and similar opinions have been expressed by the Courts of the United States.” Now, whilst there is a conflict of decisions in the English Courts, as to whether the statutes of limitation are to be construed *liberally* or *strictly* in the sense in which these words are technically understood, we find a learned judge and jurist of such high rank as HOLLOWAY, J., saying from the Bench of an Indian High Court in *Syed Ali Saib v. Sri Raja Sanyasiraz Peddabalyra Simhulu Bahadur*, 3 Mad. H. C. Rep., 5, with reference to the matter:—“For myself I wholly repudiate interpretations, strict or liberal, according to the object-matter of the law. A barbarous code of penal laws was the parent of these doctrines, and the reason disappearing, we see by no doubtful symptoms that the doctrine is disappearing too.” These observations are no doubt original and deserve the highest respect; but with all due deference to the eminent authority from which they proceed, I am unable to accept them, partly because they contradict the almost universally recognised rules of the interpretation of statutes, and partly because our Indian Statute Book is still full of legislative enactments which require an ample application of the principle of interpretation which HOLLOWAY, J., repudiated. Moreover, that principle constitutes no infringement of the general rule of placing the ordinary grammatical construction upon the language of statutes, but comes into operation only when there is an ambiguity or indistinctness of meaning; for I suppose no one would maintain that where the language of the statute itself is [482] express and clear, effect is not to be given to the words which indicate the intention of the Legislature. And I am prepared to accept for the interpretation of our Indian enactments the language used by POLLOCK, C.B., with reference to the distinction which HOLLOWAY J., repudiated, that “it is unquestionably right that the distinction should not be altogether erased from the judicial mind”—a distinction which was recognised by the Calcutta High Court in *Empress v. Kola Lalang* I. L. R., 8 Cal., 214, in interpreting a penal statute.

The question which still remains to be disposed of is whether, in this state of authority, our Limitation Act should be subjected to the rule of strict construction against its operation; and I have already said that, according to my view, the application of s. 14 of the Act to this case depends upon the decision of the question which I have just indicated. And because the matter is of such a consequence, I may say that I feel myself justified, as an Indian Judge sitting here, to resort to foreign authorities for the purpose of supporting my views upon a question in regard to which the Indian common law is silent, and which has not yet been made the subject of legislation. Under these circumstances it is necessary for me to refer to American authorities, and in the first place to a passage in Angell on the *Law of Limitation*, p. 17, and then to the *dictum* of Mr. Justice STORY in *Bell v. Morrison* (7 Peters (U.S.) R. 360), and another of Mr. Justice M’LEAN, both of which are referred to at p. 20 (4th ed.) of the same work:—“A statute of limitation,” says Mr. Justice STORY, “instead of being viewed in an unfavourable light as an unjust and discreditable defence, should have received such support from Courts of Justice as would have made it, what it was intended emphatically to be a *statute of repose*.” Mr. Justice M’LEAN in giving the opinion of the Supreme Court of the

United States in 1830, says:—"Of late years the Courts in England and in this country have considered statutes of limitations more favourably than formerly. They rest upon sound policy, and tend to the peace and welfare of society. The Courts do not now, unless compelled by the force of the former decisions, give a strained construction, to evade the effect of those statutes." Again, there is the authority of Story whose works are universally referred to with respect in English Courts. At s. 576 of his *Conflict of Laws* the following passage occurs:—"In regard to statutes of limitation or prescription of suits and lapse of time, there is no doubt that they are questions strictly affecting the remedy, and not questions upon the merits. They go *ad litem ordinationem*, and not *ad litem decisionem*, in a just juridical sense. The object of them is to fix certain periods within which all suits shall be brought in the Courts of a State, whether they are brought by or against subjects or by or against foreigners. And there can be no just reason and no sound policy in allowing higher or more extensive privileges to foreigners than are allowed to subjects. Laws, thus limiting suits, are founded in the noblest policy. They are statutes of repose, to quiet titles, to suppress frauds, and to supply the deficiency of proofs arising from the ambiguity and obscurity or the antiquity of transactions. They proceed upon the presumption that claims are extinguished, or ought to be held extinguished whenever they are not litigated in the proper *forum* within the prescribed period. They take away all solid grounds of complaint, because they rest on the negligence or neglect of the party himself. They quicken diligence by making it in some measure equivalent to right. They discourage litigation by bringing in one common receptacle all the accumulations of past times which are unexplained, and have now, from lapse of time, become inapplicable. It has been said by John Voet with singular felicity that controversies are limited to a fixed period of time, lest they should be immortal while men are mortal:—*Ne autem lites immortales essent, dum litigantes mortales sunt.*" I adopt every word of the rules of substantial justice here laid down as distinguished from merely technical rules of procedure.

Applying these principles, I have no doubt, although the view is somewhat opposed to the doctrine recognised in England, and partly countenanced in this country, in the case of *Shah Karamut Hossein v. Golub Koonwur*, 3 W. R., 401, that in India, in interpreting Acts of Limitation, we are not bound by the rules established by a balance of authority in England. I may refer to the express provisions of s. 1 of the present Act, which place it beyond the power of the judge, as well as beyond that of the defendant, to ignore or waive [484] the plea of limitation. The policy of that section is different from that adopted in the English law, for in England the law of limitation comes under the category of those rules, whether created by the statutes or by the common law, which exist for the benefit of parties, and which, like the plea of minority, may be waived by the person entitled to the benefit. I am not prepared to accept this view as applicable to India. According to our law, the rule of limitation cannot be waived. If this is so, the Limitation Acts are not to be construed as imposing burdens. They are emphatically "*statutes of repose*," especially where, as in India, the absence of effective registration laws, as to many important incidents (such as births, marriages, deaths, and adoptions), would make the preservation of testimony and the ascertainment of facts in many cases next to impossible. In the case of *Mohummud Buhadoor Khan*, L. R., 1 Ind. Ap., 167, the Privy Council would not allow any exception to the general Law of Limitation to operate in favour of a minor at the time whose property had been confiscated during the mutiny. This shows that the interpretation to be placed on such laws must be strict in favour of their operation.

How then is s. 14 of the Limitation Act to be understood? The original section on the subject was s. 14 of the Act of 1859, which ran thus:—"In computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant or some person whom he represents, *bona fide* and with due diligence in any Court of Judicature, which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which, on appeal, shall have been annulled for any such cause, including the time during which such appeal, if any, has been pending, shall be excluded from such computation." Here the most important expression is "*same cause of action*" and also "*defect of jurisdiction or other cause*." These words, however, are ambiguous. The section was reproduced in s. 15 of the Limitation Act of 1871; and while its language was more or less preserved, the expression "*same cause of action*" was changed to "*same right to sue*." The expression "*other cause*" [486] was changed to "*other cause of a like nature*," and the words "*is unable to try it*" were added. This phraseology, however, still created considerable doubt, which was manifested in a number of cases, and finally, s. 14 of the present Act again reverts to the old expression "*same cause of action*" instead of "*same right to sue*," and changes "*is unable to try it*" into "*is unable to entertain it*." I venture to say that if ever there was an ambiguous clause it is this. In the first place, "*cause of action*" is a phrase which has given rise to more difficulty than almost any other. It may mean the title *plus* the injury, or, as it is often used in England, only *injuria* or the violation of right. Then the words "*unable to entertain it*" are almost equally vague, and the Legislature might well have added illustrations to make them definite. If I were to interpret s. 14 in a liberal sense, I should hold that the present claim refers to the same cause of action, *i.e.*, relates to the same dispute as the former litigation. This, however, it is not necessary for me to rule. But I base my judgment upon the words "*good faith*" and "*other cause of a like nature*." I am of opinion that the former litigation, so far as it related to the item now in suit, was not conducted in *good faith*, because I interpret that expression to mean with due care and caution; and if the plaintiffs had taken proper care, they might easily have known that they could not deduct from the mortgage-money the sum due upon a totally different account. Moreover, in that litigation it was found that the agreement set up by the plaintiffs was not proved. In the second place, having chosen to take the course they did, the plaintiffs were not "*prosecuting a claim*" as those words are used in s. 14. "*Prosecuting*" does not mean appropriating payments or accounts, as in this case, but endeavouring to recover by legal proceedings money or other rights which a defendant declines to recognise. Again, the plaintiffs having chosen to bring those items into litigation in that way, the Court in that case did deal with it as a matter subject to its jurisdiction. There is consequently no question as to "*any cause of a like nature*" as contemplated by s. 14.

For these reasons I am of opinion that the plaintiff is not entitled to the benefit of s. 14. I may before concluding refer to the judgment of PEACOCK, C.J., in *Chunder Madhub Chuckerbutty v. [486] Bissessurce Deben*, 6 W. R., 184, where he shows that no defect arising from the plaintiff's ignorance of law constitutes a *bona fide* delay.

Again, my view is supported by the decision of the Calcutta High Court in *Rajendro Kishore Singh v. Bulaky Mahton*, I. L. R., 7 Cal., 367, and of the Bombay High Court in *Pirjade v. Pirjade*, I. L. R., 6 Bom., 681. The nearest authority is perhaps *Hafizunnessa Khaton v. Bhyrab Chunder Das*, 13 Cal.,

L.R., 214, where it was held that the pleading of a set-off by a defendant was not prosecuting a remedy within the meaning of s. 14 of the Limitation Act. I need only add that a plea of set-off is nothing but a plea to bar the plaintiff's decree *pro tanto*, unless, indeed, the set-off exceeds the amount claimed in *value*. In the present case there was no such set-off pleaded by a defendant, and the plaintiff cannot be said to have formerly prosecuted his remedy in respect of the items now claimed in a Court, which, for want of jurisdiction or cause of a like nature, was unable to entertain the claim.

For these reasons I am of opinion that the first Court was right in dismissing the suit as barred by limitation, and I concur in the order proposed by the learned Chief Justice.

Appeal allowed.

NOTES.

[The Rules of Limitation ought to receive a liberal construction as statutes of repose :— (1886) 9 All., 11 ; (1888) 10 All., 587 ; (1889) 12 All., 79.]

[8 All. 486]

The 31st May, 1886.

PRESENT :

**MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, AND
MR. JUSTICE MAHMOOD.**

Bishen Dayal and others Defendants

versus

Udit Narain Plaintiff.*

*Mortgage—Words creating simple mortgage—Bond—Interest after due date—
Measure of damages.*

A suit was brought in 1884 upon a hypothecation-bond executed in April 1875, in which the obligors agreed to repay the amount borrowed with interest at Re. 1-8 per cent. per mensem in June of the same year. There was no provision as to payment of interest after due date. The bond specified certain property as belonging to the obligors and contained the following provision :—"Our rights and property in the aforesaid taluka Rajapur shall remain pledged and hypothecated for this debt." Interest was claimed in the suit at the rate of Re. 1-8 per cent. per mensem as well for the period after as for the period before the due date of the bond.

Held, that the terms of the bond by which the property was hypothecated were sufficiently clear and explicit to constitute a legal hypothecation of the [487] shares and interests of which it recited at the opening that the obligors were owners.

Held, that although cases might arise in which a jury or a judge might refuse to give a plaintiff any interest, i e., damages, *post diem*, at all, the circumstances would have to be of a very exceptional character, as, for example, where the interest contracted to be paid before due date was exorbitant and extortionate. *Cooke v. Fowler*, L. R., 7 H. L., 27, referred to.

Held, that in determining the amount of damages the question whether the plaintiff has unnecessarily delayed bringing his suit, and so allowed his claim to mount up to a sum far

* Second Appeal No. 876 of 1885, from a decree of G. J. Nicholls, Esq., District Judge of Ghazipur, dated the 17th February 1885, reversing a decree of Pandit Kashi Narain, Subordinate Judge of Ghazipur, dated the 20th December 1884.

in excess of the principal money originally advanced, may be taken into consideration as a reason for not making the original rate of interest the basis on which to assess such damages. *Juala Prasad v. Khuman Singh*, I. L. R., 2 All., 617, referred to.

The principle upon which the obligee of the bond may recover interest after due date does not rest upon any implied contract by the obligor to pay such interest, but proceeds upon the breach of contract which has taken place by reason of the non payment on due date, and the reasonable amount to which the obligee is entitled for such breach. The decision of the question by what standard the damages should be measured must depend in each case upon its special circumstances.

The facts of this case are stated in the **judgment** of the Court.

Mr. J. E. Howard, for the Appellants.

Mr. W. M. Colvin and Mr. Habibullah, for the Respondent.

Straight, Offg. C.J.—This is a suit brought upon a hypothecation-bond of the 27th April 1875, for Rs. 462, executed by Nihang Rai, defendant, and Digambar Rai, his brother, in favour of the plaintiff. The amount of the bond, with interest at Re. 1-8 per cent. per mensem, was to be repaid on the 18th June 1875.

The claim of the plaintiff is for Rs. 462, principal, and Rs. 794-8-6, interest to date of suit,—in all for Rs. 1,256-8-6. The first set of defendants consists of Nihang Rai, one of the obligors, and his son Har Narain Rai, Bishen Dayal Rai, son of Digambar Rai, deceased, and his sons Lachmi Narain Rai, Jang Bahadur Rai, and Mahesh Narain Rai, Kali Charan Rai, also son of Digambar, and his son Lal Bahadur Rai.

The second set of defendants are alienees of the property sought to be brought to sale, but they are not concerned in the appeal, and it is unnecessary to set out their names. I should add, that of the first set of defendants Har Narain Rai, Jang Bahadur [488] Rai, Mahesh Narain Rai, Lal Bahadur Rai, being minors, are represented by Lachmi Narain Rai as guardian *ad litem*. The defendants Bishen Dayal Rai, Kali Charan Rai, and Nihang Rai, pleaded, among other matters, that the consideration of the bond was not paid, that the claim is barred by limitation, and that the plaintiff is not entitled to interest after the due date of the bond at Re. 1-8 per cent. per mensem, because he has allowed it to accumulate owing to his own *laches*, in that he took no proceedings upon the bond until the month of November 1884. Lachmi Narain Rai, for himself and the minor defendants, pleaded that the bond was not executed by Digambar Rai and Nihang Rai to raise money for the necessary expenses of the joint family, of which they and these defendants and their fathers were members; that they, therefore, are not liable to have their shares in the joint property sold; that all that could be sold would be the share and interest of Digambar Rai and Nihang Rai; and further, that the plaintiff cannot, for the reason urged by the other defendants, recover interest at Re. 1-8 per cent per mensem. With regard to the pleas put forward by the other set of defendants, it is, for the reasons I have already given, unnecessary to deal. It will be convenient here to state that among the issues fixed by the first Court was one in the following terms:—"For what necessity was the money taken? Were the heirs of the executants in any way benefited thereby?" The Subordinate Judge who tried the case as the Court of First Instance, being of opinion that the payment of consideration of the bond in suit was not satisfactorily established, dismissed the plaintiff's claim. From this decision an appeal was preferred to the Judge, who, being of a contrary opinion upon that point, and without reference to any of the other questions raised by the defendants, reversed the decree of the first Court and decreed the plaintiff's claim in full. It is from this decree of the Judge that the appeal before us has been preferred, and the pleas that

were urged at the hearing were, to shortly state them, as follows:—*First*, that the terms of the bond by which the property was hypothecated were of so general a character that they did not constitute a legal hypothecation; *secondly*, that the plaintiff was not entitled to any interest after due date; *thirdly*, that in advertence to the plea raised by Lachmi Narain [489] Rai, for himself and the minor defendants, and to the issue fixed thereon by the first Court, the Judge should have tried the question whether the money obtained under the bond was used for family purposes. It was further urged, but no specific plea in appeal was taken to that effect, that as the plaintiff had allowed so long a period of time to elapse from the due date of the bond before bringing his suit, he was not entitled to interest, *post diem*, at the rate mentioned in the bond. With regard to the first of the above contentions, it does not appear to me to have any force. It seems to me that the passage in the bond—“Our rights and property in the aforesaid taluka of Rajapur shall remain pledged and hypothecated for this debt”—is sufficiently clear and explicit to constitute and create a charge upon the shares and interests of which it is recited at the opening of the instrument that the obligors are the owners. The first plea, therefore, in my opinion, fails. The contention set up by the second plea, which goes the length of asserting that the plaintiff is entitled to no interest at all for the use of his money, *post diem*, places the position of the defendants too high. It has been settled now by the highest authority in *Cooke v. Fowler*, L. R., 7 H. L., 27, that interest may be claimed after due date, but that such claim is in the nature of one for damages; and further, in the above case it was also ruled by the then Lord CHANCELLOR, Earl CAIRNS, to the effect that, where parties agree for a certain rate of interest, up to the day of payment the same rate may be, though not necessarily, adopted in assessing the subsequent damages for non-payment, such rate being one that might be fairly presumed to afford a criterion of what the parties valued the use of the money at. With regard to the first of these propositions and to the contention of the plaintiff, I am not prepared to say that cases might not arise in which a jury or a judge might refuse to give a plaintiff any interest, *id est* damages, save a nominal amount, but the circumstances would have to be of a very exceptional character; as, for example, where the interest contracted to be paid before due date was exorbitant and extortionate. As to the second proposition, I think that in determining the amount of damages, the question whether the plaintiff has unnecessarily delayed bringing his suit, and so allowed [490] his claim to mount up to a sum far in excess of the principal money originally advanced, may be taken into consideration as a reason for not making the original rate of interest as the basis on which to assess such damages. I have already expressed a view to this effect in a case which is relied on by the defendants—*Juala Prasad v. Khuman Singh*, I. L. R., 2 All., 617. For it is to be borne in mind that the principle upon which the obligee of the bond may recover interest after due date, does not rest upon any implied contract by the obligor to pay such interest, but proceeds upon the breach of contract which has taken place by reason of the non-payment on due date, and the reasonable amount to which the obligee is entitled for such breach. It therefore becomes a question by what standard the damages should be measured, and it is obviously impossible upon such a matter to lay down any general rule for guidance, as the decision of the question must in each case turn upon its own special circumstances. In the present case, the original loan of Rs. 462 was made for a very short period, and it might well be that for this short period and for pressing reasons the obligors were willing to pay at the rate of 18 per cent. per annum. But it does not necessarily follow at all that they were willing to continue the loan at that rate, or that the use of the money over a protracted

period of time was of the same value as for the shorter interval. Nor, under ordinary circumstances, could the obligee have reasonably looked to place his money out for a term of years at more than one rupee per cent. per mensem. Now, it is obvious that all these matters were such as should have been considered by the Judge before determining the amount to which the plaintiff was entitled. It is clear from the terms of the bond of the 27th April 1875, that the provision as to payment of interest at Rs. 1-8 per mensem had reference only to the period up to date of payment, and there was nothing in them from which any contract could be implied to pay interest, *post diem*, at the contract rate. The Judge below has, in fact, never considered or tried this part of the case, and it will be necessary to remand and issue to him for that purpose. To the extent I have above indicated, the second plea, taken in conjunction with the further plea which, as I have stated, was orally urged at the hearing, must prevail.

In reference to the third plea, the matter raised by it altogether escaped the attention of the Judge, and he has held all the first set of defendants indiscriminately and indistinguishably liable, without first determining the circumstances under which the loan was taken by Digambar Rai and Nihang Rai, and whether it was of a character and nature in respect of which those two persons, being the managing members of the joint family, could bind the other members. Moreover, there is nothing to show what the ages are of the minor defendants, and whether all of them were in existence at the time the bond of 1875 was made. Of course, those of them who were not born at that time would have no right to resist the plaintiff's claim. The third plea therefore must, I think, succeed.

Looking at the case, it appears to me that the most convenient and satisfactory course to adopt in regard to it will be to remand the following issues, under s. 566 of the Civil Procedure Code, to the Lower Appellate Court for findings:—

1. Under what circumstances, and for what purposes, was the Rs. 462 borrowed by Nihang Rai and Digambar Rai on the 27th April 1875, and in what character did they borrow it, in what way was the money applied, and did Lachmi Narain Rai and the minor defendants benefit by its expenditure?

In determining this issue the Judge will necessarily have to find which of, if not all, the minor defendants were alive at the date of the loan.

2. In advertence to the remarks made by me in dealing with the second plea, to what amount in the shape of damages is the plaintiff entitled for the use of his money between the due date and the date of the institution of this suit?

The findings, when recorded, will be returned into this Court, and ten days will be allowed for objections from a date to be fixed by the Registrar.

Mahmood, J.—I concur.

Issues remitted.

NOTES.

[As regards *post diem* interest, this was followed in (1891) 13 All. 930; (1898) 8 A.W.N., 320. See also (1886) 9 All., 158; (1889) 11 All., 416; (1895) 17 All., 581:—In Dr Rash Behrai Ghosh's *Mortgages*, vol. I (1911), IV Edu., p. 505, there is a criticism of the *ratio decidendi* of these decisions.

As regards the construction of a document of hypothecation, see also (1890) 12 All., 175.]

[492] *The 21st June, 1886.*

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Tarsi Ram.....Decree-holder

versus

Man Singh and others.....Judgment-debtors.*

*Execution of decree—Adjudication that execution is barred by limitation—**Finality of order—Civil Procedure Code, s. 206—Amendment of decree—**Act XV of 1877 (Limitation Act), sch. ii, Nos. 178, 179.*

An application to execute a decree passed in April 1880, was made on the 19th February 1884, and rejected on the 26th March 1884, as being beyond time. This order was upheld on appeal in March 1885. While the appeal was pending the decree-holder in May 1884, applied to the Court of First Instance to amend the decree under s. 206 of the Civil Procedure Code, and in December 1884, the application was granted. In April 1885, an application was made for execution of the amended decree, the decree-holder contending that limitation should be calculated from the date of the amendment, and that art. 178 † of the Limitation Act (XV of 1877) applied to the case.

Held that No. 179 and not No. 178 was applicable, that the order rejecting the application of the 19th February 1884, became final on being upheld on appeal, that the amendment could not revive the decree or furnish a fresh starting point of limitation, and that the application was therefore time-barred. *Mungul Pershad v. Grija Kant Lahiri*, I. L. R., 8 Cal., 51; L. R., Ind. Ap., 123 and *Ram Kirpal v. Rup Kuari*, I. L. R., 6 All., 269; L. R., 11 Ind. Ap., 37, referred to.

Observations by MAHMOOD, J., on the amendment of decrees and s. 206 of the Civil Procedure Code.

THE decree, of which execution was sought in this case, was dated the 2nd April 1880. An application to execute the decree made on the 19th February 1884, was refused on the 26th March 1884, on the ground that it had not been made within the time allowed by law. The decree-holder appealed from this order. While the appeal was pending, he applied to the Court which passed the decree to amend it under s. 206 of the Civil Procedure Code. This application was granted on the 6th December 1884. On the 25th March 1885, the appeal was dismissed.

On the 2nd April 1885, the decree-holder again applied for execution. The Court of First Instance refused the application and its order was affirmed on appeal by the decree-holder. It was contended before the Lower Appellate

* Second Appeal No. 13 of 1886, from an order of W. T. Martin, Esq., District Judge of Aligarh, dated the 15th September 1885, affirming an order of Lala Ganga Prasad, Munshif of Koil, dated the 11th July 1885.

† [Art. 178 :—

Description of Application.	Period of limitation.	Time from which period begins* to run.
Applications for which no period of limitation is provided elsewhere in this schedule, or by the Code of Civil Procedure section 230.	Three years.	When the right to apply accrues.]

Court, on behalf of the decree-holder, that limitation should be computed from the date of the [493] amendment of the decree, the article of the Limitation Act applying being No. 178.

• The decree-holder, in second appeal, raised the same contention.

• Mr. *Shiva Nath Sinha*, for the Appellant.

Babu Jogindro Nath Chaudhri, for the Respondents.

• **Oldfield, J.**—The only ground taken in the memorandum of appeal is, that the application is one to which art. 178, and not 179, Limitation Act, applies; but this is not so.

The application is to execute a decree, dated the 2nd April 1880, and is governed by art. 179. On the 19th February 1884, the decree-holder applied to execute this decree, and it was held to be then barred by limitation.

He subsequently got the Court to amend the decree under s. 206, Civil Procedure Code, and now seeks to execute it as amended; but his decree had been held by an order to be barred by limitation before the amendment, and that order has become final in the matter of executing the decree.

This appeal is dismissed with costs.

Mahmood, J.—I am of the same opinion. The decree sought to be executed was passed on the 2nd April 1880, and was put into execution by an application dated the 19th February 1884; but execution was disallowed by an order dated the 26th March 1884, on the ground that it was barred by limitation, and that order was upheld by the Court of Appeal on the 25th March 1885. The adjudication thus became conclusive and final within the principle of the rulings of the Privy Council in *Mungul Pershad v. Grija Kant Lahiri*, I. L. R., 8 Cal., 51; I. R., 8 Ind. Ap., 123, and *Ram Kirpal v. Rup Kuari*, I. L. R., 6 All., 269; I. R., 11 Ind. Ap., 37. But in the meantime the appellant-decree-holder, during the pendency of his appeal, made an application, on the 12th May 1884, to the Court of First Instance, to amend the decree under s. 206 of the Civil Procedure Code, and the application was granted on the 6th December 1884.

The present application was made on the 2nd April 1885, for execution of the amended decree, on the contention that limitation [494] should be calculated from the date of the amendment, but both the lower Courts have disallowed the application.

I agree with my learned brother **OLDFIELD** in holding that the lower Courts acted rightly in rejecting the application. Irrespective of the merits of the amendment itself, I hold that such amendment could neither revive the decree nor furnish a fresh starting point of limitation, whilst there is of course the further consideration that the question of the decree being barred had passed into *rem judicatum*, as I have already pointed out, with reference to the Privy Council rulings.

I now wish to add that the provisions of the last paragraph of s. 206, Civil Procedure Code, have given rise to some difficulty and doubt, and I cannot help feeling that it would have been conducive to clearness, and accuracy, and uniformity of procedure in the Mufassal Courts, if the Legislature had thought fit to frame the paragraph as a separate section, and to have introduced therein definite restriction and limits as to the time within which, and the stage when, the power of amending decrees might be exercised. For instance, if a decree has already become the subject of appeal, I do not think the first Court should amend it under s. 206, for the Full Bench of this Court in *Shohrat Singh v. Bridgman*, I. L. R., 4 All., 376, has held that the decree of the Appellate Court is the only decree susceptible of execution, and the specifications of the decrees

of the lower Courts as such may not be referred to and applied by the Court executing such decree. Again, in connection with this same section, I may refer to what I said in *Raghunath Das v. Raj Kumar*, I. L. R., 7 All., 276, and also in *Sarta v. Ganga*, I. L. R., 7 All., 411, in both of which cases my judgments were upheld and approved by the Full Bench of this Court (I. L. R., 7 All., pp. 875 and 876). Those cases furnish good illustrations of the manner in which the power conferred by the section may be misapplied in the absence of more definite provisions prescribing rules for guidance. I may perhaps also add that the section should also contain an express provision to say that when a decree-holder has so far accepted a decree as framed as to put it into execution, no amendment should be allowed, and the reason should be that the proper stage for such amendment is [495] passed. I may here quote what MARKBY, J., said in *Goluck Chunder Mussant v. Gunga Narain Mussant*, 20 W. R., 111:—"It is the duty of the parties, or rather of their pleaders, when they obtain a decree, to see that it is drawn up in the proper form, and it has been ordered by a circular order of this Court of the 19th July 1867 (8 W. R., Civ. Cir., 2), that the Judges should obtain the signatures of the pleaders before the decree is finally signed. If the parties chose to allow so long a time as that allowed in this case to elapse, before they take any steps upon the decree, without taking any precaution to see that the decree is properly drawn up, it seems to us that it may be fairly presumed that they acquiesced in the decree, and that no alteration ought to be made subsequently." The rule laid down by COUCH, C. J., in *Prince Mahomed Ruhimood-din v. Babu Beer Protap Suhaz*, 18 W. R., 303, has almost a stronger tendency in the same direction.

Again, a Division Bench of this Court, in *Gaya Prasad v. Sikri Prasad*, I. L. R., 4 All., 23, held that an application for an amendment of decree under s. 206, Civil Procedure Code, was governed by three years' limitation under art. 178, sch. ii of the Limitation Act. But I respectfully doubted the accuracy of the rule in the case of *Raghunath Das*, to which I have already referred; and my view was supported by the principle upon which the rulings of the other High Courts proceed—*vide Roberts v. Harrison*, I. L. R., 7 Cal., 333, *Kylas, Goundan v. Ramasami Ayyan*, I. L. R., 4 Mad., 172, *Vithal Janardan v. Rakmi*, I. L. R., 6 Bom., 586.

These observations may possibly prove of some service to the Legislature when considering the question of the amendment of the Civil Procedure Code.

Appeal dismissed.

[8 All. 495]

The 22nd June 1886.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Balbhadar and others.....Defendants

versus

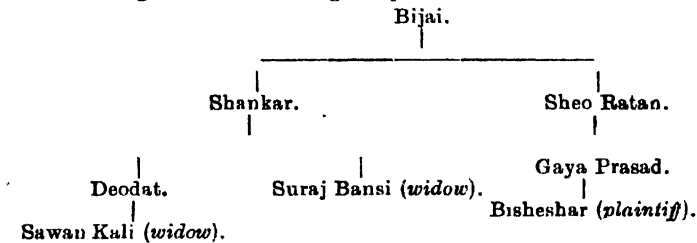
Bisheshar.....Plaintiff.*

Hindu Law—Joint and undivided Hindu family—Joint and undivided property—Debts of deceased member—Liability of his interest.

J, a member of a joint Hindu family, left two sons, *R* and *S*. *S* borrowed money upon a simple bond, and, after his death, the obligee sued his [495] widow and daughter-in-law upon the bond, obtained a decree against them, and, in execution thereof, brought to sale *S*'s interest in the property. *B*, the grandson of *R*, thereupon sued the purchaser to recover the same, on the ground that it was the joint property of *S* and himself, and could not be attached and sold in satisfaction of *S*'s debt.

Held that on the death of *S*, his interest passed to the plaintiff by survivorship, and was not liable after his death to any personal debt he had incurred, inasmuch as no charge had been made on the property, and the creditor could not recover his money from the joint property after the death of *S* when he had not obtained judgment against *S*, and taken out execution by attachment against him. *Suraj Bansi Koer v. Sheo Persad Singh*, I. L. R., 5 Cal., 148 : L. R., 6 Ind. Ap. 88, and *Rai Bai Kishen v. Rai Sita Ram*, I. L. R., 7 All. 731, referred to.

THE following table throws light upon the facts of this case :—



Deodat died in the lifetime of his father Shankar, leaving a widow Sawan Kali. On the 11th March 1877, Shankar executed a bond in favour of Ram Sahai defendant, the payment of which was not secured by the mortgage of property. Subsequently Shankar died, leaving a widow, the defendant Suraj Bansi. It appeared that Ram Sahai then sued Suraj Bansi and Sawan Kali, as the legal representatives of the deceased Shankar, on the bond mentioned above. The suit was decreed on the 8th March 1881, and in execution of the decree the rights and interests of Shankar, in the property now in suit, were sold on the 20th June 1884, and were purchased by the defendant Sheo Sewak.

The plaintiff brought the present suit to be maintained in possession of the property purchased by Sheo Sewak, alleging that he, as the grandson of Shankar's brother Sheo Ratan, was a member of a joint Hindu family with Shankar up to the time of his death; that the deceased as a matter of fact, did not die indebted at all; that the bond of the 11th March 1877, had

* Second Appeal No. 1469 of 1885, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 16th May 1885, confirming a decree of Maulvi Abdul Razak, Munsif of Bansi, dated the 15th November 1884.

been fraudulently executed by Suraj Bansi; that the decree of the 8th March 1881, passed on the aforesaid bond, was likewise collusively obtained by [497] confession of judgment; that the sale of the 20th June 1884, could not therefore affect the share of Shankar, which it purported to convey to the purchasers, the property being the undivided estate of a joint Hindu family, of which the plaintiff was the surviving member.

The Court of First Instance gave the plaintiff a decree. On appeal by the sons of Sheo Sewak, who had died, the Lower Appellate Court decided that the plaintiff and Shankar were members of a joint and undivided Hindu family; that the question of Shankar's indebtedness under the bond of the 11th March 1877, was not important, because the share of a member of a joint Hindu family could not be brought to sale in this manner after his death; and that the question of *bona fides* did not need determination in the case, as the plaintiff, who did not stand in the relation of lineal descent from Shankar, was not bound to pay his debts; and it accordingly upheld the decree of the Court of First Instance.

In second appeal by the sons of Sheo Sewak it was contended on their behalf that the finding of the Lower Appellate Court as to the joint nature of the estate of Shankar with the plaintiff was erroneous; that the Court was bound to determine the *bona fides* of the bond of 1877; that the decree of the 8th March 1881, was properly obtained by impleading Shankar's widow Suraj Bansi, who, according to the Hindu law, was a proper legal representative of her deceased husband, for the purposes of such a suit; and that the auction sale of the 20th June 1884, therefore duly conveyed Shankar's share to the appellants.

Munshi Hanuman Prasad and Lala Juala Prasad, for the Appellants.

Mr. C. H. Hill and Munshi Kashi Prasad, for the Respondent.

Mahmood, J.—I may at once state that I am not at all disposed to disturb in second appeal the concurrent findings of the Courts below as to the joint and undivided nature of the family and of the property in suit. Nor do I think it is necessary for us to investigate the *bona fides* of the debt which the bond of 1877 purported to secure, because the case for the defence has all along been that the debt was a personal debt of Shankar, who [498] was separate and divided from the plaintiff. There is absolutely no plea to the effect that the money was borrowed by Shankar as a managing member of a joint Hindu family, for the joint purposes of such family; and no such question having been raised, I think the learned Judge acted rightly in not entering into the merits of the *bona fides* of the bond, for the simple reason that the Hindu law imposes no liability upon the plaintiff to pay off the debts of his grand-uncle under such circumstances. Nor do I think it is necessary for us in this case to consider whether Musammat Suraj Bansi, the widow of Shankar, was rightly impleaded, as the representative of her deceased husband, in the suit which ended in the decree of the 8th March 1881. For I think that the whole question in the present case is, whether, after the death of Shankar, any such estate was left by him as could be made liable for the payment of his debts, such as the one for which the auction-sale of the 20th June 1884, took place.

In *Appovier v. Rama Subha Aiyar*, 11 Moo. I. A. 75, Lord WESTBURY, in delivering the judgment of the Privy Council, observed that "according to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided Hindu family could go to the place of the

receipt of rent, and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family. But when the members of an undivided family agree among themselves, with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and enjoy in severalty, although the property itself has not been actually severed and divided" (p. 90). Such being the nature of the rights [499] and interests of a member of a joint Hindu family in the joint property, it was for a long time an unsettled question, whether such rights and interests could, on the one hand, be alienated by private sale by any individual member; and on the other hand, whether they could be brought to sale for his personal debts in execution of a decree. The former part of this question would seem to be still unsettled by the highest authority, unless the ruling of the Privy Council in *Lakshman Dada Naik v. Ramchandra Dada Naik*, I. L. R., 5 Bom. 48; L. R., 7 Ind. Ap. 181, be taken to afford a settlement of the matter; for the Lords of the Privy Council in *Phoolbas Koonwur v. Jogeshur Sahoy*, I. L. R., 1 Cal. 226; L. R., 3 Ind. Ap. 7, only referred to it, but abstained from giving any ruling. The question was again referred to by their Lordships, but not determined, in *Deendyal Lal v. Jugdeep Narain Singh*, I. L. R., 3 Cal. 198; L. R., 4 Ind. Ap. 247, which, however, settled the latter part of the question enunciated by me. In that case their Lordships drew a distinction between the power of private alienation possessed by a member of a joint Hindu family and the power of a Court to seize his share, at the instance of a judgment-creditor, in execution of a decree for personal debts. And I take that case to have finally decided the question in the affirmative, and to have ruled that the share of a member of a joint Hindu family possesses a seizable character for purposes of execution, and that when it is brought to sale, the purchaser at such execution-sale possesses the right of compelling the other members of the joint family to separate the debtor's share by partition. The same I understand to be the effect of a more recent ruling of their Lordships in *Hardi Narain Sahu v. Ruder Perakash Misser*, I. L. R., 10 Cal. 626. But the case which needs special reference here is the ruling of their Lordships in *Suraj Buns Koer v. Sheo Persad Singh*, I. L. R., 5 Cal. 148; L. R., 6 Ind. Ap. 88, which carried the rule somewhat further, inasmuch as it was there held that seizure by attachment in execution is sufficient to constitute, in favour of a judgment-creditor, a valid charge upon property to the extent of the joint member's undivided share and interest, and that such charge could not be defeated by his death subsequent to such attachment, though antecedently to the actual sale. In laying down this rule their Lordships disapproved of the [300] ruling of this Court in *Goor Pershad v. Sheo Deen*, N.-W. P. H. C. Rep., 1872, p. 137, so far as that ruling ignored the seizable character of an undivided share in joint property, which had since been established by the ruling of the Privy Council in the case of *Deendyal Lal v. Jugdeep Narain Singh*, I. L. R., 3 Cal. 198; L. R., 4 Ind. Ap. 247, to which I have already referred. But the exact question here is not the same as in that of *Suraj Buns Koer*, I. L. R., 5 Cal. 148; L. R., 6 Ind. Ap. 88. Here, during the lifetime of Shankar, the bond of the 11th March 1877, was never even sued upon: the decree of the 8th March 1881, and the sale of the 20th June 1884, took place when Shankar was no longer in existence. And in such circumstances the exact question before us is, whether Shankar left behind him any

such rights at all as could either be seized in execution or be made the subject of an execution.

Fortunately this question needs no reference to original authorities, because I hold that the doctrine of the Lords of the Privy Council in the case of *Suraj Bynsi Koer*, I.L.R., 5 Cal. 148; L. R., 6 Ind. Ap. 88, is conclusive upon this point. Their Lordships observed:—"It seems to be clear upon the authorities that if the debt had been a mere bond debt, not binding on the sons by virtue of their liability to pay their father's debts, and no sufficient proceedings had been taken to enforce it in the father's lifetime, his interest in the property would have survived on his death to his sons, so that it could not afterwards be reached by the creditor in their hands."

These observations are, in my opinion, fully applicable to this case, and, indeed, go beyond the exigencies of what we have got to determine here, the plaintiff not being a son of the deceased Shankar, for whose personal debts his share was purported to be sold on the 20th June 1884. And I hold that upon that date, Shankar having died even before the litigation which terminated in the decree of the 8th March 1881, his share had already vanished and been taken by the plaintiff by right of survivorship, without being subject to the payment of Shankar's personal debts. I may perhaps also add that the family being joint, Musammatt Suraj Bansi, the widow of Shankar, could have no such rights in her husband's share as could be affected by the sale in execution of the decree against her; whilst the fact of Musammatt Sawan [501] Kali having also been impleaded in that suit, cannot, of course, help the defendants-appellants, purchasers of the execution-sale, she being the widow of Shankar's son who had pre-deceased his father.

For these reasons I would dismiss this appeal with costs.

Oldfield, J.—This suit relates to property left by one Bijai. He was succeeded by his sons Sheo Ratan and Shankar; the plaintiff represents the former. Shankar before his death borrowed money on a simple bond from one Ram Sahai, who after the death of Shankar sued his widow and daughter-in-law, and obtained a decree against them, and in execution brought to sale Shankar's interest in the property, and it was purchased by defendant-appellant.

The plaintiff is the grand-nephew of Shankar, and sues to recover the property sold at auction, on the ground that it was the joint property of Shankar and himself, and could not be taken and sold in execution of Shankar's debt.

The Courts have allowed the claim and the defendant has appealed.

The objection to the finding that the property was joint undivided property of Shankar and the plaintiff is not one which can be entertained in second appeal, the finding on this point by the Courts below being one of fact; and when it has been found that the property was undivided the appeal must fail. On the death of Shankar, his interest passed to plaintiff by survivorship, and was not liable after his death for any personal debt which he had incurred. No charge had been made on the property, and the creditor could not recover his money from the joint property after the death of Shankar, when he had not obtained judgment against Shankar, and taken out execution by attachment against him. I may refer on this point to the case of *Suraj Bynsi Koer v. Sheo Persad*, I. L. R., 5 Cal., 148; L. R., 6 Ind. Ap. 88, and *Rai Bal Kishen v. Rai Sita Ram*, I. L. R., 7 All., 731. The appeal will be dismissed with costs.

Appeal dismissed.

NOTES.

[To the same effect is the decision of the Privy Council in *Daulat Ram v. Mehr Chand* (1887) 15 Cal., 70; see also (1888) 11 All., 302; (1892) 6 C.P.L.R., 60.]

[502] *The 22nd June, 1886.*

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Deo Dat.....Defendant

versus

Ram Autar.....Plaintiff.*

*Mortgage—Usufructuary mortgage—Pre-emption—Redemption—Interest—
Act IV of 1882 (Transfer of Property Act), ss. 51, 83, 84.*

Although a successful pre-emptor becomes substituted for the original transferee, and thus becomes entitled to the benefits of the transfer, those benefits cannot be claimed by him for any period antecedent to such substitution itself, and a pre-emptor, before his pre-emption is actually enforced, possesses no such right in the subject of pre-emption as would entitle him to any benefits arising out of the property which he is entitled to take but has not yet taken. The original vendee cannot, whilst he is in possession, be regarded as a trespasser, who would have no right to enjoy the usufruct of the property which he has purchased.

Udan Singh v. Muneri Khan, 2 Cal., S. D. A. Rep., 85, dissented from. *Manik Chand v. Rameshwar Rao*, N.-W. P. S. D. A. Rep., 1865, vol. ii, 171, *Buldeo Pershad v. Mohun*, N.-W. P. H. C. Rep., 1866, Rev. Ap., 30, and *Ayudhia v. Baldeo Singh*, I. L. R., 7 All., 674, followed.

In February 1883, a decree for pre-emption was obtained in respect of a mortgage by conditional sale executed in August 1882. On the 23rd August 1883, the decree-holder executed his decree by depositing the principal amount of the mortgage money, and obtained possession of the property in substitution for the original mortgagee. In June 1884, the mortgagor, proceeding under s. 83 of the Transfer of Property Act, deposited in Court the sum of Rs. 699, claiming the same to be adequate for redemption. The case was, however, struck off in consequence of the pre-emptor's objection to receiving the deposit on the ground that it did not include the interest due on the mortgage. The deposit remained in Court, and on the 21st August 1884, the mortgagor deposited a further sum on account of interest, but this also the pre-emptor refused to receive, for the same reason as before. In a suit by the mortgagor for redemption of the mortgage, it was found that the amount deposited was all that was due on the mortgage on the 21st August 1884.

Held that until the 23rd August 1883, when the defendant enforced his pre-emptive decree by depositing the consideration for the conditional sale of August 1882, he had no such interest in the subject of pre-emption as would entitle him to any benefits arising therefrom, and that the defendant was not entitled to claim any interest on the mortgage-money for the period antecedent to the 23rd August 1883.

Semble that the proper person entitled to receive the interest for that period was the original conditional vendee, and the Court which passed the decree for pre-emption should have allowed him the amount of such interest in addition to the principal mortgage money. *Ashik Ali v. Mathura Kandu*, I. L. R., 5 All., 187, referred to.

* Second Appeal No. 1755 of 1885, from a decree of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 7th August 1885, confirming a decree of Babu Nihala Chander, Munsif of Azamgarh, dated the 21st March 1885.

[503] *Held*, with reference to s. 84* of the Transfer of Property Act (IV of 1882), that the Courts below were right in not allowing interest to the defendant after the 21st August 1884, when the plaintiff, to his knowledge, deposited the whole money due on the mortgage.

Held, with reference to the last paragraph of s. 51† of the same Act, that the Courts below were wrong in subjecting their decrees in favour of the plaintiff to the condition that the defendant should not be evicted till the crops he had sown were cut.

THE plaintiff in this case sued to recover possession of certain mortgaged property. The property, a share in mauza Chak Chaube, was mortgaged by the plaintiff on the 30th August 1882, by way of conditional sale, to one Har Prasad for Rs. 699, for a term of two years ending on Jaith sudi 15th, 1291 fasli. Under the terms of the mortgage, the mortgagor delivered possession to the mortgagee and authorized him to receive the profits, which amounted to Rs. 40 per annum, in lieu of a part of the interest, which was fixed at one per cent. per annum; and in respect of the balance of interest, namely, Rs. 44, it was agreed that the mortgagor would pay the same in cash along with the principal on taking an account at the time of the redemption.

Under the terms of the *wajb-ul-arz* of the mauza the defendant Deo Dat brought a pre-emptive suit in respect of the conditional sale, and obtained a decree on the 5th February 1883, which was finally upheld in appeal on the 14th February 1884. In the meantime, on the 23rd August 1883, the defendant executed his decree by depositing Rs. 699, the principal amount of the mortgage-money, and obtained possession of the property, being thus substituted for the original mortgagee. Matters stood thus, when the plaintiff, proceeding apparently under the provisions of s. 83 of the Transfer of Property Act (IV of 1882), deposited in Court on the 6th June 1884, the sum of Rs. 699, being the principal sum of the mortgage-money, claiming the same to be adequate for redemption. Upon the objection of the defendant to accept the money on the ground that the deposit fell short of the amount of interest due on the mortgage, the plaintiff's case was struck off on the 15th August 1884, the deposit remaining in Court. Subsequently the plaintiff made a further deposit of Rs. 44 on account of interest on the 21st August 1884, thus making the whole deposit amount to Rs. 743. The defendant again, by an application made on the [504] 16th September 1884, refused to accept the deposited money, on the ground that it fell short of the entire sum due on the mortgage. The proceedings under s. 83 of the Transfer of Property Act came to an end

*[Sec. 84 :—When the mortgagor or such other person as aforesaid has tendered or deposited in Court under section eighty-three the amount remaining

Cessation of interest.

due on the mortgage, interest on the principal money shall cease from the date of the tender or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, as the case may be.

Nothing in this section or in section eighty-three shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to reasonable notice before payment or tender of the mortgage-money].

†[Sec. 51 :—When the transferee of immoveable property makes any improvement on

Improvements made by
bona fide holders under
defective titles.

the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.]

on the 28th November 1884, when the Court rejected the plaintiff's application for summary redemption, but allowed the sum of Rs. 743 to remain a deposit in Court.

The present suit was instituted on the 26th January 1885, having for its object recovery of possession of the property by redemption of the mortgage, on the ground that the deposited sum of Rs. 743 was all that was due on the mortgage. The suit was resisted upon the ground that the plaintiff did not properly tender the mortgage-money to the defendant, nor did he make an adequate deposit in Court, and that the defendant having cultivated the land, he could not be ejected till the crops were cut and taken away.

The Court of First Instance held that the sum of Rs. 743, to which the deposit amounted on the 21st August 1884, was all that was due to defendant on the mortgage on that date; and that the defendant, having executed his pre-emptive decree, by depositing Rs. 699, the consideration of the conditional sale, on the 23rd August 1883, was entitled to remain in possession till he had gathered and carried away the crops which he had sown.

The defendant appealed, contending that he was entitled to an additional sum of Rs. 61-10-0 as interest on the mortgage money, and to Rs. 37-15-0 as costs, making a total sum of Rs. 99-9-0, which had been disallowed by the first Court. The Lower Appellate Court dismissed the appeal.

The defendant appealed to the High Court.

Mr. J. Simeon, for the Appellant.

Munshi Hanuman Prasad and Munshi Madho Prasad, for the Respondent.

Mahmood, J.—The contention urged before us on the defendant's behalf raises three main points for determination:—

1. Whether the defendant was entitled to claim interest on the mortgage-money for the period between 30th August 1882, the date of the mortgage, and the 23rd August 1883, when he enforced his pre-emptive decree by depositing Rs. 699, the principal consideration-money of the conditional sale in respect of which he enforced his pre-emption.

2. Whether the defendant was entitled to claim any interest after the 21st August 1884, when the deposit by the plaintiff, under s. 83 of the Transfer of Property Act, amounted to Rs. 743.

3. Whether, under the circumstances of this case, the defendant was entitled to costs.

I will dispose of each of these points in the order in which I have mentioned them. The first of these questions depends upon the determination of a very important point of the law of pre-emption. That a successful pre-emptor stands in the shoes of the original vendee in respect of all the rights and obligations arising from the sale under which he has derived his title, is a question which stands upon an undoubted basis, for the right of pre-emption is nothing more or less than the right of substitution. This was pointed out by me at considerable length in *Gobind Doyal v. Inayatullah*, I. L. R., 7 All., 775, where the Full Bench of this Court generally accepted my conclusions as to the nature of the pre-emptive right. This, however, is not a point which is contested on either side in the argument of the learned pleaders for the parties. All that the learned pleader for the appellant contends for here is, that his client, having succeeded to, or rather been substituted for, the original conditional vendee, Har Prasad, is entitled to claim the benefit of all the conditions of the mortgage, and is, therefore, entitled to claim interest even for the period antecedent to the 23rd August 1883, when he enforced his pre-emptive decree, by deposit of the consideration of the conditional sale under the decree of the

5th February 1883. I am of opinion that this contention is wholly unsound. It is perfectly true that a successful pre-emptor becomes substituted for the original transferee, and thus becomes entitled to the benefits of the transfer. But it is equally true, and stands to reason, that those benefits cannot be claimed for any period antecedent to such substitution itself. The right of pre-emption as based upon the *wajib-ul-arz* partakes of the nature of those obligations which fall short of an interest in immoveable property, though they [506] are annexed to the ownership of such property. The nature of such obligations is well described in s. 40 of the Transfer of Property Act, which I refer to only by way of analogical comparison. A pre-emptor, therefore, before his pre-emption is *actually* enforced, possesses no such right in the subject of pre-emption as would entitle him to any benefits arising out of the property, which he is only entitled to take by substitution, but has not yet actually taken. On the other hand, the original vendee cannot, whilst he is in possession, be regarded as a trespasser, who would have no right to enjoy the usufruct of the property which he has purchased, nor would it be equitable to hold that the pre-emptor, before he has actually paid the price, should be entitled to the profits of the property, which he can take only upon duly making such payment.

This view of the law is supported by some cases to be found in the reports. There is a very old ruling—*Udan Singh v. Muneri Khan*, 2 Cal. S. D. A. Rep., 85, where it was held that if A transfer lands to B by sale, and C afterwards come forward and establish his right of *shufa* or pre-emption, he will be entitled to the lands at the price paid for them by B, who will be compelled to refund the profit accrued during the period of his possession to C, receiving himself the purchase-money back from A. That was a case decided so long ago as 1813, and seems to have depended entirely upon the Muhammadan law of pre-emption. The judgment, however, contains no authority for the rule there laid down; and there can be no doubt that the ruling was erroneous, being opposed to the most authoritative texts of the Muhammadan law itself. Such indeed seems to be the view taken by the Sudder Court of these Provinces in *Manick Chand v. Rameshwar Kar*, N.-W. P. S. D. A. Rep., 1865, vol. ii., 171, which was a suit based upon the *wajib-ul-arz*, and where the learned Judges held that the “pre-emptor could have no preferential right till he had tendered the full price, and therefore the defendant’s intermediate possession could not be regarded as illegal.” This ruling was followed by this Court in *Baldeo Pershad v. Mohan*, N.-W. P. H. C. Rep., 1866, Rev. Ap., 30, where the learned Judges, after referring to the rule of Muhammadan law of pre-emption, held it to be equitable, and then went on to say:—“The purchaser has in most instances paid the purchase-money; is he [507] to lose all interest and profits because, at some subsequent time, the contingency occurs that a pre-emptor claims and exercises his right of pre-emption? and is the pre-emptor, who has kept his money in his pocket till it suited his purpose to exercise his right, to obtain profit, which will be the greater in proportion to his delay?”

The same rule was laid down by STRAIGHT, J., in *Ajundhia v. Baldeo Singh*, I. L. R., 7 All., 674, which is the latest case upon the subject. I entirely concur in the principle upon which these rulings proceed; and if the exigencies of this case needed it, I would, by reference to the original texts of the Muhammadan law, have shown that the principle is a necessary consequence of the very nature and incidents of the right of pre-emption itself.

Applying the principle to this case, it seems to me perfectly clear that till the 23rd August 1883, when the defendant enforced his pre-emptive decree by depositing Rs. 699—the consideration of the conditional sale of the 30th

August 1882—he had no such interest in the subject of pre-emption as would entitle him to any benefits arising therefrom. And it follows that my answer to the first question in the case must be that the defendant is not entitled to claim any interest on the mortgage-money for the period antecedent to the 23rd August 1883. This view, however, raises a subsidiary question, namely, that, if the defendant is not entitled to interest for that period, who else is entitled to it? This is a question which we are not bound to determine in this case, but I think I may safely say, as a necessary consequence of the *ratio decidendi* adopted by me, that the proper person entitled to receive the interest for that period was Har Prasad, in whose favour the *bye-bil-wafa* mortgage of the 30th August 1882, was originally executed, and who was dispossessed under the defendant's pre-emptive decree; and I think I may add that in passing that decree, the Court should have allowed the amount of interest above mentioned in addition to the principal mortgage-money. This view is based upon the same principle as my ruling in *Ashik Ali v. Mathura Kandu*, I. L. R., 5 A.L., 187, where it was held that the pre-emptor, in the case of a mortgage by conditional sale which has become absolute, is bound to pay as the price of the property the entire amount due on such [508] mortgage at the time it became absolute. Here the "price" which should have been allowed to Har Prasad under the decree of the 5th February 1883, should have been the principal mortgage-money, *p/u* such amount of interest as might have been due on the mortgage up to the period fixed by the Court for enforcement of the pre-emptive decree. That decree, having now become final, cannot of course be interfered with in this case: but its effect was to enable the defendant to pre-empt on payment of less money than he was entitled to. And I have no doubt that his present claim for interest antecedent to the 23rd August 1883, when he executed the decree, is wholly unconscionable and opposed to equity.

The next question in the case is a very simple one, because the rule contained in s. 84 of the Transfer of Property Act (IV of 1882) furnishes a clear guidance. The section says that when a mortgagor has duly made deposit under the preceding section of all that is due on the mortgage, the interest on the mortgage money is to cease. Here the plaintiff deposited the principal sum of the mortgage-money on the 6th June 1884, but that deposit was clearly inadequate and would scarcely entitle him to the benefit of s. 84 of the Act, even *pro tanto*. I will, however, not determine this point, because it is not raised here, and the plaintiff himself made a further deposit of Rs. 44 on account of interest on the 21st August 1884, thus making the whole deposit amount to Rs. 743, which has been found by the Court below to be all that was due on the mortgage on that date, and of which the defendant had due notice. The amount so deposited of course left out of account the interest for the period antecedent to the 23rd August 1883, and to which, as I have already shown, the defendant was not entitled. The Courts below were, therefore, in my opinion, right in not allowing interest to the defendant after the plaintiff had, with due knowledge of the defendant, deposited the whole money due on the mortgage to the defendant. And I may also add, with reference to a subsidiary question in the case, that the Courts below did not act rightly in rendering the decree subject to the condition that the defendant was not to be evicted till the crops he had sown were cut. The rule applicable to such cases is clearly enunciated in the last paragraph of s. 51 of the Transfer of Property Act, which creates no bar to eviction in such a case, but only lays down that the transferee [509] is entitled to the crops sown by him, and to free ingress and egress to gather and carry them. The decree in this case should have been framed accordingly, but I need say nothing more about the matter,

because that part of the decree has not been made the subject of complaint before us by the plaintiff-respondent.

Then as to the question of costs, which has been made the subject of a separate ground of appeal by the defendant-appellant, before us. Section 220 of the Civil Procedure Code gives ample power and discretion to the Court in connection with costs, and in the present case the defendant, having all along acted wrongly in declining to accept the plaintiff's deposit, and in giving up possession to him, was properly made liable for the plaintiff's costs by the Courts below.

I would dismiss this appeal with costs.

Oldfield, J.—I concur in the proposed order.

Appeal dismissed.

NOTES.

[The original vendee was held entitled to the profits between the date of the sale and the date of the payment of the pre-emption price under the decree :—(1889) 12 All., 234.

In (1909) 32 All., 45, it was held that the right being substitutionary, the pre-emptor was not bound by any mortgage that might have been effected by the original vendee.]

[8 All. 509]

APPELLATE CRIMINAL.

The 28th June, 1886.

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE.

Queen-Empress

versus

Baldeo and others.

Accomplice—Corroboration—Dacoity—Possession of stolen property.

Criminal Courts dealing with an approver's evidence in a case where several persons are charged should require corroboration of his statements in respect of the identity of each of the individuals accused. *Queen-Empress v. Ram saran, ante*, p. 306, *Queen-Empress v. Kure*, Weekly Notes, 1886, p. 65, and *Reg. v. Mullins*, 3 Cox C. C. 526, referred to.

A, B, M, R and N were tried together on a charge under s. 460 of the Penal Code. The principal evidence against all of them was that of an approver. Against A, B, and M there was the further evidence that they produced certain portions of the property stolen on the night of the crime from the house where the crime was committed. With regard to R, it was proved that he was present when B pointed out the place where some of the property was dug up, but he did not appear to have said anything or given any directions about it.

Held, with reference to A, B and M, that it could not be said that their recent possession of part of the stolen property, so soon after it had been stolen, was not such corroboration of the approver's evidence of their participation in the crime as entitled the Court to act upon his story in regard to those particular persons.

[510] Held that, inasmuch as there was no sufficient material to warrant the inference of guilty knowledge on R's part, and, with regard to N, no property was found with him or produced through his instrumentality, both R and N ought to have been acquitted.

THESE were appeals from convictions by Mr. G. H. Pearse, Sessions Judge of Meerut, dated the 14th April 1886. The appellants, Baldeo, Ram Bakhsh, Mir Singh, Amir Bakhsh and Amman were convicted, under s. 460 of the

Indian Penal Code, of house-breaking by night, in the course of the commission of which offence one Bahal Singh was murdered by some of them.

The appellants were jointly tried with three other persons called Masita, Mohsam Khan and Jamna, who were acquitted, the last mentioned being charged under s. 411 of the Penal Code.

Bahal Singh was a man reputed to be possessed of considerable wealth in coin and ornaments. On the night of the 4th January 1886, his house was broken into, and he was murdered and the house plundered. The only direct evidence against the appellants was the evidence of an accomplice called Ghariba. He stated that a dacoity on Bahal Singh had been contemplated for some time; that Baldeo, appellant, told him that he had five or six good men at his disposal, the three chaukidars Amman (appellant), Amir Bakhsh (appellant) and Masita, Mohsam Khan and his son, Ram Bakhsh (appellant), and asked him to get one or two men; that he enlisted Mir Singh Jat (appellant), a very powerful man; that Baldeo, who was a neighbour of Bahal Singh's, fixed the 4th January, as he found the house would be empty; that the gang assembled at about 7 or 8 P. M., after dark, and fixed the rendezvous for midnight, the three chaukidars going off meanwhile on their rounds; that five men, Baldeo, Ghariba, Mir Singh, Amir Bakhsh and Mohsam Khan, escalated the wall; that Baldeo had brought a rope, with which they let down Mohsam Khan into the courtyard; that he opened the door of the staircase and they all got down, opening for the other three; that Baldeo was the guide entirely; that Mir Singh was told off to overpower Bahal Singh, which he did by leaping on him on his charpai and smothering him; that the property was in a room close to where Bahal Singh was sleeping; and that it was quickly removed and carried off to Baldeo's house and divided.

[511] The nature of the evidence corroborating that of the accomplice, Ghariba, appears from the following extract from the Sessions Judge's judgment:—

"The corroborative evidence against Baldeo is that of the Sub-Inspector Narain Prasad, Rukha and Sohan Pal, as to his pointing out certain silver articles buried on the Jamna bank. This is also the evidence against his son, Ram Bakhsh. They both went together to point these things out. Fakir Chand and Harnam prove that Amir Bakhsh produced some '*kharas*' and a piece of wire from a ruined house. After Amman had denounced Ghariba, and Mir Singh and Ghariba, who had been swindled by Mir Singh and Baldeo in the division of the property, had made a clean breast of it, two Gujars, Jit and Sawant, were employed if possible to trace the property. Baldeo, as shown above, produced certain small things, and Mir Singh also admitted that he had some things which his uncle, Jamna, could give up. It may here be noted that Jit said he made promises to the different accused if they would disgorge, but those promises were in private conversation, and certainly carried none of the authority specified in s. 24, Evidence Act. Mir Singh named five articles, an '*arsi*,' '*chilas*,' '*gandas*,' '*balis*' and a '*polchi*,' all of silver. Jit and Sawant went with a third man to mauza Behari and told Jamna that Mir Singh had sent for these articles. Jamna gave them up all except the '*polchi*.' When the things were shown to Mir Singh in presence of the Inspector, he at once said that the '*polchi*' had not been sent."

The Sessions Judge further observed as follows:—"While the inquiry was on, there was apparently a competition among most of the accused to give a certain amount of information in the hope of securing impunity for themselves. Nothing of course in the nature of a confession made during the police inquiry can be put in evidence except so far as anything was elicited from it, Fakir

Chand, for instance, proves that not only was Amman constantly frequenting Baldeo's house before the murder, but that Amman gave the first information concerning the complicity of Ghariba and Mir Singh to the two outside Jats. In consequence of this certain property was recovered from Mir Singh, and Ghariba was sufficiently alarmed to turn Queen's evidence, besides disgorging some of his share."

[512] The Sessions Judge was of opinion, referring to *Empress v. Kure*, that the circumstances which appear above were sufficient corroboration of the evidence of Ghariba to warrant the conviction of Baldeo, Ram Bakhsh, Amman, Amir Bakhsh and Mir Singh, the appellants, under s. 460 of the Penal Code. He acquitted Masita and Mohsam Khan, there being no corroborative evidence against them; and he also acquitted Jamna, who had been charged under s. 411 of the Penal Code in respect of the property delivered by him to the two Jats, Jit and Sawant.

Mr. W. M. Colvin, for Baldeo, Mir Singh and Ram Bakhsh, Appellants.

The Appellants Amir Bakhsh and Amman were not represented.

The Public Prosecutor (Mr. C. H. Hill), for the Crown.

Straight, Offg. C. J.—These are five appeals from a decision of the Judge of Meerut, passed on the 14th of April last, convicting the appellants under s. 460 of the Penal Code, and sentencing Baldeo and Mir Singh to transportation for life, and Amman, Ram Bakhsh and Amir Bakhsh to seven years' rigorous imprisonment. The five appellants were tried, along with three other persons, by name Masita, Mohsam Khan and Jamna, who were acquitted, for having, on the night of the 4th January last, been jointly concerned in the breaking into the dwelling-house of one Bahal *bania* of Kutana, in the course of the commission of which offence the said Bahal was murdered. The only direct evidence against the appellants is that of an approver, by name of Ghariba, but as to Baldeo, Mir Singh and Amir Bakhsh there is the further proof that they produced, or caused to be produced, certain portions of the property stolen on the night of the crime from the house of Bahal. I have already, in the case of *Queen-Empress v. Ram Saran*, ante, p. 306, entered at length into the question of the nature and extent of the corroboration to be required to make it safe or proper to act upon the evidence of an accomplice, and it would be a useless waste of time to repeat the remarks I then made. I entirely adhere to each and every one of them, and the learned Judge is in error in supposing that the view I took in the case of *Queen-Empress v. Kure*, Weekly Notes, 1886 p. 65, was in any sense at variance with the **[513]** rule I had already laid down, namely, that Criminal Courts, dealing with an approver's evidence in a case where several persons are charged, should require corroboration of his statements in respect of the identity of each of the individuals accused. In this connection I cannot do better than refer to the observations of one of the wisest and most practical minded Judges that ever sat on the English Bench, Mr. Justice MAULE, in *Reg. v. Mullins*, 3 Cox. C.C., 526, which are singularly apposite to this country, where those who have to administer justice unfortunately know what a perverted ingenuity there is for concocting false charges, and supporting them by the most elaborately fabricated network of perjured testimony.

Says that learned Judge:—"I quite agree that the confirmation of an accomplice as to the mere fact of a crime having been committed, or even the particulars of it, is immaterial, unless the fact of the prisoner being connected with it is proved. It often happens that an accomplice is a friend of those who committed the crime with him, and he would much rather get them out of the scrape and fix an innocent man than his real associates. Confirmation

does not mean that there should be independent evidence of that which the accomplice relates, or his testimony would be unnecessary. If, for instance, a burglary had been committed, and an accomplice gave evidence that a person charged was present when it was effected, if that person had been seen hovering about the premises some time before, or was seen in possession of some of the stolen property shortly after, that might be reasonable confirmation of the statement that the prisoner helped to commit the crime."

In the present case, upon careful consideration of all the facts as to Baldeo, Mir Singh and Amir Bakhsh, I am not prepared to say that their recent possession of part of the stolen property, so soon after it had been stolen, was not such corroboration of Gharipa's evidence of their participation in the dacoity as entitled the learned Judge to act upon his story in regard to those particular persons. But as to Ram Bakhsh, although he was present when his father Baldeo pointed out the place where some of the property was dug up, he does not appear to have said any-[514] thing or given any directions about it: and there is, in my opinion, no sufficient material to warrant the inference of guilty knowledge on his part. So with regard to Amman, no property was found with him or produced through his instrumentality, and under these circumstances I think that both he and Ram Bakhsh ought to have been acquitted.

I dismiss the appeals of Baldeo, Mir Singh and Amir Bakhsh, but, allowing those of Ram Bakhsh and Amman, acquit them and direct that they be released.

[8 All. 514]

CRIMINAL REVISIONAL.

The 1st July, 1886.

PRESENT

MR. JUSTICE BRODHURST.

Queen-Empress

versus

Ram Narain and another.

*Appeal, summary rejection of—Judgment of Criminal Appellate Court—
Criminal Procedure Code, ss. 367, 421, 424, 439—High Court's
powers of revision—Delay in applying for exercise.*

The powers conferred by s. 421 of the Criminal Procedure Code should be exercised sparingly, and with great caution, and reasons, however concise, should be given for rejecting an appeal under that section.

Where a Sessions Judge rejected an appeal summarily under s. 421 of the Code, by an order consisting merely of the words "appeal rejected," and an application for revision of such order was made to the High Court nearly nine months thereafter, on the ground that the Judge was wrong in rejecting the appeal without assigning his reasons for so doing—held, that this objection, if taken within a reasonable time, would have been valid, but as the application for revision was made with very great delay, the Court should not interfere.

THIS was an application for revision of an order of Mr. H. M. Bird, Joint Magistrate of Cawnpore, dated the 4th July 1885, and of the order of Mr. W. Blennerhassett, Sessions Judge of Cawnpore, dated the 4th September 1885, summarily rejecting, under s. 421 of the Criminal Procedure Code, an appeal from the Joint Magistrate's order. The facts of the case are stated in the judgment of the Court.

Pandit *Moti Lal*, for the Applicants.

The *Government Pleader* (Munshi *Ram Prasad*), for the Crown.

[516] Brodhurst, J.—In this case Ram Narain and Ganeshi were convicted by the Joint Magistrate of Cawnpore under s. 342 of the Indian Penal Code, and were sentenced to pay fines of Rs. 200 and Rs. 100 respectively, or, in default of payment, to be rigorously imprisoned for three months. From these convictions and sentences, Ram Narain and Ganeshi each preferred an appeal. The Sessions Judge rejected the appeals summarily, his order, in each instance, consisting merely of the two words "appeal rejected."

Ram Narain and Ganeshi have now applied to this Court for revision of the orders of the lower Courts, and the 5th and last ground taken by them is "because the learned Sessions Judge was wrong in rejecting the appeal summarily without assigning his reasons for so doing."

This objection, if taken within a reasonable time, would, in my opinion, have been valid. The law, I consider, requires that a Lower Appellate Court in disposing of an appeal, and even in summarily rejecting an appeal under the provisions of s. 421 of the Criminal Procedure Code, should give reasons for so doing; and, so far as I am aware, no Criminal Appellate Court of these Provinces, other than that the proceedings of which are now objected to, is addicted to disposing of any appeal without giving reasons for doing so. It is laid down in s. 367, Chapter XXVI of the Criminal Procedure Code, that the judgment of a Criminal Court of original jurisdiction "shall contain the point or points for determination, the decision thereon, and the reasons for the decision;" and by s. 424 of the same Code—a section in the same chapter with s. 421, and only three sections after it—it is enacted that "the rules contained in Chapter XXVI as to the judgment of a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment of any Appellate Court other than a High Court." The powers conferred by s. 421 of the Code should, I consider, be exercised sparingly and with great caution, and reasons, however concise, should be given for rejecting an appeal under that section.

Under the circumstances stated above, I should have reversed the orders of the Sessions Judge, and should have directed him to **[516]** re-hear the appeals and dispose of them in accordance with law, had I not found that the application for revision was made with very great delay, that is, after the expiration of nearly nine months from the date of the Lower Appellate Court's orders. On this ground, and also because I think that valid reasons might have been given for dismissing or rejecting the appeals, I decline to interfere in this revision case and reject the application.

Application rejected.

NOTES.

[As regards the effect of delay, see also 27 All., 408; (1907) A.W.N., 204.]

As regards the necessity for stating reasons in the judgment, see also (1893)-21 Cal., 32.]

[8 ALL. 516]
PRIVY COUNCIL.

The 10th February, 1886.

PRESENT :

LORD BLACKBURN, LORD MONKSWELL, LORD HOBHOUSE, AND
SIR RICHARD COUCH.

Muhammad Ismail Khan.....Defendant
versus
Fidayat-un-nissa and others.....Plaintiffs.

[On appeal from the High Court for the North-Western Provinces.]

*Family custom—Wajib-ul-arz—Muhammadan Law—Appeal
to Her Majesty in Council—Question of fact.*

It having been alleged that an estate, by custom, descended to a single heir in the male line, the High Court, concurring with the Court of First Instance, found that this custom had not been proved to prevail in the family.

On an appeal contesting this finding, it was argued, among other objections, that the High Court had not given sufficient effect to an entry in the *wajib-ul-arz* of a zamindari village, the principal one comprised in the family estate now in dispute; the last owner of that estate, who held all the shares in the village, having caused an entry to be made to the effect that his eldest son should be his sole heir, the others of the family being maintained.

Held, that, though termed an entry in a *wajib-ul-arz*, the document was not entitled to the name, but was rather in the nature of a testamentary attempt to make a disposition contrary to the Muhammadan law of descent.

The appeal was not taken out of the rule as to the concurrent findings of two Courts, primary and appellate, on a question of fact.

APPEAL from a decree (21st April 1881) of the High Court, confirming a decree (14th July 1880) of the Subordinate Judge of Meerut.

Ghulam Ghaus Khan, of an ancient Biluch family in the Bulandshahr district, died in 1879, leaving one son, the appellant, and three daughters, the respondents, besides certain illegitimate children. Upon his death, his son took possession, and alleged a sole title to the inheritance by the custom of the family. Between the brother and the sisters, the question on this appeal was whether [517] it had been proved that, by custom, the ancestral estate descended to a single heir in the male line, instead of to sharers according to the Muhammadan law of the Sunni sect to which the parties belonged. In the Court of First Instance, when the respondents brought this suit, other children of Ghulam Ghaus Khan were joined as plaintiffs; and, altogether, the claim was made for 82 saahms, as portions, out of 96 saahms, representing the whole estate.

All obtained a decree in their favour, which, however, was maintained in the High Court only in favour of the three daughters, now respondents; the other plaintiffs being found to be of illegitimate birth. The latter did not appeal against the decision; but the defendant, the brother, appealed; and the principal question now raised related to the proofs given by him of the alleged family custom. Among these was an extract from the *wajib-ul-arz* of village Jhagir, pargana Dankaur, tahsil Sikandrabad, zila Bulandshahr, in which village Ghulam Ghaus Khan, in his lifetime, was the recorded proprietor of all the 20 biswas.

This contained an entry dated the 12th September 1870, to the effect that, after his death, his eldest son should be heir to, and should manage, all his estate; it being declared that two other sons, who, however, both died in their father's lifetime, should receive only maintenance.

Mr. C. W. Arathoon appeared for the Appellant.

Reference was made to *Lekraj Kuar v. Mahpal Singh*, L. R., 7 Ind. Ap., 22; I. L. R., 5 Cal., 744, in which it was held that *wajib-ul-araz*, or village administration papers, properly prepared and attested, were admissible to prove a custom of inheritance stated therein.

The respondents did not appear.

Their Lordships' judgment was delivered by

Sir R. Couch.—The appellant in this case is the only surviving son of Ghulam Ghaus Khan, who died on the 6th November 1879, and the respondents are his three daughters, who it is not disputed were legitimate. The suit was brought by the three respondents, together with one Nanhi Begam, who was alleged to be a wife of Ghulam Ghaus Khan, and her children, who were [818] alleged to be legitimate. It has been found by the High Court that Nanhi Begam was not the wife of Ghulam Ghaus Khan, and that her children were illegitimate, and there is no question as to them in this appeal.

The plaintiff claimed on the part of the plaintiffs that they were entitled to 82 parts of the estate of the deceased, the whole being divided into 96 parts, that being the shares which they would be entitled to under the Muhammadan law, supposing all were entitled. The Subordinate Judge gave a decree in favour of all the plaintiffs for the 82 parts. The only part of the defence set up by the present appellant which it is now material to consider was that there was a family custom by which the eldest son was entitled to succeed to the whole of the property of the deceased. The Subordinate Judge found this custom was not proved. The present appellant, who was defendant, appealed to the High Court. The High Court, coming to the conclusion that Nanhi Begam and her children were not entitled to any share of the property, modified the decree of the lower Court and made a decree in favour of the appellant and the three respondents, dividing the property, as it then became necessary to do, in a different way. The property was divided into 35 parts, and 21 of these were given to the respondents, the plaintiffs, and the remainder to the present appellant; the defendant, the property being divided according to the Muhammadan law. The High Court also found, as the Subordinate Judge had found, that the family custom had not been proved.

The defendant has appealed to Her Majesty in Council, and the ground of appeal taken is that the High Court was wrong in finding that the custom was not proved. Objections have been taken to the judgment of that Court, but when they are examined they appear to their Lordships to amount only to this, that they contest the propriety of the finding of the Court or the construction of the evidence. The principal argument turns upon the contents of what is called a *wajib-ul-arz*, which does not appear properly to be a document entitled to that name, but rather a document in the nature of an administration or testamentary paper, by which Ghulam Ghaus Khan indicated the way in which he [819] should like the property to be enjoyed after his death. It seems to be rather an attempt on his part to make a disposition of his property contrary to the Muhammadan law.

The case appears to their Lordships to come within the rule that when there is a concurrent judgment of the two lower Courts upon a question of fact, it ought not to be disturbed; and their Lordships will therefore humbly

advise H^{er} Majesty to dismiss the appeal and affirm the decision of the High Court. There will be no order as to costs.

Appeal dismissed.

• Solicitors for the Appellant :—Messrs. Barrow and Rogers.

[8 All. 519]
CIVIL REVISIONAL.

The 1st July, 1886.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Dhan Singh.....Judgment-debtor

versus

Basant Singh and others.....Decree-holders.*

High Court's powers of revision—Civil Procedure Code s. 622—Meaning of "jurisdiction"—Amendment of decree—Civil Procedure Code, s. 206—Act XV of 1877 (Limitation Act), sch. ii, No. 178.

In execution of a decree for partition of immoveable property passed in 1872, a dispute arose as to the execution in reference to a portion of the property, and in 1881 it was finally decided that the decree was defective in its description of the property, and therefore incapable of execution. In May 1885, on application by the decree-holder, the Court passed an order amending the decree, the amendment having reference to an arithmetical error. The judgment-debtor applied to the High Court for revision of this order, on the grounds that the amendment of the decree was barred by limitation, and that the decree itself being barred by limitation and finally pronounced to be incapable of execution, the Court had acted beyond its jurisdiction in amending it.

Held, that the application for revision must be rejected.

Per OLDFIELD, J., that the High Court had no power to entertain the application under s. 622 of the Civil Procedure Code, with reference to the decision of the Privy Council in *Amir Hassan Khan v. Sheo Baksh Singh*, I. L. R., 11 Cal., 6, and of the Full Bench in *Badami Kuar v. Dinu Rai*, ante., p. 111, and further that, upon the facts stated, the Court ought not to interfere.

Per MAHMOOD, J., that the Court was not precluded from entertaining the application for revision under s. 622 of the Civil Procedure Code. *Amir Hassan Khan* [520] v. *Sheo Baksh Singh*, I. L. R., 11 Cal., 6; *Badami Kuar v. Dinu Rai*, ante, p. 111; *Raghunath Das v. Raj Kumar*, I.L.R., 7 All., 276; *Surta v. Ganga*, I. L. R., 7 All., 411; *Magni Ram v. Jiwa, Lal*, I.L.R., 7 All., 386; *Har Prasad v. Jafar Ali*, I. L. R., 7 All., 345, referred to. *Bhagwan Singh v. Jageshar Singh*, Weekly Notes, 1886, p. 57, and *Abu Said Khan v. Hamid-un-nissa*, Weekly Notes, 1886, p. 39, dissented from.

The meaning of the term "jurisdiction" used in s. 622 of the Civil Procedure Code must not be confined to the territorial or pecuniary limits of the powers of a Court, or to the nature of the class to which the case belongs. It implies, in addition to questions of these

* Application No. 98 of 1886, for revision, under s. 622 of the Civil Procedure Code, of an order of Maulvi Mazhar Husain, Munsif of Nagina, dated the 5th May 1885.

kinds, the presence or absence of a positive authority or power conferred by the law upon tribunals in cases which satisfy the other conditions referred to. In framing the section, the Legislature gave to the High Court power to interfere with the action of subordinate tribunals in cases where there is no remedy either by appeal or otherwise, and where those tribunals have either exceeded or wrongly declined to exercise the authority, the power and the jurisdiction which the law confers upon them, or, under the pretence of exercising such authority, power and jurisdiction, have acted against a positive prohibition of the law. *Combs v. Edwards*, L. R., 8 P. D., 108, and *Cropps v. Durdan*, 1 Smith's L. O. 8th ed., 711, referred to.

Held, also, *per* MAHMOOD, J. that in the present case the Court below had jurisdiction to entertain the application under s. 206 of the Code, that it did so entertain it, and that in making the amendment its action could not be regarded as beyond the limits of its legal power and authority, so as to render it open to the objection of the exercise of jurisdiction "illegally or with material irregularity," within the meaning of s. 622. *Lucas v. Stephen*, 9 W.R., 801; *Oomanund Roy v. Maharajah Suttish Chunder Roy*, 9 W. R., 471; *Zuhoor Hossein v. Syedun*, 11 W. R., 142, and *Goluck Chander Mussant v. Ganga Narain Mussant*, 20 W. R., 111, referred to.

Under a proper interpretation of the preamble and s. 4* of the Limitation Act (XV of 1877), the rule of limitation is confined to the litigants, and is inapplicable to acts which the Court may or has to perform *suo motu*. Section 206 of the Civil Procedure Code empowers a Court of its own motion to amend its decree, and the mere fact that one of the parties has made an application asking the Court to exercise that power will not render the action of the Court subject to the rule of limitation. *Roberts v. Harrison*, 1. L. R., 7 Cal., 393; *Vithal Janardan v. Rakmi*, 1.L.R., 6 Bom., 586, and *Kylasa Goundan v. Ramasami Ayyar*, 1. L. R., 4 Mad., 172, referred to.

THE facts of this case are stated in the judgments of the Court.

Munshi *Hanuman Prasad*, for the Petitioner.

Babu *Ratan Chand*, for the Opposite Party.

[821] *Oldfield, J.*—This is an application to revise, under s. 622 of the Civil Procedure Code, an order passed under s. 206, amending a decree.

The decree is dated the 10th July 1872; it was for partition of immoveable property, and it appears that applications to execute were made on the 20th June 1875, on the 10th June 1876, and on the 9th June 1879, when a dispute arose as to the execution in reference to a portion of the property, and the Court held that the decree was defective in its description of the property, and therefore incapable of execution. The final order was made by this Court on the 13th July 1881. On the 8th February 1882, the decree-holder sought to execute the decree in respect of other property, but execution was refused under an order by this Court dated the 17th March 1884.

The decree-holder then applied, on the 23rd February 1885, to amend the decree, and the amendment was made on the 5th May 1885. It is not disputed that the amendment has reference to an arithmetical error, and is one which could properly be made under s. 206.

The application, therefore, was properly one coming under the provisions of the section, and which the Court had jurisdiction to entertain under s. 206.

*[Sec. 4 :—Subject to the provisions contained in sections five to twenty-five (inclusive), every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by the second schedule hereto annexed shall be dismissed, although limitation has not been set up as a defence.

Explanation:—A suit is instituted in ordinary cases when the plaint is presented to the proper officer; in the case of a pauper, when his application for leave to sue as a pauper is filed; and in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator.]

The Court's order, therefore, is not open to any objection on the score of want of or excess of jurisdiction, and there is, therefore, no power in this Court to entertain this application under s. 622 of the Civil Procedure Code, with reference to the Privy Council decision in *Amir Hassan Khan*, I. L. R., 11 Cal., 6, and that of the Full Bench of this Court in *Badami Kuar v. Dinu Rai*, *Ante*, p. 111. In the last, the meaning of the Privy Council in the case above-mentioned was fully considered, and it was thus expressed by PETHERAM, C.J.—

"I understand the Privy Council to mean that if the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it, either of fact or of law, and that the High Court has no jurisdiction under s. 622 to enquire into the correctness of its view of the law, or the soundness of its finding as to facts." That view was taken by the Full Bench [522] of this Court of the scope and powers of the Court under s. 622, and is binding on us for dealing with cases coming under s. 622. The Court, in the case before us, was within its jurisdiction in amending the decree under s. 206; and whether or not it erred in entertaining the application on the ground of its being barred by limitation or other grounds, these are questions which do not affect the jurisdiction of the Court, so as to enable this Court to interfere under s. 622.

I may add, however, that, on the facts stated to us, this is not a case in which, having regard to the facts, I should be inclined to interfere. The application is dismissed with costs.

Mahmood, J.—I confess I am wholly unable to accept the preliminary objection urged on behalf of the respondent, to the effect that s. 622 of the Civil Procedure Code does not empower us to interfere in revision with any kind of orders passed by the lower Courts under s. 206 of the Code. This is not the first time that such a question has been raised before me, for I had to consider the matter on two former occasions. The first was the case of *Raghunath Das v. Raj Kumar*, I. L. R., 7 All., 276, and the other was *Surta v. Ganga*, I. L. R., 7 All., 411, and on both those occasions I stated the reasons in my dissentient judgment why the revisional powers of this Court should be exercised under s. 622 of the Civil Procedure Code. In both those cases my view of the law was upheld by the Full Bench of this Court, I. L. R., 7 All., pp. 875 and 876, and in both those cases the amending order was set aside as *ultra vires*.

But, then, it is argued that the Full Bench ruling of this Court in *Magni Ram v. Jiva Lal*, I. L. R., 7 All., 336, which followed the Privy Council ruling in *Amir Hassan Khan v. Sheo Baksh Singh*, I. L. R., 11 Cal., 6, is decisive upon the point, and restricts the revisional jurisdiction of this Court to pure questions of jurisdiction. Further, it is argued that the rule has been narrowed even further by a more recent Full Bench ruling of this Court in *Badami Kuar v. Dinu Rai* [*Ante*, p. 111] where the view of PETHERAM, C. J., was adopted by the whole Court, though STRAIGHT, J., delivered a separate judgment not consistent with the opinion of the learned Chief Justice, but surrendered [523] his own views, as he regarded the question as simply one of practice. With all the learned Judge said on that occasion in illustrating the effect of s. 622 of the Civil Procedure Code, I entirely concur, but I respectfully think that the matter before the Court was not one of practice, but a matter affecting the revisional jurisdiction of this Court—a jurisdiction the importance of which I cannot express in better language than in the words of STRAIGHT, J., himself:—"I need only add that, in my opinion, if there is one power which it is of the first importance that the Court should possess, it is the power of sending for the record in civil cases where no appeal lies. Experience shows that in

a very great many such cases grave illegalities and material irregularities do occur in the proceedings of the Courts below; and it is essential that in such cases the High Court should have the power of interference."

The ruling of PETHERAM, C. J., however, in which the rest of the Court concurred, is expressed in these words:—

"The section has been considered by the Privy Council in the case of *Amir Hassan v. Sheo Baksh Singh*, I. L. R., 11 Cal., 6, and the Full Bench of this Court in the case of *Magni Ram v. Jiwa Lal*, I. L. R., 7 All., 336, and the result of those cases, in my opinion, is that the questions to which s. 622 applies are questions of jurisdiction only. To make my meaning plain, I understand the Privy Council to mean that if the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it, either of fact or of law; and that the High Court has no jurisdiction under s. 622 to inquire into the correctness of its view of the law, or the soundness of its findings as to facts, but that, when no appeal is provided, its decision on questions of both kinds is final."

And perhaps the best way to illustrate how these words have been understood by two of the learned Judges themselves who were parties to the last Full Bench ruling, is to cite the case of *Bhagwant Singh v. Jageshar Singh*, Weekly Notes, 1886, p. 57, the effect of which I understand to be, that a Court having jurisdiction to hear a suit may say that it has no jurisdiction to hear it, and that its view as to [524] the want of jurisdiction, though erroneous, must be accepted as final and beyond the revisional jurisdiction of this Court under s. 622 of the Code. The same I understand to be the effect of the ruling of the same learned Judges in *Abu Sard Khan v. Hamid-un-nissa*, Weekly Notes, 1886, p. 39, in which the last Full Bench ruling was expressly cited as an authority for not interfering.

Now, I must say with all due respect that I find it impossible to agree in the rule laid down in either of these two cases, and the best manner in which I can state my reason for this view is to go back to the Full Bench ruling in the case of *Magni Ram*, I. L. R., 7 All., 336, to which I was a party, and in which I concurred in the somewhat laconic judgment which PETHERAM, C. J., delivered in that case. Soon after I found it necessary—because the ruling was being constantly misunderstood—to state my reasons why I had concurred in that ruling, and I did so in *Har Prasad v. Jafar Ali*, I. L. R., 7 All., 345, which has been fully reported. In that case I stated at considerable length by way of illustration the class of cases to which the provisions of s. 622 of the Civil Procedure Code would apply, and I also explained how I understood the words "questions relating to the jurisdiction of the Court" as used in the Full Bench case of *Magni Ram*, I. L. R., 7 All., 336, and the manner in which I interpreted the meaning of the word "jurisdiction" as used by their Lordships of the Privy Council in the case of *Amir Hassan Khan*, I. L. R., 11 Cal., 6. But it is contended that the last Full Bench ruling of this Court in *Badami Kuar's Case* [Ante p. 111] has overruled all the previous rulings, including the three cases in which I had delivered separate judgments, and in two of which, as I have already stated, my view of the law was unanimously accepted by the Full Court. Now, if those judgments of mine have been actually overruled by the Full Court, I should, of course, bow to the decision. But I find from the report of *Badami Kuar's Case* [Ante p. 111] that none of the rulings of this Court to which I have referred were considered, with the exception of the Full Bench ruling of this Court in *Magni Ram's Case*, I. L. R., 7 All., 336, where in the judgment the word "jurisdiction" occurs, and, as I showed in the case of

Har Prasad, I. L. R., 7 All., 345, is the turning-point of the interpretation of that ruling. Yet the exact application of the word to such cases [526] was, I respectfully think, not explained in the last Full Bench ruling in the case of *Badami Kuar* [*Ante*, p. 111] and the result is that, as I understand that ruling, it has left the matter exactly where the former Full Bench case of *Magni Kam*, I.L.R., 7 All., 336, had left it. At least this is the only manner in which I can understand the ruling of PETHERAM, C.J., in the case of *Badami Kuar*, for I find it impossible to conceive that the learned Chief Justice was either unaware of my rulings in the cases of *Har Prasad*, I. L. R., 7 All., 345, of *Surtu*, I. L. R., 7 All., 411, and *Raghunath Das*, I. L. R., 7 All., 276, or that he intended to overrule them without expressly referring to them in his judgment. Indeed, he could not have overruled two of them without having overruled two Full Bench judgments to which he himself was a party, and which judgments had not only accepted my conclusions, but also the reasons upon which they proceeded.

In this condition of the case-law of this Court, I decline to accept the contention that the last Full Bench ruling in the case of *Badami Kuar*, [*Ante*, p. 111] has swept away the whole of the antecedent case-law of this Court, and all I feel myself bound to do is to interpret the judgment of PETHERAM, C. J., in that case as best I can. And in doing so the word "jurisdiction" as used by His Lordship is again the turning-point of the exact meaning to be attached to his ruling. I fully agree with him when he says "that the questions to which s. 622 applies are questions of jurisdiction only." But then the question is, what does jurisdiction mean? The learned Chief Justice went on to say that the effect of the Privy Council ruling was "that if the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it, either of fact or of law, and that the High Court has no jurisdiction under s. 622 to inquire into the correctness of its view of the law, or the soundness of its findings as to facts; but that, when no appeal is provided, its decision on questions of both kinds is final." I have no hesitation whatsoever in accepting this enunciation of the law, provided that the word "jurisdiction," wherever it occurs in this passage, is to be understood in the sense in which I interpreted it in the case of *Har Prasad*, I. L. R., 7 All., 345. The learned Chief [526] Justice's ruling gives no information as to whether that interpretation was right; so long as there is no authoritative ruling binding upon me, which says that my interpretation was wrong, I have no reason to think so. On the contrary, considering that in two of the cases which proceeded upon the same interpretation, the Full Bench has approved my judgments, which judgments again have never been overruled, I think I am justified in saying, notwithstanding the case of *Badami Kuar*, *Ante*, p. 111, that my interpretation of what constitutes questions relating to jurisdiction is right, and I still adhere to that interpretation. At any rate, as I have already said, with due respect, I am unable to accept the view taken by two learned Judges of this Court in the cases of *Bhagwant Singh*, Weekly Notes, 1886, p. 57, and *Abu Said Khan*, Weekly Notes, 1886, p. 39, which go the length of laying down that even wrongful assumption of jurisdiction, or wrongful refusal to exercise jurisdiction, are matters which fall beyond the scope of s. 622. According to my humble opinion, such a view is not only not deducible from, but opposed to, the judgment of PETHERAM, C.J., in the last Full Bench ruling in the case of *Badami Kuar* [*Ante*, p. 111] and that the effect of such a view would be to abrogate the whole section 622 itself. For the view comes to this, that a Court having jurisdiction may wrongly say that it has no jurisdiction; and a Court having no jurisdiction may wrongly say that it has jurisdiction; and yet such erroneous refusal or assumption of

jurisdiction could not be interfered with under s. 622 of the Code, because—to use the language employed in one of the judgments—“the Court had jurisdiction to decide, and was bound to decide, whether the suit was or was not within its cognizance.” Yet in the last Full Bench case of *Badami Kuar* [*Ante*, p. 111] itself the Court interfered because the Munsif had wrongly declined to exercise jurisdiction.

I have dwelt upon this matter at such length because I cannot help feeling, with profound respect, that neither the Full Bench ruling in the case of *Magni Ram*, I. L. R., 7 All., 336, nor the last Full Bench ruling in the case of *Badami Kuar* [*Ante*, p. 111] is sufficiently explicit to place the exact scope of s. 622 beyond doubt, and the doubt has all along arisen over the exact manner in which the word “jurisdiction” as used by Their Lordships of the Privy Council in the case of *Amir Hassan Khan*, I. L. R., 11 Cal., 6, is to be understood. In the case of *Har Prasad*, I. L. R., 7 All., 345, I think I said enough to show from the judgment of Their Lordships themselves that they employed the word not in the narrow sense in which it is sought to be interpreted here, limiting it to territorial or pecuniary limits, and to questions relating to the nature of the suit, but in the comprehensive sense in which that word is understood as a term of English law. Now it is not for me, to whom English is a foreign tongue, to interpret the meaning of the English word, and I have, therefore, referred to Wharton’s “Law Lexicon” in order to ascertain the exact meaning in which the word is used in its legal sense, and that work explains “jurisdiction” to mean “legal authority; extent of power; declaration of the law;” and it is in this sense that I understand it as used by the Lords of the Privy Council in the case of *Amir Hassan Khan*, I. L. R., 11 Cal., 6, and I said so in the case of *Har Prasad*, I. L. R., 7 All., 345. Further, if there is any doubt about the matter, I would refer to the judgment of Lord PENZANCE in the celebrated case of *Combe v. Edwards*, L. R., 3 P. D., 103, where the word “jurisdiction” constantly occurs, not only in His Lordship’s own judgment, but in the passages to which he refers from earlier cases, and I think I may safely say that the word is used throughout in the comprehensive sense in which Wharton has explained it. And, indeed, if any further authority is required for my view, I will resort to no less an eminent authority than Lord MANSFIELD himself, whose use of the word in the leading case of *Grepps v. Durden*, 1 Smith’s L. C., 8th ed., 711, seems to me to be wholly consistent with the meaning which I humbly think the word has, and in which sense I understand it to have been used by the Lords of the Privy Council in *Amir Hassan Khan’s Case*, I. L. R., 11 Cal., 6. But because the interpretation of the Privy Council ruling depends upon the exact interpretation of the word, and also because much divergence of opinion apparently prevails both among the members of the Bench and of the Bar, I think it will not be out of place to quote a whole passage from the judgment of Lord MANSFIELD in the case above referred to, in order to illustrate the exact manner in which His Lordship understood and used the word “jurisdiction” as a term of law. His Lordship said:—

[528] “The first question is, ‘whether any objection can be made, to the legality of the convictions before they were quashed.’ In order to see whether it can, we will state the objection: it is this—that here are three convictions of a baker for exercising his trade on one and the same day, he having been before convicted for exercising his ordinary calling on that identical day. If the Act of Parliament gives authority to levy but one penalty, there is an end of the question, for there is no penalty at common law. On the construction of the Act of Parliament the offence is ‘exercising his ordinary trade upon the Lord’s

Day,' and that without any fractions of a day, hours or minutes. It is but one entire offence, whether longer or shorter in point of duration; so, whether it consists of one or a number of particular acts, the penalty incurred by this offence is five shillings. There is no idea conveyed by the Act itself, that if a tailor sews on the Lord's Day, every stitch he takes is a separate offence; or if a shoemaker or carpenter works for different customers at different times on the same Sunday, that those are so many separate and distinct offences. There can be but one entire offence on one and the same day; and this is a much stronger case than that which has been alluded to, of killing more hares than one on the same day: killing a single hare is an offence, but the killing ten more in the same day will not multiply the offence, or the penalty imposed by the statute for killing one. Here repeated offences are not the object which the Legislature had in view in making the statute, but simply to punish a man for exercising his ordinary trade and calling on a Sunday. Upon this construction, the justice had *no jurisdiction whatever* in respect of the three last convictions."

Having read this passage with the greatest care, I find it wholly impossible to doubt that Lord MANSFIELD, in saying that "the justice had no jurisdiction whatever in respect of the three last convictions," meant that the statute, then under consideration, did not *empower* the justice to convict more than once for trading on one Sunday, and that therefore the other three convictions were opposed to the Act, were *ultra vires*, and therefore made "without jurisdiction." Is it possible to conceive that the word would have been employed in such a manner and in such a case if its meaning were confined to territorial or pecuniary limits, or to the nature of [529] the class to which the case belongs? The case was undoubtedly of a nature cognizable by the justice, and the only question was whether the law authorized him to convict a person more than once for trading on the same Sunday. Lord MANSFIELD found that the statute did not so authorize the justice, that his action went beyond the authority of the law; it was therefore *ultra vires*, and His Lordship denominated such an action to be without any jurisdiction whatever.

This is the sense in which I understand the use of the word by the Lords of the Privy Council in *Amir Hassan Khan's Case*, I.L.R., 11 Cal, 6, and by PETHERAM, C.J., in the Full Bench cases of *Magnu Ram*, I.L.R., 7 All., 336, and *Badami Kuar* [*Ante*, p. 111] and this is the sense in which I interpreted it in the case of *Har Prasad*, I. L. R., 7 All., 345. And to what I said in that case I may add the two very apt illustrations given by STRAIGHT, J., in *Badami Kuar's Case* [*Ante*, p. 111] of what would constitute a question relating to the exercise of jurisdiction "illegally and with material irregularity" within the meaning of s. 622 of the Code; and I may add that the cases of *Surta*, I. L. R., 7 All., 411, and *Baghunath Das*, I. L. R., 7 All., 276, which have received the approval of the Full Bench of this Court, furnish further illustration of cases to which the revisional power of this Court under s. 622 would apply. I do not think any further illustrations are necessary, and I need only summarize the effect of all that I have said in this and the preceding cases as to the exact manner in which I understand what constitutes questions relating to the exercise of jurisdiction for purposes of revision. Such questions may refer to the following points:—

- (i) Territorial limits of jurisdiction.
- (ii) Pecuniary limits of jurisdiction.
- (iii) Jurisdiction with reference to the nature of the class to which the case belongs.

- (iv) Presence or absence of a positive authority or power conferred by the law upon tribunals in cases which satisfy the three preceding conditions.

The last is really the only point upon which my views have been doubted, but for such doubt no room is left after reading what I [530] have already quoted from Lord MANSFIELD's judgment. If a conviction wholly unauthorized by law furnishes a case of want of jurisdiction, I fail to conceive why an action by a civil tribunal, in a manner equally unauthorized, or, may be, positively prohibited by law, should not be held to be a question relating to the want of, or the illegal and irregular exercise of, jurisdiction. I entirely fail to see any difference in principle between the two kinds of cases here contemplated. For instance, take the provisions of s. 111, which authorizes the Court to allow a set-off only in a certain limited class of cases and subject to certain specific restrictions. The suit must be "*for the recovery of money*," and the subject of set-off must be an "*ascertained sum of money legally recoverable*" from the plaintiff. The power conferred by the section is denominated throughout in Courts of Chancery as one kind of "*equity jurisdiction*"—a phrase which would be unintelligible if the fourth point enumerated by me was not included within the meaning of the word *jurisdiction* (STORY, "*Eq. Juris.*," 11th ed., s. 1430—34). Again Mr. Justice STORY's work is full of phrases in which he uses the word *jurisdiction* in the sense of authority and power. For example, in s. 1431 he has the following:—"And, in the first place, let us consider the subject of *set-off* as an original source of equity jurisdiction. It is not easy to ascertain the true nature and extent of this *jurisdiction*." Now, if the power to allow set-off is a matter of jurisdiction," I should say that where the action of a Court which allows set-off is in direct contravention of the restrictions imposed upon its authority by s. 111, which creates that authority, the matter would be a proper subject for revision under s. 622 of the Code.

I have thus the authority of Lord MANSFIELD, Lord PENZANCE, and Mr. Justice STORY for the comprehensive meaning which I attach to the use of the word "*jurisdiction*," as a legal term, in the English language. Nor am I aware of any authority which has used the word in any other sense. And so long as I understand the word in the sense in which such eminent authorities have understood and used it, so long shall I hold that the Legislature, in framing s. 622 of the Civil Procedure Code, gave us the authority, the power and the jurisdiction to interfere in the action of the tribunals subordinate to this Court in cases where there is no remedy either by appeal or otherwise, and where those tribunals [531] have either exceeded or wrongly declined to exercise the authority, the power and the jurisdiction which the law confers upon them, or, under the pretence of exercising such authority, power and jurisdiction, have acted against a positive prohibition of the law. And I humbly say, Understand the word "*jurisdiction*" in the judgment of the Lords of the Privy Council in *Amir Hassan Khan's Case*, I. L. R., 11 Cal., 6, as a legal expression having a definite meaning in the language and in the country in which Their Lordships delivered the judgment, and no difficulty or inconsistency arises between what Their Lordships said and the express letter of the statute. The case before Their Lordships was one in which two tribunals having full jurisdiction to deal with the case, and in the exercise of such power and authority as that jurisdiction conferred upon them, had come to the definite conclusion that the property which was then in litigation had not been the subject of any such previous adjudication as would furnish a basis for the plea of *res judicata*. The judgments of the two tribunals were concurrent, and under the Oudh Civil Courts Act they were final. The Judicial Commissioner interfered with them

under s. 622, as the High Court of that province, and their Lordships of the Privy Council declared that "the Judicial Commissioner had no *jurisdiction* in the case." Surely not in the limited sense to which the word is sought to be confined here, but in the broad sense of want of authority and power under the law; in other words, in the sense in which it is understood in England. The effect of that ruling, as I have once before fully explained in *Har Prasad's Case*, I. L. R., 7 All., 345, is not to divest this Court of its revisional power of interference in cases where the subordinate tribunals have totally disregarded, either in the affirmative or in the negative, the limits of the authority and power conferred upon them by law, or have acted in contravention of a positive prohibition. For instance, the law says an immoral contract shall not be enforced, because it is opposed to public policy, and if a Court, in direct contravention of this prohibition, enforces such a contract, there would, of course, be no question relating to any of the first three points which I have above enumerated in connection with jurisdiction; but the action of the Court would relate to the fourth point, and this Court could [532] interfere in revision, because the Court below had no legal authority and no power under the law to enforce a contract which the Legislature in its wisdom had said shall not, under any conditions, be enforced.

Such, then, are my views in connection with the scope of s. 622 of the Civil Procedure Code; such is my interpretation of the ruling of the Privy Council in *Amir Hassan Khan's Case*, I. L. R., 11 Cal., 6, and such also is my interpretation of the Full Bench rulings of this Court in the cases of *Magni Ram*, I. L. R., 7 All., 336, and *Badami Kuar*, *Ante*, p. 111, and in the cases of *Surta*, I. L. R., 7 All., 411, and *Raghunath Das*, I. L. R., 7 All., 276. And reading these various cases as I have done, I do not find myself precluded from entering into this case for the purpose of satisfying myself whether the jurisdiction assumed in this case by the lower Court, purporting to act under s. 206 of the Civil Procedure Code, was rightly assumed; and if so, whether its action in amending the decree did not exceed the authority and power which that provision of the law conferred upon that Court, and also whether that Court has not acted against some positive prohibition of the law. I therefore entertain this petition in revision, and I will dispose of it upon what can be shown on either side in the case. And I proceed to consider what actually happened here.

The original decree in the case was passed on the 10th July 1872, in a suit for partition of certain pieces of land. The decree, *inter alia*, declared the plaintiff entitled to land, 27 yards by 25 yards in length and breadth. This would yield an area of 675 square yards, but the decree described it to be 925 square yards, apparently in accordance with the statement in the plaint.

The decree does not appear to have been appealed from; but the inconsistency of the figures above stated was detected, apparently for the first time, on the 16th February 1880 by the amin who was deputed, during the course of the execution of the decree, to measure the land. The Munsif who dealt with the execution case held, in the order dated 10th April 1880, that the measurement of the length and breadth of the land was accurately entered in the decree, but that the area, 925 square yards, had been [533] erroneously entered instead of 675, and he allowed execution accordingly. But upon appeal the Judge set aside the order on the 24th December 1880 and pointed out the boundaries of the land which was to be allotted to the decree-holder under the decree. From this order a second appeal was preferred to this Court, and TYRRELL and DUTHOIT, JJ., held that "the decree, execution whereof has been attempted, is, as it stands, by reason of inherent errors and

inconsistencies, unsusceptible of execution, and it was for the decree-holder to have procured from the Court such amendment as would cure these defects, without which amendment the decree cannot be executed." The order of this Court was made on the 13th July 1881, and its effect was to annul the proceedings of both the Courts. The decree-holder thereupon made an application to the Munsif, under s. 206 of the Civil Procedure Code, for amendment of the decree, and the Munsif, by an order dated the 5th May 1885, granted the application, and amended the decree so as to allot to the decree-holder an area of only 675 square yards, which, according to the opposite party's own contention, was the extent of land decreed.

For the revision of this order this application has been made by the judgment-debtor under s. 622 of the Civil Procedure Code, and the contention urged before us raises two points for determination. In the first place, it is urged, relying upon the ruling of this Court in *Gaya Prasad v. Sikri Prasad*, I.L.R., 4 All., 23, that art. 178, sch. ii of the Limitation Act applies to this case, and that the amendment of the decree was barred by limitation. It is contended, in the second place, that the decree of the 10th July 1872, being barred by limitation and finally pronounced by this Court to be incapable of execution, the Munsif acted beyond jurisdiction in amending such a decree.

As to the first of these points, all I have to say is that on a former occasion, in the case of *Ragunath Das v. Raj Kumar*, I. L. R., 7 All., 276, I respectfully expressed my inability to accept that ruling. holding, as I did then, and still do, that under a proper interpretation of the preamble and s. 4 of the Limitation Act (XV of 1877), the rule of limitation is confined to the litigants, and is inapplicable to acts which the Court may, or has to, perform *suo motu*. And [834] I think that this view is supported by the principle upon which the rulings in *Robarts v. Harrison*, I. L. R., 7 Cal., 333; *Vithal Janardan v. Rakmi*, I. L. R., 6 Bom., 586, and *Kylasu Goundan v. Ramasami Ayyar*, I.L.R., 4 Mad., 172, proceeded. Section 206 of the Civil Procedure Code empowers a Court of its own motion to amend its decree, and the mere fact that one of the parties has made an application asking the Court to exercise that power will not, in my opinion, render the action of the Court subject to the rule of limitation.

As to the next point, I decline to enter into the question whether the decree of the 10th July 1872, was barred by limitation when the amendment was made. The question properly appertains to the stage when execution of the decree is prayed for, and, moreover, the record of the case now before us furnishes no material for any adjudication upon the point. Nor do I think that the order of this Court, dated the 13th July 1881, stood in the way of the amendment. On the contrary, it suggested such amendment, and at any rate cannot be understood to have terminated all future proceedings, whether for securing the amendment or for executing the amended decree. This being my view, the matter stands clear enough. The Munsif had jurisdiction to entertain the application under s. 206 of the Code; he did so entertain it, and in making the amendment his action cannot be regarded as *ultra vires*, beyond the limits of his legal power and authority, so as to render it open to the objection of the exercise of jurisdiction "illegally or with material irregularity" within the meaning of s. 622 of the Civil Procedure Code. In laying down this rule I have used the word "jurisdiction" in the sense in which I have explained it. To use the words of PHEAR, J., in *Lucas v. Stephen*, 9 W. R., 301, it is a right "incident to every Court to correct its formal records in such way, if needed, as will make them represent truly the decision which was intended to be judicially expressed when the decision was delivered. In this way blunders of the pen may be set right." This, indeed, is the

scope of the last paragraph of s. 206 of the Civil Procedure Code, and the Munsif in this case only corrected what was obviously a "clerical or arithmetical error" in the decree. In the cases of *Oomanund Roy v. Maharajah* [535] *Suttish Chunder Roy*, 9 W. R., 471; *Zuhoor Hossein v. Syedun*, 11 W. R., 142, and *Goluck Chunder Mussant v. Ganga Narain Mussant*, 20 W. R., 111, the Calcutta High Court, even under the old Code, allowed such amendments, even though the decree had been made the subject of appeal; and the last of these cases is so far similar to the present case that there, as here, the decree was found incapable of execution because it did not contain any clear direction as to the payment of costs, and the High Court had suggested the amendment. All these cases support my view, and indeed go beyond it. But I must state that I am not prepared, in view of the Privy Council ruling in *Kistokinker Ghose Roy v. Barrodacant Singh Roy*, 10 B. L. R., 101, and the Full Bench ruling of this Court in *Shohrat Singh v. Bridgman*, 1. L. R., 4 All., 376, to accept the proposition that the power of amending a decree continues in the Court making it after it has become the subject of appeal. MARKBY, J., in the case of *Goluck Chunder Mussant v. Ganga Narain Mussant*, 20 W. R., 111, doubted the proposition, and, speaking for myself, I would accept the rule laid down by COUCH, J., in *Bhanu Shankar Gopal Ram v. Raghunath Ram Mangal Ram*, 2 Bom. H. C. Rep., 106. But the point does not arise in this case as it has been presented to us.

For these reasons I would dismiss this application with costs; but before concluding I wish to point out that this case is distinguishable from our recent ruling in *Tarsi Ram v. Man Singh*, ante, p. 492, where the amendment of decree was made after it had been held by a final adjudication to have been barred by limitation, and where the application, with which we had to deal, was in consequence also barred by limitation.

Application dismissed.

NOTES.

[As regards the meaning of 'jurisdiction' in sec. 115, C.P.C., 1908: sec. 622, C.P.C., 1882, see the notes to 11 Cal., 7 in the Law Reports Reprints. See also (1888) 8 A.W.N., 148; (1888) 10 All., 467; (1887) 9 All., 486; (1887) 10 All., 119; (1890) 12 All., 115; (1908) 11 O.C. 208.

As regards revision, see also (1907) 31 Bom., 447.

As regards limitation in respect of acts of Court *suo motu*, see also (1889) 13 All., 78.]

[536] APPELLATE CIVIL

The 1st July, 1886.

PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Ramadhar.....Decree-holder

versus

Ram Dayal.....Judgment-debtor.*

Civil Procedure Code, s. 230—Twelve years' old decree—Execution of decree—Meaning of "granted."

A decree passed in April 1872, was kept alive by various applications for execution up to 1883. In February and December of that year two such applications were made, but the

* Second Appeal No. 46 of 1886, from an order of W. Blennerhassett, Esq., District Judge of Cawnpore, dated the 22nd December 1885, affirming an order of Munshi Kulwant Prasad, Subordinate Judge of Cawnpore, dated the 15th April 1885.

proceedings on both occasions terminated in the applications being struck off without any money being realized under the decree. In November 1884, the decree-holder again applied for execution, the application being the first made after the decree had become twelve years old, and being made within three years from the passing of the Civil Procedure Code, 1882.

Held, that the application must be entertained in accordance with the ruling of the Full Bench in *Musharraf Begum v. Ghalib Ali*, I.L.R., 6 All., 189. *Tufail Ahmad v. Sadho Saran Singh*, Weekly Notes, 1885, p. 193, dissented from. *Jokhu Ram v. Ram Din*, ante, p. 419, referred to.

Per MAHMOOD, J., that the previous execution proceedings initiated by the applications of February and December 1883, having terminated in those applications being struck off, it could not be said that the applications were "granted" within the meaning of s. 230 of the Civil Procedure Code. *Paraga Kuar v. Bhagwan Das*, ante, p. 301, referred to.

THE decree of which execution was sought in this case was passed on the 29th April 1872, and two or three applications for execution were made before the year 1883. Then, on the 2nd February 1883, an application for execution was made, and notice was issued and served upon the judgment-debtor, who raised objections to the execution on the 10th March 1883, and a reply to those objections was filed by the decree-holder on the 18th April 1883. On the 9th July 1883, the parties asked the Court to allow time for an amicable settlement, but no such settlement having been notified to the Court, the application was struck off on the 19th July 1883, without any money being realized under the decree. The next application for execution was made on the 10th December 1883, and notice was issued to the judgment-debtor, but as he could not be found it was affixed to his house under the provisions of the Code; but the decree-holder took no further [537] action, and his application was again struck off on the 19th May 1884, without any money being realized under the decree.

The next application for execution of the decree was made on the 24th November 1884, and notice having been issued to the judgment-debtor, the latter, on the 2nd February 1885, objected to the execution upon the ground, among others, that the decree was barred by the twelve years' rule under s. 230 of the Civil Procedure Code. This objection was allowed by the first Court on the 15th April 1885, and the order was upheld in appeal by the Lower Appellate Court on the 22nd December 1885; and from this order this second appeal was preferred.

It was contended for the appellant that, under the circumstances of this case, the application was not barred, being entitled to three years' grace from the passing of the present Code (17th March 1882), under the proviso to s. 230, with reference to the Full Bench ruling of this Court in *Musharraf Begum v. Ghalib Ali*, I.L.R., 6 All. 189, and that neither the application of 2nd February 1883, nor that of 10th December 1883 having been "granted" within the meaning of s. 230 of the Code, the limitation of twelve years, contained in that section, was not applicable to the present application. In support of this last contention, *Paraga Kuar v. Bhagwan Din*, ante, p. 301, was cited.

Mr. Simeon, for the Appellant.

Mr. Carapiet, for the Respondent.

Mahmood, J.—The exact effect of the Full Bench ruling was, recently discussed and summarized by me in *Jokhu Ram v. Ram Din*, ante, p. 419. It is clear from the report of the Full Bench ruling that the application, which was under consideration in that case, was the first made under the present Code after the decree had become twelve years old, and in view of this circumstance the learned Judges constituting the majority of the Full Bench observed:—"In the execution proceedings to which this reference relates, the respondent-decree-holder's application to execute the decree of November 1870, was not only the

first preferred by him under s. 230 of Act XIV of 1882, but the first he had made after the expiration of [538] twelve years from the date of the decree, and as such was, we think, entertainable." That this was not a mere *obiter dictum*, but formed a part of the *ratio decidendi*, is apparent from the judgment itself, and the same conclusion is derivable from what STRAIGHT, Offg. C. J., one of the learned Judges of the majority of the Full Bench, has said in *Paraga Kuar v. Bhagwan Din*, ante, p. 301 :—"Looking at the provisions of s. 230 of the Civil Procedure Code, it would appear that, after a decree is twelve years old, there is a prohibition against its being executed more than once; that is, an application for execution should not be granted if a previous application had been allowed under the provisions of that section." There can therefore be no doubt that, according to the opinion of the majority of the Full Bench in the case of *Musharraf Begam*, I.L.R., 6 All., 189, the holder of a decree more than twelve years old was to be allowed *only one* opportunity to execute his decree under that section, and indeed the application with which the Full Bench was dealing was the first application after the decree had become twelve years old, and also the first under the present Code.

Such is not exactly the case here, for both the application of the 2nd February 1883, and that of the 10th December 1883, were made under the present Code, but on neither of those occasions was the decree more than twelve years old. The present application, which was made on the 24th November 1884, is, therefore, the *third* application made under the present Code, but it is the first made after the lapse of twelve years from the date of the decree. It must therefore be entertained within the principle of the ruling of the Full Bench; because the twelve years limitation provided by s. 230 of the Code of 1877 cannot, according to that ruling, be read as included in the proviso to that section. The only authority for the respondent's contention, that this decree is barred, is the ruling of PETHERAM, C. J., in *Tufail Ahmad v. Sadho Saran Singh*, Weekly Notes, 1885, p. 193, but in the case of *Jokhu Ram v. Ram Din*, ante p. 419, I have already stated my reasons for being unable to adopt that ruling.

Then again I agree in what STRAIGHT, Offg. C.J., has said in *Paraga Kuar v. Bhagwan Din*, ante, p. 301, as to the meaning of the word "granted" as used in s. 230 of the Civil Procedure Code. Here [539] the previous execution proceedings under the present Code initiated by the applications of the 2nd February 1883, and 10th December 1883, terminated in these applications being struck off, and these results cannot be construed to mean that these applications were "granted" within the meaning of s. 230 of the Civil Procedure Code.

I would decree this appeal, and setting aside the orders of both the lower Courts, remand the case to the Court of First Instance for disposal according to law, with reference to the other objections raised by the judgment-debtor. Costs to abide the result.

Oldfield, J.—This is an appeal from an order disallowing an application to execute a decree. The decree bears date the 20th April 1872. Applications to execute the decree have been made and granted under Act X of 1877 and under the present Code of Civil Procedure, and the present application is dated the 24th November 1884. The question is, whether it is barred under the provisions of s. 230.

This application is made more than twelve years after the date mentioned in the section, and a previous application for execution has been made and granted under this Code: consequently it would be barred by time, unless it comes under the proviso in the last paragraph of the section, which is as follows :—"Notwithstanding anything herein contained, proceedings may be

taken to enforce any decree within three years of the passing of this Code, unless when the period prescribed for taking such proceedings by the law in force immediately before the passing of this Code shall have expired before the completion of the said three years."

Now this application is within three years of the passing of this Code, and we have to see if the period prescribed for taking proceedings to enforce the decree by the law in force immediately before the passing of this Code has expired. The decree, no doubt, has become time-barred under the provisions of s. 230, Act X of 1877; but it has been held by the majority of the Full Bench of this Court that the law referred to in the proviso is not s. 230, Act X of 1877, but the Limitation Act; and with reference alone to the Limitation Act the decree cannot be held to be time-barred.

[540] I dissented from the majority of the Full Bench in the ruling referred to, but I am bound to decide this case in accordance with it. A decision of a Division Bench of this Court has been cited to the effect that "that the proviso in s. 230 applies to those decrees which would be barred on the date of the Code coming into force, and does not apply to those decrees which were not barred by the twelve years' rule when the Code came into force, and which could have been executed on the Code coming into force by reason of the fact that the period of twelve years had not expired from the date mentioned in s. 230"—[*Tufail Ahmad v. Sadho Saran Singh*, Weekly Notes, 1885, p. 193.]

According to this ruling, the decree we are dealing with would not be saved by the proviso, which would not apply to it.

But I am unable to concur in the interpretation of the proviso taken by the learned Judges in that case.

I would set aside the orders and remand the case for execution. Appellant will have costs in all Courts.

Case remanded.

NOTES.

[See also (1890) 12 All., 571; (1893) 15 All., 198.]

[8 All. 540]

The 2nd July, 1886.

PRESENT:

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, AND MR. JUSTICE MAHMOOD.

Ram Autar.....Plaintiff

versus

Dhanauri and others.....Defendants.*

Mortgage—First and second mortgages—Registered and unregistered documents—Act III of 1877 (Registration Act), s. 50—Fraudulent transfer—Act IV of 1882 (Transfer of Property Act), s. 63.

Apart from any question of equitable estoppel, such as described by Lord CAIRNS in the *Agra Bank v. Barry*, L. R., 7 H. L., 135, where one person takes a possessory mortgage of

* Second Appeal No. 1629 of 1885, from a decree of C. Donovan, Esq., District Judge of Benares, dated the 28th July 1885, confirming a decree of Pandit Rajnath, Munsif of Benares, dated 19th February 1885.

property with full knowledge and notice that another is already in possession of such property under an earlier instrument of a similar kind, he cannot be said to be acting in good faith, and the principle of s. 53 of the Transfer of Property Act (IV. of 1882) is applicable to such a transaction. In such a condition of circumstances, *quoad* the prior title, though created by an unregistered instrument, the status of the second mortgagee under his registered document is affected by his own *mala fides*; and as, on the one hand, the first mortgagee might avoid it on the ground that it was executed in fraud of him, so, on the other, the second mortgagee cannot, on the strength of his own fraud, pray in aid the provisions of the Registration Law to give preference to an instrument which records a [541] transaction that, in its inception, being fraudulent, was a *nudum pactum*. Such document would not be a "document" in the sense of s. 50 of the Registration Act, which term as therein used means a document legally enforceable. *Rahmat-ulla v. Sariut-ulla*, 1 B. L. R., F. B., 58, referred to.

In a suit for possession of immoveable property by virtue of a registered instrument of mortgage executed in 1883, against a defendant in possession of the same property under an unregistered mortgage-deed of 1881 (both deeds being instruments the registration of which was not compulsory), it was found as a fact that at the time of the execution and registration of his mortgage-deed the plaintiff was aware that the defendant was in possession under his mortgage.

Held, that, under these circumstances, the fact that the plaintiff's deed was registered did not entitle him to dispossess the defendant by virtue of the provisions of s. 50 of the Registration Act (III of 1877).

THE plaintiff in this case claimed possession of certain land, by virtue of a registered instrument of mortgage dated the 20th June 1883. Part of the land was in the possession of one of the defendants under an unregistered instrument of mortgage dated the 17th January 1881. Both the instruments of mortgage were instruments the registration of which was not compulsory. It was found as a fact that at the time of the execution and registration of his mortgage-deed, the plaintiff was aware that the first mortgagee, defendant, was in possession under his mortgage. Both the lower Courts held that, under these circumstances, the fact that the plaintiff's deed was registered, did not entitle him to dispossess the first mortgagee.

In second appeal the plaintiff contended that his registered deed should have priority over the defendant's unregistered deed.

Mr. Niblett, for the Appellant.

Lala Juala Prasad, for the Respondents.

Straight, J.—It has been found as a fact by both the lower Courts, and the appellant's pleader admits it to have been so found, that the plaintiff took his mortgage of the 20th June 1883, with notice of the defendant's possessory mortgage of the 17th January 1881. Both these instruments were for sums of money below Rs. 100, and both were optionally registrable, that of the 20th June 1883, being, in fact, registered, and that of the 17th January 1881, being unregistered.

The question then arises, whether the plaintiff, having taken his document of the later date with knowledge of the prior title [542] of the defendant and of his possession, in virtue of it, of the land to which the suit relates, is entitled to enforce the provisions of s. 50 of the Registration Act, 1877? In support of the contention that he is, his pleader referred to *Nallappa Goundon v. Ibram Sahib*, I. L. R., 5 Mad., 73; *Madar Sahib v. Subbarayalu Nayudu* I. L. R., 6 Mad., 88, and *Kota Muthanna Chetti v. Ali Beg Sahib*, I. L. R., 6 Mad., 174. On the other side our attention was called to *Fuzl-ud-deen Khan v. Fakir Mahomed Khan*, I. L. R., 5 Cal., 336; *Dinonath Ghose v. Auluck Moni Dabee*, I. L. R., 7 Cal., 753; *Narain Chunder Chuckerbutty v. Dataram Roy*, I. L. R., 8 Cal., 597 and

Nani Bibee v. Hafiz-ul-lah, I.L.R., 10 Cal., 1073, and *Bhalu Roy v. Jokhu Roy*, I. L. R., 11 Cal., 667. Putting aside any question of equitable estoppel, such as is so forcibly described by Lord CAIRNS in the *Agra Bank v. Barry*, L. R., 7 H. L., 135, it seems to me that where one person takes a possessory mortgage of property with full knowledge and notice that another is already in possession of such property under an earlier instrument of a similar kind, he cannot be said to be acting in good faith (see Story's Equity by Grigsby, s. 397, and 2 White and Tudor, pp. 45, 46), and that the principle enunciated in s. 53 of the Transfer of Property Act is applicable to such a transaction. In other words, in such a condition of circumstances, the condition of things is that *quid* the prior title, though created by an unregistered instrument, the *status* of the second mortgagee under his registered document is affected by his own *mala fides*; and as, on the one hand, the first mortgagee might avoid it on the ground that it was executed in fraud of him, so, on the other, the second mortgagee cannot, on the strength of his own fraud, pray in aid the provisions of the Registration Law, to give preference to an instrument which records a transaction that in its inception being fraudulent, was a *nudum pactum*. In this respect of the matter such document would not be a "document" in the sense of s. 50 of the Registration Act, which term, as therein used, I understand to mean a document legally enforceable, and I am confirmed in this opinion by the remarks of Sir BARNES PEACOCK, C.J., in *Rahmat-ulla v. Sariat-ulla*, 1 B. L. R., F. B., 82. This being the view I take of the question raised by the second [543] plea in appeal, the Courts below were, in my opinion, right in giving effect to the defendant's deed, and I dismiss this appeal with costs.

Mahmood, J.—I concur.

Appeal dismissed.

NOTES.

[There is no priority when the subsequent document, though registered, was taken with notice of the prior one:—(1891) 16 Mad., 148; (1896) 19 All., 145; (1902) 27 Bom., 452; (1892) 6 C.P.L.R., 112; (1913) 20 I.C., 195 (Cal.).]

[8 All. 543]

The 8th July, 1886.

PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE TYRRELL.

Behari Das.....Plaintiff

versus

Kalian DasDefendant.*

Arbitration—Making award after the time allowed by Court—

Civil Procedure Code, s. 521.

Under s. 521 of the Civil Procedure Code, the rule that no award shall be valid unless "made" within the period fixed by the Court, is equivalent to a rule that the award must be "delivered" within that period.

Upon a reference to the arbitration of three persons, the Court ordered that the award made by them should be filed on the 19th September 1885. The award was not filed on that date, but was signed by two of the arbitrators on that date, and by the third arbitrator on the 20th September, on which day it was filed. It had been agreed that the opinion of the majority should carry the decision.

* First Appeal No. 97 of 1886, from an order of Lala Banwari Lal, Subordinate Judge of Aligarh, dated the 10th May 1886.

Held, that the award was not "made within the period fixed by the Court" within the meaning of s. 521 of the Civil Procedure Code.

THE facts of this case are stated in the judgment of the Court.

Babu *Ratan Chand*, for the Appellant.

Pandit *Nand Lal*, for the Respondent.

Tyrrell, J.—This case is one in which a reference to arbitration was made when the suit was in the Court of First Instance.

The question at issue was referred to three arbitrators, namely, Nand Kishore, ~~the~~ Mal and Beni Ram, and the order of the Court was, that the award made by these arbitrators should be filed, that is to say, made and delivered, on or before the 19th September 1885. As a matter of fact the award of the three arbitrators was not filed on that date, but was signed by two of them on that date, and by Beni Ram, the third arbitrator, on the 20th September. Both parties objected to the propriety and correctness of the arbitrator's award, but their objections were overruled, and a decree based on the award was passed.

[544] On appeal by the defendant the Lower Appellate Court set aside this decree, holding the award to be invalid, and remitted the case to the first Court for trial on its merits. This order of the Lower Appellate Court is the subject of the present appeal. The learned pleader for the appellant, while admitting that the award was not signed, filed and delivered within the period allowed by the Court, contends notwithstanding that the award was "made" on the 19th September, in the sense of the last paragraph of s. 521, and therefore was valid. He bases his argument mainly on the terms of s. 515 of the Code, which provides that when an award has been made, the parties shall sign it, the argument being that an award, though unsigned, may still, in the sense of that section, be considered to have been "made." He also contends in an oral plea that the award of two out of three arbitrators having been made and signed on the 19th September, the award was a good one, inasmuch as it had been agreed that the opinion of the majority should carry the decision. I would not allow these contentions. Looking to s. 508 of the Code, I find that it is the duty of the Court to fix the time for "delivery" of the award, and under s. 514, if the award cannot be completed within the time so fixed, the Court may enlarge the time for its "delivery." These are the only provisions referring to the period to be fixed by the Court; and as they both contemplate the *delivery* of the award, which necessarily pre-supposes the *making* and signing of such award, it follows that, under s. 521, the rule that no award shall be valid unless "made" *within the period fixed by the Court*, is equivalent to a rule that the award must be "delivered" within that period. In the case before us it is to be noted that the order to file or deliver the award before the 19th September was as precise as it could be. The award, therefore, in the case which was signed by two arbitrators only within the time fixed for its delivery in a completed state, and was not filed till the day after the expiry of the limit fixed by the Court, was not "made within the period fixed by the Court." As to the oral plea, it is sufficient to say that the Court's order was, that the award of the three arbitrators, and not the award of the majority, should be filed on or before the 19th September; and even the award of the majority was not delivered or filed on that day. I am, therefore, [545] of opinion that the pleas in appeal are not sound, and that this appeal must be dismissed with costs.

Oldfield, J.—I concur.

Appeal dismissed.

NOTES.

[It is necessary, for the validity of an award, that it must be completed and signed by the arbitrators on or before the date fixed. The filing of it in Court beyond the date fixed does not render it illegal :—(1905) 27 All., 459; (1903) 26 All., 105 (where the award was filed after office hours on the last day); (1898) 22 Mad., 22 (where the delay was two days); (1888) 13 Bom., 119 (where the filing was delayed for one month).]

[8 All. 545]

The 8th July, 1886..

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE TYRRELL.

Nand Ram.....Plaintiff.

versus

Sita Ram and another.....Defendants.*

Execution of decree—Decree enforcing the right of pre-emption—Non-payment of purchase-money decreed by appellate Court—Restitution of purchase-money paid under lower Court's decree—Civil Procedure Code, s. 583—Application for restitution—Revival of application—Act XV of 1877 (Limitation Act), sch. ii, No. 179 (4).

A decree for pre-emption was passed conditionally upon payment by the decree-holder of Rs. 1,139, and in July 1880, the plaintiff paid this amount into court, and it was drawn out by the defendant in August 1881. Meanwhile, in July 1881, the High Court in second appeal raised the amount to be paid by the plaintiff to Rs. 2,400, but the plaintiff allowed the time limited for payment of the excess difference to elapse without paying it and the decree for pre-emption thereupon became dead. In May 1883, the plaintiff applied in the execution department for the refund of the deposit which had been drawn and retained by the defendant. This application was granted and the defendant ordered to refund, and this order was confirmed on appeal in January 1885, and by the High Court in second appeal in May 1885. Meanwhile the first Court had suspended execution of the order pending the result of the appeal, and in December 1884, removed the application temporarily from the "pending" list. In February 1885, the plaintiff applied for restitution of the amount deposited, asking for attachment and sale of property belonging to the defendant. This application was dismissed as barred by limitation.

Held, that this application was only a revival of the application of May 1883, which was within time.

Held, also, that the plaintiff was, in the sense of s. 583 of the Civil Procedure Code, "a party entitled to a benefit by way of restitution under the decree" of the High Court of July 1881; that it was a necessary incident of that decree that he was entitled to restitution of the sum which he had paid as the sufficient price under the decree of the Lower Appellate Court; that he was competent under s. 583 to move the local Court to execute the appellate decree in this respect in his favour "according to the rules prescribed for the execution of decrees in suits;" that he did this in May 1883, by an application made according to law in the proper Court in the sense of art. 179 of the Limitation Act; and that his present application to the same effect being within three years from that application was within time.

[546] THE facts of this case were as follows :—

The plaintiff in a suit to enforce the right of pre-emption obtained a decree in the Court of the Subordinate Judge of Aligarh for possession of the property

* Second Appeal No. 52 of 1886, from an order of M. S. Howell, Esq., District Judge of Aligarh, dated the 12th April 1886, reversing an order of Babu Abinash Chander Banarji, Subordinate Judge of Aligarh, dated the 6th February 1886.

claimed, conditionally on the payment of Rs. 1,098-11-0. The defendants-vendees appealed to the District Judge, by whom the purchase-money was increased, to Rs. 1,139-15-6. On the 6th July 1880, the plaintiff paid this sum into court, and it was taken out by the defendants on the 19th August 1881. The defendants having preferred a second appeal to the High Court, that Court, on the 27th July 1881, increased the purchase-money to Rs. 2,400, directing that this sum should be paid into court within six weeks from the date of its decree, that is, by the 7th September 1881, or the plaintiff's suit should stand dismissed. The plaintiff did not pay the money, and consequently his suit stood dismissed. On the 25th May 1883, he applied to the Subordinate Judge for the restitution of the money he had paid into court under the decree of the District Judge, asking for the arrest of the defendants. This application was allowed on the 4th July 1883; but the defendants having preferred an appeal to the District Judge against the order granting it, the Subordinate Judge, on the 4th December 1884, struck off the application pending the decision of the appeal. On the 15th January 1885, the District Judge affirmed the order of the 4th July 1883, and dismissed the appeal. On the 19th February 1885, the plaintiff applied again to the Subordinate Judge for the restitution of the money, asking for the attachment and sale of property belonging to the defendants. On the 25th May 1885, the defendants having in the meantime appealed from the District Judge's order of the 15th January 1885, that order was affirmed by the High Court.

The defendants contended that the application of the 19th February 1885, was barred by limitation. The Subordinate Judge disallowed this contention, holding that limitation would run from the order of the High Court dated the 25th May 1885, and that the application was only a revival of the one made on the 25th May 1883.

On appeal by the defendant the District Judge held that the application was an independent one, and not a revival of the one [547] of the 25th May 1883; that it was one for refund of money paid under the District Judge's decree and therefore governed by No. 178, sch. ii of the Limitation Act; that the right to apply accrued on the 7th September 1881; and the application was therefore barred by limitation.

The defendant appealed to the High Court, contending, *inter alia*, that the application was within time, being a revival of the one of the 25th May 1883.

Pandit Nand Lal, for the Appellant.

Babu Jogindro Nath Chaudhri, for the Respondents.

Oldfield and Tyrrell, JJ.—The appellant was a successful plaintiff in a pre-emption suit, the first Court having decreed the property to him on condition of his paying for it the price of Rs. 1,098-11-0. The first appellate Court raised this sum to Rs. 1,139-15-6; and on the 6th July 1880, the plaintiff paid this sum into court. The defeated party drew it out on the 19th August 1881. But meanwhile the High Court in second appeal decreed the enhanced sum of Rs. 2,400 to be the true price payable by the pre-emptor, who, finding it more than he cared to give, let the time limited for payment of the excess difference elapse without paying it. On the 25th May 1883, the plaintiff applied to the Subordinate Judge in the department of execution of the decree for the refund of his deposit, which had been drawn and retained by the other side. His application was granted, and the defendant was ordered to refund on the 4th July 1883. But the latter carried the case in appeal to the District Judge, who, on the 15th January 1885, confirmed the Subordinate Judge's orders. Meantime the latter had suspended execution of the order, pending the result of the appeal; and the order of the 4th December 1884, removed the application

temporarily from the "pending" list. On the 19th February 1885, the plaintiff applied to the Subordinate Judge to enforce the refund; and an appeal by the defendant in the last resort to the High Court was dismissed on the 25th May 1885, the orders of the local Courts being confirmed. But the Aligarh District Judge has now pronounced the plaintiff's remedy to be barred by limitation. Hence this appeal. It is argued that the application of the 19th February 1885, is only a revival of [548] the application of the 25th May 1883, which was within time; and the contention appears to be sound and sustainable. But apart from this consideration, it is clear that the application for the refund is not time-barred. The plaintiff-applicant is, in the sense of s. 583 of the Civil Procedure Code, "a party entitled to a benefit by way of restitution under the decree" of the appellate Court made on the 27th July 1881. It was a necessary incident of that decree, which declared the plaintiff's deposit of Rs. 1,139-15-6 to be insufficient to purchase the property under pre-emption, that he was entitled in consequence to restitution of this sum, which he had paid as the sufficient price under the decree of the Lower Appellate Court, and the plaintiff was competent to move the local Court to execute the appellate decree in this respect in his favour "according to the rules prescribed for the execution of decrees in suits"—s. 583 *supra*. This he did in May 1883, by an application made according to law in the proper Court in the sense of art. 179 of the Limitation Act. And his present application to the same effect made on the 19th February 1885, being within three years of that application, is within time. The order of the Subordinate Judge therefore, directing execution to be made in the plaintiff's favour, must be restored, that of the District Judge being set aside, and this appeal is allowed with all costs.

Appeal allowed.

NOTES.

[As regards whether Art. 178 or Art. 179 is the proper article applicable for applications to obtain restitution under a decree, (1897) 20 Mad., 448 held that Art. 179 was applicable; while (1900) 28 Cal., 113 approving of the earlier Madras case (10 Mad., 66), holds that Art. 178 is the proper article. See also (1910) 11 C. L. J. 541.]

[8 All. 548]

The 9th July, 1886.

PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE BRODHURST.

Chuha Mal.....Plaintiff

versus

Hari Ram.....Defendant.*

Arbitration—Making award after the period allowed by Court—Order fixing time, or enlarging time fixed, for the delivery of award requisite—Civil Procedure Code, ss. 508, 514, 521, 522—Decree in accordance with award—Appeal—Objection to validity of award taken for the first time in appeal.

The law contained in ss. 508 and 514 of the Civil Procedure Code requires that there shall be an express order of the Court fixing the time for delivery of the award or for

* First Appeal No. 78 of 1886, from an order of C. J. Daniell, Esq., District Judge of Farukhabad dated the 24th March 1886.

extending^d or enlarging such time ; and the mere fact that the Court has passed a decree in accordance with the award cannot be taken as affording a presumption that an extension of time was given.

• An award which is invalid under s. 521 of the Civil Procedure Code, because not made within the period allowed by the Court, is not an award upon which the Court can make a decree, and a decree passed in accordance with such an award [549] is not a decree in accordance with an award from which no appeal lies, with reference to the ruling of the Full Bench in *Lachman Das v. Brijpal*, I. L. R., 6 All., 174.

Where objection to the validity of the award on the ground that it was made beyond the time allowed was not taken by the defendant in the first Court, *held* that he was not thereby estopped from raising the objection for the first time in appeal, inasmuch as it was not shown that in the first Court he was aware of the defect, or had done anything to imply consent to extension of the time.

THE plaintiff in this case claimed possession of certain land. In the course of the suit in the Court of First Instance the parties agreed to refer the case to the arbitration of one Amba Prasad. The Court of First Instance (Munsif of Farukhabad) made an order referring the case to the arbitrator, and fixing the 10th July 1885, for the delivery of the award. On the application of the arbitrator the time for the delivery of the award was extended to the 9th August 1885, and then to the 24th September 1885. The arbitrator delivered his award (which was in the plaintiff's favour, and awarded him possession of the land claimed and costs of the suit) on the 26th September 1885, or two days beyond the time allowed. The defendant took certain objections to the award, but did not take the objection that the award was invalid as it had not been made within the time allowed by the Court. The Court of First Instance disallowed the objections, and passed a decree in accordance with the award. The defendant appealed on the ground that the award was invalid, as it had not been delivered within the time allowed ; and the Lower Appellate Court (District Judge of Farukhabad) allowed the appeal on this ground, and, setting aside the award, remanded the case to the Court of First Instance for trial on the merits.

The plaintiff appealed from the order of remand, the 1st and 2nd grounds of appeal being (i) that the decree of the Court of First Instance was not appealable, having been passed in accordance with the award ; (ii) that the objection with reference to which the Lower Appellate Court had reversed that decree had not been taken in the Court of First Instance, and was therefore not entertainable in the Appellate Court.

Babu Ram Das Chakrabati, for the Appellant.

Pandit Sunder Lal, for the Respondent.

• [550] *Oldfield, J.*—This is an appeal from the decree of the Judge setting aside the decree of the Court of First Instance made on an award of arbitrators.

The matter in dispute had been referred to arbitration under s. 506 and following sections, Civil Procedure Code, and a time fixed for submission of the award, which was extended : the award, however, was not submitted till two days after the expiry of the time allowed.

Objections were taken to the award by the defendant, which did not include any as to its invalidity by reason of its being submitted after the time allowed. The objections were disallowed, and the Court made a decree in accordance with the award.

The defendant appealed to the Judge on the ground that the award was invalid, and the Judge, allowing the plea, has set aside the decree. The plaintiff now appeals to this Court, and contends that under s. 522, Civil Procedure Code, no appeal lay to the Judge, and that the defendant is estopped from raising

the objection, as he failed to raise it in the Court of First Instance. Section 521 enacts that no award shall be valid unless made within the period allowed by the Court. The award in this case was not made within the period allowed by the Court, and consequently it must be held to be invalid, that is, there was no award on which the Court could make a decree. I think the law (ss. 508 and 514) requires that there shall be an express order of the Court fixing the time for delivery of the award, or for extending or enlarging such time; and the mere fact that the Court has passed a decree in accordance with the award, cannot be taken as affording a presumption that an extension of time was given; nor do I think that the defendant is estopped from raising this particular ground of objection because he did not raise it in the first Court; it is not shown that he was then aware of the defect, or had done anything to imply consent to extension of the time.

As the award was invalid, the decree of the first Court is not a decree in accordance with an award from which no appeal lies, with reference to the Full Bench ruling of this Court, I. L. R., 6 All., 174. I would dismiss the appeal with costs.

[551] Brodhurst, J.—I entirely concur in dismissing the appeal with costs, and in the reasons given by my brother OLDFIELD for so doing.

Appeal dismissed.

NOTES.

[This case was approved by the Privy Council in (1891) 13 All., 300 P. C.]

Following this case, it was held in (1903) 26 All., 105, that an award signed by the arbitrators on or before the date fixed but filed in Court after office hours on the last day, was valid.

In (1908) 30 All., 169, it was held that omission to fix a date for delivering the award was fatal and rendered all subsequent proceedings illegal.

See also (1901) P. R., 81; (1907) P. R., 89; (1910) 21 M. L. J., 263.]

[4 All. 551]

CIVIL REVISIONAL.

The 22nd July, 1886.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Maktab Beg and others.....Defendants

versus

Hasan Ali.....Plaintiff.

Civil Procedure Code, s. 561—Objections by respondent—Withdrawal of appeal.

Where an appeal was dismissed upon the application of the appellant himself made before the hearing,—*held* that the respondents, who had filed objections to the decree of the Court of First Instance under s. 561 of the Civil Procedure Code, had no claim to have their objections heard, notwithstanding the dismissal of the appeal. *Coomar Puresh Narain Roy v. Watson and Co.*, 23 W. R., 229, and *Dhonai Jagannath v. The Collector of Salt Revenue*, I.L.R. 9 Bom., 28, referred to.

The facts of this case are stated in the judgment of Oldfield, J.

Mr. Niblett, for the Applicants (Defendants).

Munshi Kashi Prasad, for the Plaintiff.

* Application No. 217 of 1885 for revision under s. 622 of the Civil Procedure Code of an order of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 21st July 1885.

Oldfield, J.—This is an application, under s. 622 of the Civil Procedure Code, to revise an order of the Lower Appellate Court passed in an appeal from a decree of the Munsif of Muhammadabad. The plaintiff brought a suit against the applicants before us for damages for breach of contract. The Munsif decreed a portion of the claim and dismissed the remainder. The plaintiff preferred an appeal, and the applicants before us, who were respondents, filed objections under s. 561 of the Code. Before the hearing began the plaintiff-appellant applied to withdraw his appeal, and it was dismissed, and the applicants' objection were at the same time dismissed, without the Lower Appellate Court going into them. It is this order of the Judge we are asked to revise. I am of opinion that the applicants had no claim, under the circumstances, to have their objections heard when the appeal itself was not heard. The terms of s. 561 are, that a respondent may, upon the hearing, support the decree on any grounds decided against him in the Court [552] below, or take any objection to the decree which he could have taken by way of appeal, but he can only do so upon the hearing, that is, if the appeal comes to be heard. This view is supported by *Coomar Puresh Narain Roy v. Watson & Co.*, 23 W. R., 229 and *Dhondi Jagannath v. The Collector of Salt Revenue*, I. L. R., 9 Bom., 28, the latter decision proceeding upon the same *ratio decidendi*. This application must therefore be dismissed.

Mahmood, J.—I am entirely of the same opinion, and would add that the principle of this decision is in accord with that which the Procedure Code and the law recognizes as applicable in cases where the action of one party to a suit is dependent on that of the other. It proceeds upon the hypothesis that had the applicants really desired to object to the lower Court's decision, they would themselves have preferred a separate appeal. The right of a respondent to have his objections heard as if he had appealed must, I think, depend on the appellant's appeal, and should only be allowed when the appellant proceeds with his appeal to a hearing. In my experience these objections are generally filed long after the time allowed for appealing has expired, and the hearing of them is subject to the condition of the appellant proceeding with his appeal to a hearing. The right to have these objections heard vanishes when the condition upon which they depend vanishes, and this upon general principles. In this case the appeal itself was never heard.

Application dismissed.

NOTES.

[The same principle was applied to cases of dismissal for default, and withdrawal:—(1888) 10 All., 587; (1895) 17 All., 518.

But the law was altered in the C.P.C., 1908, O. 41, r. 22, cl. 4.]

[8 All. 553]
APPELLATE CIVIL.

The 22nd July, 1886.

PRESENT :
MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Waris Ali.....Defendant
versus

Muhammad Ismail and others..... Plaintiffs.*

"Rent-free grant"—"Rent"—Services—Jurisdiction—Civil and Revenue
Courts—Act XII of 1881 (N.-W. P. Rent Act), ss. 3 (2), 30,
95 (c)—Act XIX of 1873 (N.-W. P. Land Revenue
Act), ss. 3 (4), 79-89, 241 (h).

A suit was brought for the ejectment of the defendant from certain land, on the allegations that it was rent-paying land which had been granted to the defendant's vendor by the plaintiff's father free from payment of any rent, on [553] condition that he should perform certain services as a mimic, and that these services were discontinued by the defendant's vendor. The plaintiff endeavoured to resume the land in the Revenue Court as a rent-free grant under s. 30 of the N.-W. P. Rent Act (XII of 1881), but the application was rejected. In answer to the suit, the defendant pleaded that it was not cognizable by the Civil Court.

Held by OLDFIELD, J., (MAHMOOD, J., *dissenting*) that the suit could not be held to be one to resume a rent-free grant, inasmuch as there was no rent-free grant at all in the sense of s. 30 of the Rent Act, and that the Civil Court therefore had jurisdiction to entertain the suit.

Held by MAHMOOD, J., that the land constituted a rent-free grant, that the claim was one for the resumption of such grant or subjecting it to assessment to rent, and that under these circumstances the suit was not cognizable by the Civil Court.

Per OLDFIELD, J.—The definition of the term "rent" in s. 3 of the Rent Act was intended to include services or labour rendered for the use of land, and the grantee in the present case was a tenant who rendered rent in this sense on account of the use of the land. Further, there was no such grant as is contemplated by s. 30 of the Rent Act, inasmuch as that section refers to grants for holding land exempt from the payment of rent alluded to in s. 10 of Regulation XIX of 1793, and that Regulation, assuming it to refer to grants free from payment of rent as well as of revenue, contemplated grants not only free from payment of rent in cash or kind, but free from payment of anything in lieu thereof. A tenure such as in the present case, where the land was land originally paying rent in cash, and where the cash rent was exchanged for rendition of services, is not a rent-free grant within the meaning of the Regulation, nor consequently of s. 30 of the Rent Act. *Mutty Lall Sen Gywal v. Deshkar Roy*, 9 W. R. 1, and *Puran Mal v. Padma*, I. L. R., 2 All., 732, referred to.

Per MAHMOOD, J.—The services connected with the grant in this case did not constitute "rent" within the meaning either of the N.-W. P. Rent Act, or of the N.-W. P. Land Revenue Act (XIX of 1873), and the word "render" in s. 3 of the former Act does not include or imply the rendering of services or labour. The word "rent" is probably used as the equivalent of the Hindustani words *lagan* or *poth*, representing the compensation receivable by the landlord for letting the land to a cultivator, and s. 3 of the Rent Act, where it uses the expressions "paid, delivered, or rendered," must be taken to refer respectively to rent

* Second Appeal No. 1749 of 1885, from a decree of W. R. Barry, Esq., Additional Judge of Aligarh, dated the 20th August 1885, confirming a decree of Baboo Ganga Prasad, Munsif of Koil, dated the 5th January 1885.

paid in cash, to rent delivered in kind, and to rent rendered by appraisement or valuation of the produce. The grant in the present case was a rent-free grant of the nature of *chakran* or *chakri*, i.e., service-tenure, to which s. 41 of Regulation VIII of 1793 related. The incidents of the tenure would be governed by s. 30 of the Rent Act and ss. 79-84 of the Land Revenue Act, being matters outside the jurisdiction of the Civil Court. The scope of s. 10 of Regulation XIX of 1793 is not limited to permanent rent-free grants, and the present suit was in respect of a matter falling within s. 95 (c) of the Rent Act, and "provided for in ss. 79 to 89, both inclusive," of the Land Revenue Act, within the meaning of s. 241 (h) of the latter [554] Act. *Puran Mal v. Padma*, I. L. R., 2 All., 732, *Tika Ram v. Khuda Yar Khan*, I. L. R., 7 All., 191, and *Forbes v. Meer Mahomed Tuquee*, 13 Moo. I. A. 438, referred to.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of OLDFIELD, J.

Munshi Kashi Prasad, for the Appellant.

Pandit Ajudhia Nath, for the Respondent.

Oldfield, J.—This suit has been brought by the plaintiff to eject the appellant-defendant, Waris Ali, from one bigha of land in mauza Burhausi.

The plaintiff's case is that this is rent-paying land which had been granted to Nasiba by the plaintiff's father many years ago, free from payment of any rent, on condition that certain services as a mimic should be performed; that these services continued to be performed till lately, when Nasiba discontinued them, and has sold the land to the appellant.

The plaintiff endeavoured to resume the land in the Revenue Court as a rent-free grant under s. 30 of the Rent Act: but the application was disallowed on the ground that the Revenue Court had no jurisdiction, there being no rent-free grant as contemplated in the Act.

The defence was, that the land had been bestowed unconditionally on Nasiba, who enjoyed it as the proprietor.

The Court of First Instance found that the land had, up to 1264 fasli, been recorded as paying cash rent, and in 1274 fasli it was recorded that the said rent was remitted in lieu of services rendered, and it found that the land had been held by Nasiba on these conditions; that there was no rent-free grant in the sense of s. 30 of the Rent Act, and no bar to entertaining this suit for ejectment, since the conditions of service had ceased, and Nasiba had wrongfully alienated the land.

Waris Ali appealed to the Judge, who has substantially come to the same conclusion as the first Court.

Waris Ali, defendant, has appealed on three grounds:—

(i) That this suit is not cognizable by the Civil Court; (ii) that the proceedings in the Revenue Court operate to bar the claim, as [555] the matter was finally decided there, and the question now raised is *res judicata*; (iii) that the finding as to the nature of the tenure is not supported by the evidence.

The last plea cannot be entertained, so far that we cannot in second appeal interfere with the finding that the land was granted to, and held by, Nasiba in lieu of services to be performed, which were rendered instead of a cash rent payment.

Whether or not this suit is cognizable by the Civil Court, depends on whether it can be held to be a suit to resume a rent-free grant in the sense of s. 30 of Act XII of 1881, or has for its object to eject a tenant, and so deals with matters in which the Revenue Court has exclusive jurisdiction under ss. 93 and 95 of the Rent Act.

Now, it is found that this land was land for which rent used to be paid in cash, and it was given to Nasiba on the condition that he rendered to the zamindar certain services in lieu of paying a cash rent for the land. Now rent in the Rent Act is defined to be "whatever is paid, delivered, or rendered by a tenant on account of his holding, use, or occupation of land," and it seems to me clear that Nasiba was a tenant who rendered certain services on account of his use of the land. It has been pressed on us that the term "rent" as used in the Rent Act cannot mean services rendered to the landlord for the use of land, but is confined to that which is paid or delivered or rendered in cash or kind; because the provisions of the Act are only operative in respect of remedies in regard to rent of that character, and inoperative in respect of rent in the shape of services rendered. But the argument is not conclusive; for whether or not all the provisions of the Act can be brought into force only in respect of rent taken in one shape is no ground for assuming that the term "rent" may not include something taken in another shape. Now the definition of "rent" in s. 3 seems to me expressly intended to include services or labour rendered for the use of land, and in point of fact the word "rent" has always been so understood.

Blackstone defines it:—"The word rent, or render, *reditus*, signifies a compensation or return, it being in the nature of an acknowledgment given for the possession of some corporeal hereditament. It is defined to be a certain profit issuing yearly out of lands [556] and tenements corporeal. It must be a profit, but there is no occasion for it to be, as it usually is, a sum of money, for spurs, capons, horses, corn, or other matters, may be rendered by way of rent. It may also consist in services or manual operations, as to plough so many acres of ground, to attend the king or the lord to the wars, or the like, which services in the eye of the law are profits."

I have no doubt the Legislature had this meaning of rent in view, and it seems clear from s. 8 (c) of the Act that "rent" was intended to include services rendered for the use or occupation of land.

Section 8 (c) contemplates the case of a tenant holding land in lieu of wages, that is, holding it for services rendered, remunerated by the profits of the land instead of wages. But a tenancy implies the relation of landlord and tenant between the holder of the land and the receiver of the services, and as landlord is defined in the Act to be the "person to whom a tenant is liable to pay rent," it follows that in such a case the services rendered constitute rent under the Act.

I therefore hold that the tenure in this case is that of a tenant paying rent to the landlord.

But a further question would arise whether there has been such a grant as is contemplated by s. 30 of the Rent Act. That section refers to grants for holding land exempt from the payment of rent alluded to in s. 10, Regulation XIX of 1793.

Now it appears to me very clear that the grant in this case is not one of those to which the Regulation refers. The Regulation has reference to grants of land free from payment of revenue; but, assuming that it refers to grants free from payment of rent also, it contemplated grants of land not only free from payment of rent in cash or kind, but free from payment of anything in lieu thereof. This was pointed out by NORMAN, J., in a very important case decided by the Calcutta Court, where the whole question of these grants was exhaustively discussed—*Mutty Lall Sen Gywal v. Deshkar Roy*, 9 W. R. 1.

NORMAN, J., remarked that what was contemplated was a grant of land to hold in absolute proprietary right, not only free from [557] payment of any

rent in money, but without any dependence on, or duty to, the zamindar, and that when the grantor holds subject to the performance of any duty or conditions, the Regulations appear to treat him as a lease-holder; and he pointed out that s. 7, Regulation VIII of 1793, shows that persons holding land subject to performance of conditions stipulated for, are to be considered as lease-holders only. The same view was taken by this Court in *Puran Mal v. Padma*, I.L.R., 2 All., 732.* Section 30 of the Rent Act deals with such grants as are contemplated in s. 10, Regulation XIX of 1793, and we must see what they were, and I think the view expressed by NORMAN, J., and by SPANKIE, J., in the case of *Puran Mal*, I. L. R., 2 All., 732, is correct, and that a tenure, such as the one we are now dealing with, where the land was land originally paying rent in cash, and where the cash rent was exchanged for rendition of services, is not a rent-free grant within the meaning of the Regulation, nor consequently of s. 30 of the Rent Act.

There was therefore no rent-free grant at all in the sense contemplated by s. 30 of the Rent Act, and this cannot be held to be a suit to resume a rent-free grant, in which matters the Revenue Court has exclusive jurisdiction. It is, in fact, a suit to eject the appellant as a trespasser, between whom and the plaintiff there is no relation whatever of landlord and tenant, and it does not concern itself with any dispute or matter such as are referred to in s. 93 or s. 95 of the Rent Act as exclusively cognizable by the Revenue Court. From what has already been stated, it is scarcely necessary to add that the plea of *res judicata*, with reference to anything done in the Revenue Court, has no force whatever. I would dismiss the appeal with costs.

Mahmood, J.—The only question of significance raised in this appeal relates to the jurisdiction of the Civil Court in a suit of this nature, and on that question depends also the determination of the plea of *res judicata* which has been raised in this case. In deciding the question some difficulty, no doubt, is created by two rulings of this Court, one being *Puran Mal v. Padma*, I. L. R., 2 All. 732, and the other a ruling of my own in *Tika Ram v. Khuda Yar Khan*, I. L. R., 7 All., 191. In the former of these cases the plaintiffs, as zamindars, sued for certain land in their village, on the allegation that it had been [558] assigned to a predecessor of the defendant to hold so long as he and his successors continued to perform the duties of *balahar* or village watchman, and that the defendant, having ceased to perform those duties, was holding as a trespasser, and as such was liable to eviction. The defendant's plea was that he and his predecessors, having held the land rent-free for two hundred years, had acquired a proprietary title which could not be defeated by the plaintiff. SPANKIE, J., who delivered the judgment of the Court in that case, held that such assignment of land was not a "grant" within the meaning of Regulation XIX of 1793; that the operation of ss. 30 and 95 (c) of the Rent Act (XVIII of 1873) and ss. 79 and 241 (h) of the Revenue Act (XIX of 1873), so far as they oust the jurisdiction of the Civil Court, was limited to grants contemplated by that Regulation; and that therefore the dispute raised in that suit was cognizable by the Civil Court. In the course of his judgment the learned Judge observed:—"What the plaintiff desires in this case is full possession of a plot of land which, he says, has hitherto been held without payment of rent by defendant, the village '*balahar*' or watchman. He was allowed to occupy the land for his support, and, in point of fact, whatever he derived from the land constituted his wages. But there was no permanent grant of the land to him or his predecessors. He would continue to occupy it as long as he continued to give his services as watchman." In the other case, the facts before me were not altogether dissimilar to the case just referred to,

but it had been found that "the defendant and their ancestors have been in possession of this land for more than fifty or sixty years," and that they "are in possession as *muafi*-holders, and have never paid any rent." The duties for which the land was originally assigned were those of *kherapati* of the village, such duties being the performance of certain annual religious ceremonies, and the ground upon which the eviction of the defendant was claimed was that the defendant, having wrongly planted a grove on the land, had been dismissed by the plaintiff zamindar from the office of *kherapati*. Upon this state of things I held that the grant, whatever its origin may have been, was admittedly a rent-free grant, and being proved to be older than sixty years, during which time the defendant or his ancestors never paid any rent, as was found by the Courts, the [559] nature of the dispute there was beyond the jurisdiction of the Civil Court, because it could form the subject of an application to resume a rent-free grant within the meaning of s. 30 of the Rent Act (XII of 1881), and therefore the provisions of cl. (c) of s. 95 of that Act, and for similar reasons of cl. (h) of s. 241 of the Land Revenue Act, were applicable. Whether there is any distinction in principle, for the purposes of this question of jurisdiction, between the temporal functions of a *balahar* or village watchman and those of a *kherapati* or the village priest, is open to doubt, though I may observe that in the case of *Raghubardyal v. Gyadin*, (cited at page 16 of Mr. Teyen's edition of the Rent Act), the Sudder Board of Revenue held that religious grants which involve more or less the performance of some religious rite or ceremony, do not fall under the head of '*khidmati*' grants, and the provisions of s. 30 of the Rent Act are therefore applicable to them (Board's File No. 802 of 1881). I, however, think that the learned Judge of the Lower Appellate Court was right in thinking that the two rulings of this Court already referred to are not fully reconcilable in their *ratio decidendi*, and I may add, as supporting the view of SPANKIE, J., that the Sudder Board of Revenue in *Ganga Dhar v. Baldeo** held that an assignment of land, on condition that certain services are performed by the assignee (*haqqul-khidmat* grants), is not a rent-free grant within the meaning of s. 30 of the Rent Act, since the service is equivalent to rent.

It might perhaps have been possible, with reference to the rulings above mentioned, to distinguish my ruling in *Tika Ram v. Khuda Yar Khan*, I. L. R., 7 All., 191, by saying that the duties of a *kherapati* were of a spiritual nature, and could not therefore be regarded as rent within the meaning of the definition contained in cl. (2) of s. 3 of the Rent Act, or cl. (4) of s. 3 of the Land Revenue Act. But this was not the *ratio decidendi* upon which my ruling in that case proceeded, and, moreover, here the services for which the grant is alleged to have been made were those of a mimic or drollery, which it would not be easy to classify either under the head of spiritual or substantial temporal services. At any rate, the exigencies of the present case require me to decide whether such services are "rent" [560] within the meaning of cl. (2), s. 3 of the Rent Act, or cl. (4), s. 3 of the Land Revenue Act, the words employed in both the enactments in defining rent being identical. The words are:—" '*Rent*' means whatever is to be paid, delivered, or rendered by a tenant on account of his holding, use or occupation of land." It is contended that the word "*rendered*" is used in this definition as applicable only to services, and that cl. (c) of the proviso to s. 8 of the Act, which lays down that no tenant shall acquire a right of occupancy "in land held by him in lieu of wages," supports this interpretation.

Having given the question the best consideration I can, I find myself forced to arrive at the conclusion that the services attributed to the grant in

* N.-W. P. Legal Remembrancer, Revenue and Rent Series, 118.

this case did not constitute "rent" within the statutory definition. The whole argument in favour of the contention really rests upon the exact interpretation of the word "render"—a word which, in the English language, possesses many meanings, and which in one sense would undoubtedly include or imply the rendering of service or labour. But the primary meaning of the word is "to return, to pay back, to restore," and among other meanings the word simply means "to give on demand, to give, to assign, to surrender." The last and most approved edition of *Webster's Dictionary* is my authority for these meanings, and I am inclined to adopt this interpretation in preference to limiting the word to services. I shall presently show that this is the only manner in which the definition of "rent" in the interpretation clause can be rendered intelligible and consistent with the use of the word throughout the remaining provisions of these enactments. It is contended, with reference to cl. (c) of the proviso to s. 8 of the Rent Act, that a tenant holding land "in lieu of wages" renders service as "rent" within the meaning of the definition. But I do not think such a conclusion necessarily follows. The word "tenant" is not exhaustively defined in either of these enactments, and if the word is understood in its general sense, it does not, on the one hand, necessarily follow that every tenant pays rent, or delivers anything in lieu thereof; nor, on the other hand, does it necessarily follow that every service performed by such tenant for the zamindars constitute rent. Thus, a tenant who is in possession of land, "in lieu of wages," [561] need not be liable to payment of any "rent," within the meaning of the Act.

I shall now show this is the only consistent interpretation required by that rule of construing statutes, which says that when words are specially defined in an enactment, they must throughout be interpreted in that same sense. The scope of the Rent Act includes among its most important provisions, as the preamble shows, rules "relating to the recovery of rent," and indeed this might perhaps be said to be the whole province of the enactment. Now, if I can show from the enactment itself that there is not a single provision in it which can possibly be construed as laying down a rule for the "recovery of rent," if services such as those in this case are understood as rent, I think I shall have shown that "rendered" must be understood as I have interpreted it, and that rent must not be understood to include such services.

The first provision, then, to which I would refer is s. 24 of the Rent Act, which confers a general right upon all tenants to claim a lease from the landlord, defining *inter alia*, matters as to the amount of "annual rent payable," "the instalments in which, and the dates on which, such rent is to be paid." These are the words of clauses (b) and (c), and it is clear that neither of them can possibly apply to such services as in this case. Then comes cl. (e), which, in enumerating the contents of the lease, says—"If the rent is payable in kind, or is calculated on a valuation of the produce, the proportion of produce to be delivered, the mode of valuation, and the time, manner, and place of delivery." In my opinion, it is impossible to hold that mimicry can be regarded either as rent "payable in kind," or covered by any other portion of this clause. And if this is so, then we have the necessary inconsistency in the Act that whilst the section confers the right upon "every tenant," a tenant who holds land in lieu of the performance of mimicry cannot claim the benefit of the law. Then comes s. 34, which lays down that "when an arrear of rent remains due from any tenant, he shall be liable to pay interest on such arrear at one per cent. *per mensem*; and if the arrear remains due on the 30th day of June, to be ejected from the land in respect of which the arrear is

due." It is obvious that in this clause "rent" cannot be understood to include [562] services of mimicry. I could go through the whole Act and show that in no part of it can such services be possibly understood to mean "rent." But I will go at once to the remedial part of the statute and refer to s. 56, which, after stating that the produce of all land in the occupation of a cultivator is to be deemed as hypothecated for rent, goes on to say that "when an arrear of rent is due from any cultivator, the person entitled to receive rent immediately from him may, instead of suing for the arrear as hereinafter provided, recover the same by distress and sale of the produce of the land in respect of which the arrear is due, under the rules contained in this chapter." How is it possible to hold that this provision applies to rent of the nature which is said to constitute rent in this case? And if distress is not the mode of recovering such rent, is there a single provision of the Act which provides a remedy for the landlord to recover such rent? There is, indeed, another provision to be found in cl. (a), s. 93, which relates to "suits for arrears of rent, or, where rent is payable in kind, for the money equivalent of rent, on account of land or on account of any rights of pasturage, forest rights, fisheries or the like." This clause is equally inapplicable to such services as mimicry, and I am wholly unaware of any provision in the Act which would enable the landlord to enforce the recovery of such rent. The matter therefore stands thus. that a statute which in the preamble states its object to be to provide rules for the "recovery of rent," defines rent in such a broad manner as to include the performance of mimicry, and then defeats its own whole object by providing absolutely no rule for recovery of such rent. Sooner than accept this necessary consequence, I am prepared to say that the word "rent," as it occurs in the definition of "rent," must not be so understood as to include such services. Similar reasons, *mutatis mutandis*, satisfy me that the word "rent," as used in the Land Revenue Act, must not be understood in any sense other than that which I have interpreted it in the Rent Act.

What I have already said is sufficient to show that upon the case as set up by the plaintiff himself, the grant in this case was free of "rent," in the sense in which that word must be understood both in the Rent Act and in the Land Revenue Act. But I will go further and show how the definition of the word in those [563] two enactments may be accepted in an intelligible sense without involving the inconsistencies to which I have referred. The truth seems to me to be that the word "rent," which has found its way into the two enactments above referred to from the old Regulations of the East India Company, is used probably as the equivalent of the Hindustani words *lagan* or *poth*, which are well understood in the country as representing the compensation receivable by the landlord for letting the land to a *kashtkar* or cultivator. It is equally well known that such compensation, ever since the reign of the Emperor Akbar, when his Revenue Minister, Raja Todar Mal, introduced his system, payments of *lagan* were made in three ways. The first of these was *batai* or division of the produce in kind, of which the zamindar, or where such rights did not exist, the Government, took a certain proportion. When cash payments were introduced instead of *batai*, one method was to make an estimate or appraisement of the crops, and to take in cash what would represent the due proportion as the *lagan*. The third method was cash payments of fixed *lagan* agreed upon by the *kashtkar*, and irrespective of the nature, quality or quantity of the produce. This last was perhaps the most recent outcome of Maharaja Todar Mal's powerful administrative intellect, and this is the system which has received encouragement all over India under the British rule. But neither the old Regulations nor our present Land Revenue and Rent Acts force the zamindar to adopt the system of pure cash payments in preference to the other two methods. I am

unaware of any further kind of "rent" or *lagan* which went beyond the principle of the three main methods which I have thus described, though there were mixed methods of paying rent. At any rate, so long as the law does not make the matter so clear as to place it beyond doubt, I shall not be willing to interpret the word "*rent*" as used in the Revenue and Rent Acts in any such way as would operate in defeasance of the rights of the agricultural population.

But what do those two Acts themselves indicate? I have already shown that they cannot, without involving immense inconsistency, be taken to use the word "*rent*" as including the services of a mimic. And I will now show that there is every indication that the Rent Act uses the word in no sense which [564] goes beyond the principle of the three old methods of receiving *lagan* from *kashkars* or cultivators. And once this interpretation of the word "*rent*" is accepted, the whole Act becomes consistent and intelligible. We have then s. 24, cl. (b), relating to purely cash payments, and cl. (c) relating to the instalments of such payments. Then comes cl. (e), which distinctly relates to the other two kinds of *lagan*, namely, "rent payable in kind" or "calculated on a valuation of the produce"—the former being *batai*, and the latter being usually called *kankut* in most parts of the country. The three methods of receiving rent are kept in view throughout by the Act, and whilst in connection with purely cash payments no great difficulties as to the amount of rent can arise, we have the whole of s. 43 devoted to providing rules in respect of the other two methods of realising *lagan* or *rent*, with the object of providing a remedy both for the landlord and the tenant. The provisions, then, both in respect of distress and suits for recovery of rent, become intelligible, and the body of the Act presents no contradiction of its preamble. And in this light the definition of "rent" in cl. (2), s. 3 of the Act, when it uses the three words "paid, delivered or rendered," must be taken to refer respectively to rent paid in cash, to rent delivered in kind, and to rent rendered by appraisement, the native words for the three methods being "*naqqad*," "*batai*," and "*kankut*."

I may here add that lands held under any other system, that is to say, lands granted either for past or continuing services, or for personal merit or worth (as in the case of religious or charitable grants), which involved no rent in any of the three forms above described, were all known under the generic name of *muafi* or "rent free"—a term having many sub-divisions (such as *shankalap*, etc.), and one of them is well known as *chakran* or *chakri*, that is, service tenure, to which s. 41, Regulation VIII of 1793, related, rendering them liable to redemption and assessment. All these were regarded as "rent-free," simply because they were not subject to anything which could be called "*rent*," whatever the origin, the motive, the object or the conditions of the grant, may have been. In the present case, according to the plaintiff's own allegation, "the father of the plaintiff remitted the rent of the land in suit to the ancestors of Nasiba, defendant, on the occasion of the birth of [565] Muhammad Ismail Khan, plaintiff, on the condition of his performing the services of *naqqal* (mimic). The ancestors of Nasiba and Nasiba himself continued to perform the services in lieu of the rent of the land, and they were recorded in the settlement papers to be in possession as servants." This, taken at its best, would go to show that no "*rent*" in the sense in which I have explained the word was taken for the land. There is indeed no allegation to this effect, and the finding of the Lower Appellate Court is the same. The grant then, putting the plaintiff's case at its best, was a rent-free grant of the nature of *chakri*.

This being so, the question arises whether such rent-free grants fall under the purview of s. 30 of the Rent Act, or of ss. 79-89 of the Revenue Act, so as to oust the jurisdiction of the Civil Courts under s. 95, cl. (c), of the former, or under s. 241, cl. (h), of the latter Act. The answer to this question, as I have already shown, has been given in two different ways in the two rulings of this Court, to which I have already referred. In *Puran Mal v. Padma*, I. L. R., 7 All., 732, the first point in the *ratio decidendi* was that the operation of s. 30 of the Rent Act, as well as of s. 79 of the Revenue Act, must be restricted to such grants as were contemplated by s. 10 of Regulation XIX of 1793. I am willing to concur in this proposition. But then what was the scope of that section of the Regulation? The answer given by the ruling is, that it is limited to "permanent grants," and would not include grants under which the grantee "would continue to occupy it as long as he continued to give his services." With due deference, I am unable to accept this limitation of the scope of that Regulation or of the sections of the present Rent and Revenue Acts already referred to. A grant for 999 years (a not unusual term of an English lease) is not a *permanent* alienation, and I do not think such a grant would be excluded from the operation of the Regulation and the Acts to which I have referred. To impose a restriction upon general expressions, especial reasons or express words are necessary, and whilst there is nothing in those enactments to justify the restriction, the principle upon which they proceed clearly indicates that the policy on which the prohibition as to such grants proceeds would be applicable as much to permanent grants as to grants for a term of years.

[566] The policy of the law, as indicated by the preamble of the Regulation, seems clear enough. In India, what would be called free-hold in England, vests in the State till it itself alienates its rights to private individuals. The ultimate ownership of the soil thus rests in the State, but upon the soil, in this part of the country, exists two classes of interests. The first is that of the cultivator, who makes that soil yield produce, the second is that of the zamindar, who standing in the position of the middleman, facilitates the recovery by the State of its share of the produce. The share of the State is called *revenue* as distinguished from *rent*, which is the share of the zamindar in the produce of the soil. He takes the rent from the cultivator, and out of such rent pays over the share of the State. He is called proprietor; but his proprietorship is qualified by the great incident that if he does not pay the government revenue his proprietorship ceases, much in the same manner as non-payment of a mortgage results in foreclosure or sale of the property. Such being the nature of zamindari rights, it is then that upon the maxim that no one can give more than he has, any alienation of land by the zamindar, purporting to make it free of its liability to Government revenue, would be void. Upon general principles he may indeed alienate his own right to take rent, but even in respect of such alienations the State is so far interested that the zamindar thereby reduces his own pecuniary means to meet the Government demand of revenue. Such alienations, whether permanent or temporary, have this tendency in effect *pro tanto*.

Regulation XIX of 1793 was passed to obviate both these evils *inter alia*, and s. 10 has this double aspect. On the one hand, it declared the invalidity of "all grants for holding land exempt from the payment of revenue," and, on the other hand, it required and authorized persons possessing "the proprietary right in any estate" "to collect *rents* from such lands at the rates of the pargana, and to *dispossess* the grantee of the proprietary right in the land, and to re-annex it to the estate or *taluk* in which it may be situated." These two

aspects of the Regulation appear in other parts of it also, and the sections of the present Rent and Revenue Acts (above referred to) aim at the same two results. Under certain conditions they authorize proprietors "to resume [567] such grants or to assess rent on the land"—the former right involving eviction of the grantee, the latter implying that he is left in possession, but is made liable to payment. But both these remedies, as I have already indicated, have for their ultimate aim the security of the Government revenue, which the law declares is the first charge upon land, and s. 83 of the Revenue Act declares that "no length of rent-free occupancy of any land, nor any grant of land made by the proprietor, shall release such land from its liability to be charged with the payment of Government revenue."

I have described these matters at such length because they show the whole policy of the law, and afford indications of the principles which regulate questions of jurisdiction. It may be stated as a general rule that all matters affecting or regulating Government revenue are placed by the Legislature beyond the jurisdiction of the Civil Courts, for reasons of policy which it is beyond my province to question. Section 241 of our Revenue Act justifies this observation, whilst s. 95 of the Rent Act indicates the same conclusion. And if this interpretation is right the present suit could not lie in the Civil Court.

But what is the nature of the suit? It begins by stating facts which mean a "rent-free grant" according to my interpretation of the term. Then the reason for resumption is stated to be that "the defendant (Nasiba) having acquired the knowledge of Persian, does not now perform the services of a *naqqal* (mimic), and he has sold the land to Waris Ali, defendant, for Rs. 150, on the 26th May 1883. As the defendant has discontinued performing the services, he has no right to the land, nor was he competent to make the sale, nor could the vendee (Waris Ali) acquire any valid title." The defence of Nasiba was that the land was given to his ancestors rent-free "hundreds of years ago" as a reward, and that "the *naqqal* has to perform no services, nor was this land given to the ancestors of the defendants subject to any condition." The defence of the vendee, Waris Ali, was in keeping with that of his vendor, Nasiba, in whom he set up a proprietary title. Such being the dispute, it seems to me that it was "a matter provided for in ss 79 to 89 (both inclusive)" of the Revenue Act, within the meaning of cl. (h) [568] of s. 241. And for similar reasons it would fall under cl. (c) of s. 95 of the Rent Act. And this conclusion is supported by the only finding of fact at which the Lower Appellate Court has arrived. The learned Judge says:—"As far as the evidence on the record goes, it seems to prove that occupation of the land by Nasiba's predecessors *free of rent* had its origin in services rendered by those persons to the zamindars. They were mimics, and doubtless followed their calling, and amused the company at marriages and festivals. Nasiba has ceased to follow the calling of a mimic, and the plaintiff wishes to eject him from the land or assess rent upon it. This is the best finding on the facts at which this Court can arrive."

Upon this finding, which we are bound to accept in second appeal, it seems to me clear that no rent, either in kind or in cash by valuation of the crops, or in cash by fixing the amount, was ever paid for the land. And if this is so, that land constituted a rent-free grant, and the claim amounts to nothing more or less than resumption of such grant or subjecting it to assessment of rent.

The exact terms of the grant do not appear from any document or any specific oral evidence. All that has been said or proved is, that the grant was made on the occasion of the birth of a son in lieu of services as a mimic or

naqqal. But there is nothing to establish that the continued performance of such services was the condition upon which the grant was to be held. To use the words of the Lords of the Privy Council in *Forbes v. Meer Mahomed Tuquee*, 13 Moo., I. A., at p. 464, "there is a clear distinction between the grant of an estate burdened with a certain service and the grant of an office the performance of whose duties are remunerated by the use of certain lands." And Their Lordships went on to say — "Assuming it to be a grant of the former kind, Their Lordships do not dispute that it might have been so expressed as to make the continued performance of the services a condition to the continuance of the tenure. But in such a case, either the continued performance of the service would be the whole motive to, and consideration for, the grant, or the instrument would, by express words, declare that, the service ceasing, the tenure should [669] determine." And no such conditions being proved, Their Lordships said, — "Hence the grant may be said to have been made *pro servitiis impensis et impendendis*—partly as a reward for past, partly as an inducement for future services." Whether the grant in this case was of this nature or of the other, it was a rent-free grant all the same; and in calling it "rent-free" I am only using the expression as employed by the Lords of the Privy Council in the case just referred to. And this being so, the incidents of the tenure as to resumption or assessment of rent would be governed by s. 30 of the Rent Act and ss. 79-84 of the Revenue Act, being matters which lie beyond the jurisdiction of the Civil Court. Whether the defendant Nasiba had, under those provisions, acquired a proprietary title under cl. (d) of s. 30 of the Rent Act, or under s. 82 of the Revenue Act, is a question which, for want of jurisdiction of the Civil Court, I am not called upon to determine in this case. For it is admitted that such rights as Nasiba had have been sold by him to Waris Ali, appellant, under the sale-deed of the 26th May 1883, and the latter therefore stands in the shoes of the former, for purposes either of resumption or of assessment of rent. Nor do I, under this view, feel myself called upon to decide the question of *res judicata*, or to enter into the merits of the case, and the only ground upon which I base my judgment is the want of jurisdiction of the Civil Court. For these reasons, I regret I am unable to concur with my learned brother OLDFIELD in the conclusions at which he has arrived, and I would decree this appeal, and, setting aside the decrees of both the lower Courts, dismiss the suit with costs in all the Courts.

[8 All. 569]

The 24th July, 1886.

PRESENT:

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, AND
MR. JUSTICE TYRRELL.

Gaya.....Defendant

versus

Ramjiawan Ram.....Plaintiff.*

Lease—Istimrari patta—Hereditary title—Construction of patta.

In an instrument described as a perpetual lease (*patta istimrari*) the lessor covenanted as follows:—"So long as the rent is paid, I shall have no power to resume the land. The lessees shall have no power to sell the land in any way. I have therefore executed these few words by way of a perpetual lease, that it [570] may be used when needed." Upon the death of one of the lessees, his heir, who was in possession of the land which formed the subject of the lease, claimed to be the lessee of a moiety thereof on the ground that the lease was one creating a heritable interest. The claim was allowed by the settlement officer, and the lessor thereupon brought a suit to have it declared that he was entitled to eject the defendant, under s. 36 of the N.-W.P. Rent Act (XII of 1881), as being a tenant-at-will, and to set aside the settlement officer's order.

Held that the mere use of the word *istimrari* in the instrument did not *ex vi termini* make that instrument such as to create an estate of inheritance in the lessee; that the words "so long as the rent is paid I shall have no power to resume the land" did not show any meaning or intention that the lease was to be in perpetuity; and that the defendant (even should he be the legal heir and representative of one of the lessees) could not resist the plaintiff's claim. *Tulshi Pershad Singh, v. Ramnarain Singh*, I. L. R., 12 Cal., 117, followed. *Lakhu Kowar v. Harikrishna Singh*, 9 B. L. R., 226, dissented from.

THE plaintiff in this case, on the 24th July 1873, gave two persons called Jag Lal and Har Prasad a lease of certain land, the terms of which were as follows:—

"I, Ramjiawan, * * * do hereby declare as follows.—I have given a perpetual lease (*patta istimrari*) of 24 bighas of land, bearing numbers as given below, situated in mauza Raghunathpur, otherwise called Bilaauripur, pargana Shadiabad, on a rent of Rs. 48 a year, at the rate of Rs. 2 per bigha, besides the acreage and the patwari's fee, to Jag Lal, *Jati*, and Har Prasad, *Jati*, residents of Raghunathpur, in equal shares, and do hereby stipulate and covenant in writing that they may get into possession and cultivate the land from 1281 fasli, and pay me its rent every year, and at due instalments, and obtain receipts bearing my signature. They should never make a default. In case of the rent falling in arrears, I shall have the power to oust them without the assistance of the Court. They shall not make an objection on the score of weather contingencies, or of any act of the Sovereign, and pay the rent without any objection. So long as the rent is paid, I shall have no power to resume the land. The lessees shall have no power to sell the lands in any way. I have, therefore, executed these few words by way of a perpetual lease, that it may be used when needed."

The lessees being dead, the defendant, who was in possession of the land, claimed, as heir to Har Prasad, to be the lessee of a [571] moiety of the land

* Second Appeal No. 1215 of 1885, from a decree of Pandit Kashi Nath, Additional Subordinate Judge of Ghazipur, dated the 22nd May 1885, reversing a decree of Maulvi Syed Muhammad Ashgar Ali, Munsif of Saidpur, dated the 17th January 1885.

under the lease, asserting that the lease was one creating a heritable interest. This claim was allowed by the settlement officer, and the plaintiff accordingly brought this suit to have it declared that he was entitled to issue a notice of ejectment to the defendant, under the provisions of s. 36 of the N.-W. P. Rent Act (XII of 1881), as being a tenant-at-will, and to set aside the settlement officer's order.

The Court of First Instance dismissed the suit for reasons which it is not necessary to mention. On appeal by the plaintiff the Lower Appellate Court held, on the construction of the lease, that it did not create a heritable interest, but a life interest only, and decreed the claim. The defendant appealed to the High Court.

Mr. *Amir-ud-din* and *Lala Latta Prasad*, for the Appellant.

Mr. *Howell* and *Munshi Sukh Ram*, for the Respondent.

Straight, Offg. C.J.—I think this appeal fails. The Subordinate Judge, having regard to the language of the lease of the 24th July 1873, was of opinion that its proper interpretation was that it was not, as alleged by the defendant-appellant, a lease in perpetuity, or one that created any heritable interest. Now no doubt the word "*istimrari*" is used in several places in this document, and it was contended by the learned counsel for the appellant that the use of this word was sufficient of itself to show that what the parties intended was, that the lease should continue binding, not only so long as the fixed rent was paid, and that the interest granted by the plaintiff was not a mere life but a heritable interest. He supported this contention by referring us to the case of *Lakhu Kowar v. Harikrishna Singh*, 3 B. L. R. 226, and no doubt if that authority is correct in law, it favours his view. But our attention has been called by the learned pleader for the plaintiff-respondent to a ruling of their Lordships of the Privy Council in the case of *Tuishi Pershad Singh v. Ramnarain Singh*, I. L. R., 12 Cal., 117, which appears to be directly apposite to the present case. Their Lordships here remark that "the words *istimrari* and *muqarrari* in a patta do not, *per se*, convey an estate of inheritance, but they do not accept the decisions as establishing that such an estate cannot be created without the addition of the other words that are mentioned ("*bafazandan*" [572] or "*naslan bad naslan*"), as the Judges do not seem to have had in their minds that the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties might show the intention with sufficient certainty to enable the Courts to pronounce that the grant was perpetual." Now as I understand these observations of their Lordships, the mere use of the word *istimrari* in the instrument with which we are dealing, does not *ex vi termini* make that instrument such as to create an estate of inheritance in the lessee. Their Lordships, as I understand them, also say that the words "from generation to generation," "*naslan bad naslan*," must not necessarily be inserted in an instrument of lease in order to constitute a grant in perpetuity, and that the word *istimrari*, accompanied by other words and illustrated by the subsequent conduct of the parties, and in acting upon the instrument, may show that an estate of inheritance was intended. The learned counsel urges that the words used in the lease before us, namely, "so long as the rent is paid I shall have no power to resume the land," are sufficient to show that the lease was one in perpetuity; but I confess that those words do not convey to my mind any such meaning or intention. Had the lease been clearly expressed as one for the life of the lessee, or for the joint lives of two lessees, or have been a lease for five or ten years, those words might equally as well have been used.

I cannot, therefore, hold that the construction put upon the lease by the Lower Appellate Court is erroneous. Its decision that the defendant-appellant (even should he be, as he claims to be, the legal heir and representative of one of the lessees) is not a person who can resist the plaintiff's claim, is correct, and its finding appears to me to be quite in accord with the terms of the document and the facts of the case as evidencing the intention of the parties. The appeal therefore fails, and must be dismissed with costs.

Tyrrell, J.—I am entirely of the same opinion.!

Appeal dismissed.

NOTES.

[See also (1903) 8 O.C., 61.]

[573] *The 30th July, 1886.*

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Nur-ul-Hasan..... Judgment-debtor
versus

Muhammad Hasan and others.....Decree-holders.*

*Execution of decree—Limitation—Act XV of 1877 (Limitation Act), sch. vi,
No. 179 (2).*

Art. 179, cl. (2) of the Limitation Act (XV of 1877) must be construed as intended to apply without any exceptions to decrees from which an appeal has been lodged by any of the parties to the original proceedings, and should certainly be applied to cases where the whole decree was imperilled by the appeal.

A suit for pre-emption was decreed against the vendors, the purchaser, and another set of pre-emptors, in March 1882. The last-mentioned defendants alone appealed, and their appeal was dismissed in May 1882. In May 1885, the decree-holders applied for execution of the decree. The application was objected to by the purchaser as barred by limitation, having been filed more than three years from the passing of the decree, and it was contended that art. 179, cl. (2), did not apply to the case, inasmuch as the purchaser did not appeal from the original decree.

Held that art. 179, cl. (2), of the Limitation Act was applicable, and that the application, being made, within three years from the date of the appellate Court's decree, was not barred by limitation.

Hur Proshaud Roy v. Enayet Hossein, 2 Cal. L. Rep. 471, and *Sangram Singh v. Bujharat Singh*, 1. L. R., 4 All. 36, distinguished. *Mullick Ahmed Zumma v. Mahomed Syed* 1. L. R., 6 Cal. 194, and *Ram Lal v. Jagannath*, Weekly Notes, 1884 p. 138, relied on.

THE decree-holders in this case, Muhammad Hasan and Miyan Muhammad, having brought a suit to enforce the right of pre-emption in respect of the sale of certain property, two persons named Amir Chand and Khurshed Husain brought a suit claiming a similar right in respect of the same sale. These

* Second Appeal No. 62 of 1886, from an order of T. Benson, Esq., District Judge of Saharanpur, dated the 2nd April 1886, reversing an order of Maulvi Tajammul Husain, Munsif of Shamli, dated the 27th June 1885.

persons were added as defendants in the suit of Muhammad Hasan and Miyan Muhammad. On the 7th March 1882, Muhammad Hasan and Miyan Muhammad obtained a decree in respect of a moiety of the property in dispute against the vendors, the purchaser, and Amir Chand and Khurshed Husain, the rival claimants to the right of pre-emption. The vendors and the purchaser did not appeal from this decree, but the rival claimants to the right of pre-emption, Amir Chand and Khurshed Husain, did, and the decree of the 7th March 1882, was affirmed by the Court of first appeal on the 12th [574] May 1882. Amir Chand and Khurshed Husain then preferred a second appeal to the High Court, but the appeal was dismissed and the decree of the Court of first appeal affirmed.

On the 12th May 1885, Muhammad Hasan and Miyan Muhammad, decree-holders, applied for delivery of possession in execution of decree. This application was objected to by the purchaser judgment-debtor, Nur-ul-Hasan, on the ground that it was barred by limitation. He contended that it should have been made, so far as he was concerned, within three years from the date of the original decree, the 7th March 1882, from which he had not appealed, and that not having been so made, it was made beyond time.

This contention the Court of First Instance allowed, and dismissed the application. On appeal by the decree-holders the Lower Appellate Court held that limitation began to run from the date of the High Court's decree, and the application having been made within three years from that date was within time, and directed that execution should issue.

The judgment-debtor appealed to the High Court, again contending that limitation should be computed from the date of the original decree.

Mr. *Amir-ud-din* and *Munshi Hanuman Prasad*, for the Appellant.

Pandit Ajadhu Nath, for the Respondents.

Oldfield, J.—The matter in this appeal relates to the execution of a decree obtained for a right of pre-emption. It appears there were two sets of pre-emptors. The first set are respondents before us. They brought a suit against the vendors, the vendee (who is the appellant before us), and the other set of pre-emptors, and obtained a decree for a moiety of the property. This decree is dated the 7th March 1882. Out of the defendants, the second set of pre-emptors alone appealed, and their appeal was dismissed on the 12th May 1882. The decree-holders (respondents) applied to execute their decree on the 12th May 1885, and this application, being objected to by the purchaser, the appellant before us, was disallowed by the Munsif, but on appeal to the Lower Appellate Court the Munsif's order was reversed, and execution granted against Nur-ul-Hasan, the purchaser of the property. He has now [575] preferred this appeal on the ground that the application for execution is barred, having been filed more than three years after the passing of the decree. In my opinion the appeal fails, because art. 179, cl. (2), being the limitation law applicable, the time should run from the date of the decree of the appellate Court. It is contended that that law is inapplicable because the appellant did not appeal from the original decree; and so far as he is concerned, the respondents ought to have executed the decree irrespectively of the fact that an appeal had been preferred by some of the defendants. On this point certain decisions have been brought to our notice.—*Hur Proshad Roy v. Enayet Hossein*, 2 Cal., L. Rep., 471; *Sangram Singh v. Bujharat Singh*, I. L. R., 4 All., 36. I think those cases are distinguishable from the present case: as in this case, although only one set of defendants appealed against the original decree, the grounds of such appeal imperilled the rights of the plaintiffs-respondents which they had obtained by a decree against all the

defendants. Had the appeal of the second set of pre-emptors succeeded, the property decreed to the respondents would have passed away from them, and there would have been no decree for them to execute against the present appellant. I think this circumstance marks the distinction between the present case and the cases cited; but for my own part I think the terms of art 179, cl. (2), are so clear and distinct that they scarcely admit of any such distinction being drawn. Under that law the period for the execution of a decree will begin to run, where there has been an appeal, from the date of the final decree or order of the Appellate Court. It contains nothing as to whether the appeal shall have been made by all the parties, or by one, or how far the Appellate Court's order may or may not affect the rights of parties, who have not appealed. It seems to me to give a plain and clear rule that in all cases where there has been an appeal, the date of the final decision of the Appellate Court shall be the date from which the time for execution will begin to run. In support of the view I am taking, that in the present case limitation should run from the date of the Appellate Court's decree, I may refer to *Mullick Ahmed Zumma v. Mahomed Syed*, I. L. R., 6 Cal., 194, and *Ram Lal v. Jagannath*, Weekly Notes, 1884, p. 138.

I would dismiss the appeal with costs.

[576] **Mahmood, J.**—I have arrived at exactly the same conclusion as my learned brother, but I wish to say that the ground of distinction which he has drawn between the present case and those referred to is, to my mind, very clear. The present case is not necessarily inconsistent with what was ruled there. In the 2nd clause of art. 179 there are no words limiting or qualifying the application of those words to decrees in which only one or more of the parties have appealed; the clause as framed must be looked upon as intended to apply, without any exceptions, to decrees from which an appeal has been lodged by any of the parties to the original proceedings, and I should say the clause should certainly be applied to cases such as the present, where the whole decree was imperilled by the appeal.

I think the decree-holders in this case might, as a consequence of the appeal by the rival pre-emptors, claim, by analogy, the same footing with reference to limitation for executing their decree as a decree-holder who has taken a step in aid of execution, which is another ground for extending the time for execution, as provided in the 4th clause of the same article. This I mention only by way of analogy, and regarding it as such, I think it was sufficient to justify the decree-holders not applying for execution before the appeal was decided.

Under these circumstances the application for execution is within time, and I agree with my learned brother's order dismissing this appeal with costs.

Appeal dismissed.

NOTES.

[This case was not followed in (1889) 12 Mad., 479 (where the reason is stated at p. 460) and (1889) 13 All., 1 F. B., in which the dissenting Judges alone preferred to follow this ruling.

See (1896) 22 Bom., 500; (1903) 33 Bom., 39; (1906) 30 Mad., 1; (1914) 22 I.C., 685 (Cal.); (1907) P.R., 32.]

[8 All. 576]
FULL BENCH.

The 2nd August, 1886.

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, MR. JUSTICE OLDFIELD,
MR. JUSTICE MAHMOOD, AND MR. JUSTICE TYRRELL.

Jadu Rai and another.....Defendants

versus

Kanizak Husain and others.....Plaintiffs.*

Hearing of suit—Trial—Death or removal of Judge during suit—Procedure to be followed by new Judge—Power of new Judge to deal with evidence taken by his predecessor—Civil Procedure Code, s. 191.

The trial of a suit before a Subordinate Judge was completed except for argument and judgment and a date was fixed for hearing argument. At this [577] point a new Subordinate Judge was appointed, and he passed an order directing a further adjournment and fixing a particular date for disposal of the case. After some further adjournments, the Subordinate Judge delivered judgment, having heard argument on both sides upon the evidence taken by his predecessor. The District Judge having on appeal upheld the Subordinate Judge's decision, a second appeal was preferred to the High Court, and an objection was raised on the appellant's behalf that the proceedings taken before the Subordinate Judge were void, and he could not be said to have tried the case, inasmuch as no evidence was taken before him, and his judgment was based solely on evidence recorded by his predecessor. No objection of this kind was taken in either of the Courts below.

Held by the Full Bench that with reference to the grounds of appeal, and under the circumstances of the case, the officer who passed the decree in the Court of First Instance had jurisdiction to deal with and determine the suit in the mode in which he did. *Jagram Das v. Narain Lal*, I. L. R., 7 All., 857, and *Afzal-un-nissa Begam v. Al Ali*, *ante*, p. 35, discussed.

Per STRAIGHT, Offg. C. J., that as no objection was raised before the Subordinate Judge to his taking up and dealing with the case in the mode in which he did, but the evidence was discussed and criticised on both sides, there had been a waiver on the part of the appellant in reference to the action of the Subordinate Judge of which he now sought to complain.

Per OLDFIELD, J., that where a Judge takes up a trial begun by another, although the law permits him to deal with the evidence taken by his predecessor as if he himself had taken it down, he must deal with it judicially, and try the cause as though it had come before him in the first instance, and there must be a hearing of the entire case before himself; and in every case it has to be seen whether, as a matter of fact, there has been a real trial and hearing of the entire case by the Judge, and if the evidence previously taken was not judicially dealt with, counsel heard upon it, and the entire case fully heard and tried, there has been no trial in the legal sense of the word, and the proceedings must be set aside. *Jagram Das v. Narain Lal*, I. L. R., 7 All., 857, and *Afzal-un-nissa Begam v. Al Ali*, *ante*, p. 35, followed.

Per MAHMOOD, J., that although it is true that "a trial must be one, and must be held before one Court only," the identity of the Court is not altered by a new Judge being appointed to preside in such Court; that when a trial goes on for more than one day, each day constitutes

* Second Appeal No. 1155 of 1885, from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 18th July 1885, confirming a decree of Babu Abnash Chandar Banarji, Subordinate Judge of Allahabad, dated the 24th June 1884.

date; that the case was partly heard before his predecessor, and to continue it from the point at which it was left off; that where the Judge who has partly heard a case dies or is removed, the trial, so far as it has gone before him, is neither abortive nor becomes a nullity; that the new Judge is not required to fix a day for the entire hearing of the suit before himself, nor is there anything to prevent him from taking up a trial which has been partly heard by his predecessor, and to proceed with it as if it had been commenced before himself; that the Code does not recognise such procedure as amounting to separate trials; that the Judge who succeeds another after a trial which has partly proceeded [578] before his predecessor is not bound to fix a new day for commencing the trial *de novo*, nor should the trial proceed before the new Judge as if the day were the first on which the case had ever come on for hearing; that the evidence recorded by the preceding Judge, by the mere fact of being upon the record, is *ipso facto* evidence in the cause, and could, under s. 191 of the Code, be treated by the succeeding Judge "as if he himself had taken it down or caused it to be made"; that when the case comes on for hearing before the new Judge, there is no necessity for putting in the depositions of witnesses which, though taken by his predecessor, are already upon the record; that such depositions must be dealt with as materials of evidence before the new Judge; that a judgment and decree upon such evidence are neither illegal nor absolute nullities, there being no want of jurisdiction; that when such judgment and decree are passed, the Court of first appeal is prohibited by s. 564 of the Code to order a trial *de novo*, but is bound by s. 565 of the Code to decide the appeal upon the evidence on the record; that where further issues are directed to be tried, or additional evidence is to be taken, the Court of appeal is bound to act according to the provisions of ss. 566, 568, and 569 of the Code, but cannot order a new trial; that even when there has been an irregularity on the part of the first Court in receiving or rejecting evidence, the provisions of s. 578 of the Civil Procedure Code and s. 167 of the Evidence Act prohibit the reversal of a decree and the remand of a case for new trial, unless the irregularity affects the merits of the case or the jurisdiction of the Court.

Jagran Das v. Narain Lal, 1. L. R., 7 All. 857, and *Afzal-un-nissa Begam v. Al Ali*, ante, p. 35, dissented from.

Per TYRELL, J., that in reference to the Full Bench the only matters which can legally be attended to are the cases referred, and it is not competent for the Full Bench to review or pronounce judicial opinions upon the Court's judgment in cases which have been finally decided and not made the subject of reference. *Jagran Das v. Narain Lal*, 1. L. R., 7 All. 857, and *Afzal-un-nissa Begam v. Al Ali*, ante, p. 35, followed and explained.

THIS was a reference to the Full Bench by STRAIGHT, Offg. C.J., and MAHMOOD, J., of the following question:—"Whether, with reference to the first and second grounds of appeal, and having reference to the circumstances disclosed in the proceedings of the Court of First Instance, that Court, or the officer presiding therein who passed the decree, had jurisdiction to deal with and determine the suit in the mode in which he did." It was further stated that the reference was made for the special purpose of considering the effect of the judgments of the Court in *Jagran Das v. Narain Lal*, 1. L. R., 7 All. 857, and *Afzal-un-nissa Begam v. Al Ali*, ante, p. 35. The first and second grounds of appeal mentioned in the question referred to the Full Bench were as follows:—"First, because there exists a substantial defect in the procedure followed by the learned [579] Subordinate Judge who decided this case, which renders the proceedings in this case void, inasmuch as no evidence was taken before the learned Subordinate Judge who passed the decision referred to, and that officer's judgment is based solely on evidence recorded by his predecessor; second, because the learned Subordinate Judge cannot be said to have tried the case."

The proceedings in the Court of First Instance and the mode in which the judicial officer who passed the decree dealt with and determined the suit, were

as follows.—The suit was filed in the Court of Babu Ram Kali Chaudhri, Subordinate Judge of Allahabad, on the 31st March 1883. A written statement of defence was filed, issues were framed, witnesses were examined on both sides, and various adjournments took place, up to the 3rd March 1884. Upon that date the examination of witnesses was concluded, and an order was passed by the Subordinate Judge in these terms:—"As this case is complete, it is ordered that the 14th March 1884, be fixed for hearing arguments. Pleadings to be informed." At this point Babu Abinash Chandar Banarji succeeded Babu Ram Kali Chaudhri as Subordinate Judge of Allahabad. On the 10th May 1884, he passed the following order:—"In this case Munshi Ram Prasad stated to-day that Lala Raj Bahadur, plaintiff's pleader, was not present, and as he was fully acquainted with the facts of the case, it could not be argued in his absence. Ordered that the case be adjourned to-day, and that the 13th May 1884; be fixed for decision." On the 13th May there was a further adjournment to the 16th June, and ultimately, on the 24th June 1884, the Subordinate Judge delivered judgment after hearing what he described as "very able and lengthy arguments on both sides." Judgment was in favour of the plaintiff, and the defendants appealed to the District Judge of Allahabad, who, on the 18th July 1885, affirmed the first Court's decree.

No objection appeared to have been raised in the first Court, or taken as a ground of appeal before the District Judge, to the course adopted by Babu Abinash Chandar Banarji. The defendants preferred a second appeal from the decision of the District Judge to the High Court, the only grounds which need be mentioned being those already set forth.

[580] Mr. W. M. Colvin Babu Dwarka Nath Banarji, Munshi Hanuman Prasad, Munshi Ram Prasad, and Lala Juala Prasad, for the Appellants.

Mr. G. E. A. Ross and Mr. Shivanath Sinha, for the Respondents.

Straight, Offg. C. J.—In my opinion the question put by this reference must be answered in the affirmative. It is not contested that the learned Subordinate Judge has jurisdiction territorially and pecuniarily to try the suit, and the single point appears to be, did he try it, or, in other words, did he hold a legal trial? It is conceded by the appellants' learned counsel that no objection was raised before the Subordinate Judge to his taking up and dealing with the case in the way that he did; on the contrary, he is admitted to observe correctly in his judgment, where he says—"I have heard very able and lengthy arguments on both sides. *The evidence has been minutely dissected and criticized*, and many probabilities urged upon both sides." It is obvious from this passage that, if there could have been a waiver on the part of the appellants in reference to the action of the Subordinate Judge, of which they seek now to complain in special appeal, there was such waiver. In short, their position is this, that having appeared before the Subordinate Judge and consented to his doing what he did, and thus taking their chance of succeeding on the merits, they are nevertheless now to be allowed to turn round and say all that was done was illegally done, and there was no trial at all. I presume it would hardly be seriously contended that if a Court issue a summons to a defendant to appear on a certain date for the mere settlement of issues, and the defendant appears on that date and consents to the suit being then and there disposed of, and makes his defence, such defendant can afterwards be permitted to object that the summons to him was for settlement of issues only, and not for final disposal of the suit. I confess I see no serious distinction between such a case and the present, where the Subordinate Judge having undoubted jurisdiction to try the suit, the parties consented to his trying it by waiving certain rules of procedure enacted in the interests of suitors

personally, and not for any public object. I cannot think that the late learned Chief Justice of this Court, in the decisions quoted by the appellants' [581] learned counsel, ever intended to lay down that, under circumstances such as these, the Subordinate Judge must be held to have acted without jurisdiction, and that his proceedings, adopted on consent of parties, were void. If he did, I can only say with the most profound respect that I dissent from such a view, the inconvenience and hardship of giving effect to which would be strikingly illustrated by the particular case out of which the reference has arisen.

For these reasons, as stated at the outset of my remarks, I answer the reference in the affirmative.

Oldfield, J.—This reference raises a question in regard to the scope and intent of the provisions of s. 191, Civil Procedure Code, by which, when the Judge taking down any evidence or causing any memorandum to be made under Chapter XV dies, or is removed from the Court before the conclusion of the suit, his successor may, if he think fit, deal with such evidence or memorandum as if he himself had taken down or caused it to be made.

The question has already been before this Court in the case of *Jagram Das v. Narain Lal*, I. L. R., 7 All., 857, and *Afzal-un-nissa Begam v. Al Ali*, ante, p. 35, and in the exposition of the law given by PETHERAM, C. J., relating to trial of cases when the trial had been begun by one Judge and taken up by another, I entirely concur.

PETHERAM, C. J., observes :—" His business (that of the Judge taking up the trial of a case begun by another) was to try the case according to law ; and if he did not so try it, he had no jurisdiction to try it at all. All that he could properly do was to take up the case at the point which it had reached before the commencement of the hearing under Chapter XV of the Code. He should have fixed a day for the entire hearing of the suit before himself, and in that case the regular course would have been for the plaintiff's counsel to have opened his case and proved it by evidence, and for the defendant's counsel to have followed him. The Subordinate Judge should then have heard arguments on both sides, and should finally have decided the case which he had himself heard and tried. He might have called in aid the provisions of s. 191, Civil Procedure Code, which enacts that a Judge, in the hearing of [582] a cause which was partly heard by another, may allow the evidence which was previously taken to be used before himself. If he had taken that course, the trial would have been perfectly regular ; and if, upon the day fixed for the hearing, he had first heard the opening statement on behalf of the plaintiff, and then allowed the plaintiff to prove his case by putting in the depositions which had been taken before his predecessor, his proceedings would not have been open to objection." And in *Afzal-un-nissa Begam v. Al Ali*, he observes :—" The question then arises :—What was the duty of Maulvi Zain-ul-abdin ? I think that when the case was called on before him on the 9th December, he ought to have fixed a date for the hearing, that is to say, for the entire hearing and trial of the case before himself. He might, at the request of the pleaders, have fixed the same day, the 9th December, and proceeded to try the case at once. But, by the act of fixing a date he would have avoided the danger of making it appear possible that he was deciding a case which he himself had not heard. Then, when the time fixed—either the same day, by such an arrangement as I have suggested, or a future date—arrived, the trial would proceed in the ordinary way, as if the day were the first day on which the case had ever come on for hearing, except that the parties should be allowed, by s. 191 of the Civil Procedure Code, to prove their allegations in a different way. The Code has provided a

mode of avoiding the inconvenience which might arise if the witnesses had to be called twice over, if neither the parties nor the Judge consider such a course to be necessary. But no Court can, in my opinion, extend the operation of the Statute so as to enable a new Judge to take up a trial which has been partly heard by his predecessor, and to proceed with it as if it had been commenced before himself."

In the above observations I entirely concur.

The law permits a Judge taking up a trial begun by another Judge, to deal with the evidence taken by his predecessor as if he himself had taken it down; but this permission does not relieve him of the duty of dealing with it judicially, of trying the cause as though it had come before him in the first instance. The trial is, in fact, begun *de novo* before him; he may deal with the evidence already taken as if he himself had taken it; but he must deal with [583] it judicially by allowing counsel to put in the evidence and hearing argument on it. In fact, there must be a hearing of the entire case before himself. The proper procedure, and the safest, to pursue is no doubt that pointed out by PETHERAM, C.J.

In every case, however, we have to see whether, as a matter of fact, there has been a real trial, a hearing of the entire case by the Judge; whether, looking to what has taken place, the evidence previously taken was judicially dealt with, counsel heard upon it, and the entire case fully heard and tried. If this has not been done, there has been no trial in the legal sense of the word, and the proceedings must be set aside.

In the case referred to us, I find that the Judge fixed a day for hearing, and having heard counsel on the case, delivered judgment. There is no reason to suppose that the trial was other than sufficient and proper, and that there was not an entire hearing of the case.

Mahmood, J.—The question referred to the Full Bench in this case is—"Whether, with reference to the first and second grounds of appeal, and having regard to the circumstances disclosed in the proceedings of the Court of First Instance, that Court, or the officer presiding therein who passed the decree, had jurisdiction to deal with and determine the suit in the mode in which he did." The two grounds of appeal referred to in this question are—"First, because there exists a substantial defect in the procedure followed by the learned Subordinate Judge who decided this case, which renders the proceedings in this case void, inasmuch as no evidence was taken before the learned Subordinate Judge who passed the decision referred to, and that officer's judgment is based solely on evidence recorded by his predecessor; and secondly, because the learned Subordinate Judge cannot be said to have tried the case."

Neither of these grounds was taken in the Lower Appellate Court, and there can be no doubt, as was intimated by the learned counsel for the appellant, that these grounds have been taken owing to the practice which has sprung up in this Court, during the last year, in consequence of two rulings of PETHERAM, C.J., the late learned Chief Justice of this Court. The first of these rulings is the [584] case of *Jagram Das v. Narain Lal*, I. L. R., 7 All., 857, the effect of which can be best summarized in the words of the head-note in the report. In that case a Subordinate Judge having taken all the evidence in a suit before him, and having completed the hearing of the suit, except for the arguments of counsel on both sides, was removed, and the case came on for hearing before his successor. The new Subordinate Judge took up the case from the point at which it had been left by his predecessor, and proceeded to judgment and decree. It was held that the only power given by the Civil Procedure Code in such cases is to allow the evidence taken at the first trial to be used as evidence

at the second trial, and not to allow the two hearings to be linked together and virtually made one; that the Subordinate Judge should have fixed a day for the entire hearing of the suit before himself, and should first have heard the opening statement on behalf of the plaintiff, the evidence produced by both sides and the arguments on behalf of both, and then, finally, decided the case which he had himself heard and tried; that he might, in accordance with the provisions of s. 191 of the Civil Procedure Code, have allowed the depositions which had been taken before his predecessor, to be put in; and that, in neglecting to take this course and in deciding the case upon materials which were never before him, his action was illegal, and the judgment and decree were nullities. This ruling—to use the words of PETHERAM, C.J., himself—“led to some confusion as to the mode in which cases of this kind should be dealt with;” and the learned Chief Justice in a later ruling—*Afzal-un-nissa Begam v. Al Ali, ante*, p. 35—took opportunity to point out what appeared to him the course which should have been adopted in that case, which he regarded as “a fair illustration of what commonly happens.” The head-note of the report in that case summarizes the effect of the ruling, and it appears that what happened in that case was, that a Subordinate Judge, having taken all the evidence in a suit before him, adjourned the case to a future date for disposal. Upon the date fixed a further adjournment was made. The Subordinate Judge, at this stage of the proceedings, was removed, and a new Subordinate Judge was appointed. It was held by the learned Chief Justice that the trial, so far as it had gone [585] before the first Subordinate Judge, was abortive, and, as a trial, became a nullity; and it was also held that the duty of the second Subordinate Judge, when the case was called on before him, was to fix a date for the entire hearing and trial of the case before himself; that he might, at the request of the pleaders, have fixed the same day upon which the case was called on, and proceeded to try it at once; and that the trial should then have proceeded in the ordinary way, except that the parties would be allowed, under s. 191 of the Civil Procedure Code, to prove their allegations in a different manner.

These two rulings constitute the exposition of the law upon which Mr. Colvin has relied, and it will be my duty to consider the *ratio decidendi* upon which these two rulings proceed. But the learned counsel has also relied upon certain unreported cases which were submitted at the hearing. One is the case of *Mulik Fakir Bakhsh v. Chauhanja Bakhsh Singh*—(F. A. No. 88 of 1884, decided on the 7th July 1885)—in which PETHERAM, C.J., made certain observations, which may be quoted here as affording indications of the view which he entertained:—“It appears to be a general opinion in this country that it is in the power of a new Subordinate Judge to take up a case which has been partly heard by his predecessor, and to continue the same trial; and so in this case the parties appear to have given a sort of consent to the adoption of this course. But I am of opinion that this view of the law is wrong. A trial must be one, and must be held before one Court only. There are provisions which enable evidence taken by one Judge to be put in and used as evidence by his successor; but there is nothing to authorize a Judge to take up a case which has been partly heard before his predecessor, and to continue it from the point at which his predecessor left off. He could only allow the evidence previously taken to be used as evidence under s. 191 of the Civil Procedure Code, in a case wholly tried by himself. I have already fully explained my views on this subject in the case of *Jagram Das v. Narain Lal*; and for the reasons which I there stated, I am of opinion that this trial must be treated as a nullity, that therefore all proceedings subsequent to fixing the issues must be set aside, and that the Subordinate Judge must reinstate the case upon his

file, and try it according to law." The next [586] unreported case which has been cited is *Sah Kirpa Dayal v. Musammat Rani Kishori*—(F. A. No. 108 of 1884, decided on 3rd November 1885)—to which PETHERAM, C.J., was again a party, and in which the ruling in the case of *Jagram Das* was again followed, with the result of annulling all the proceedings, and directing a fresh trial of that case and also of another connected case "according to law." Again, another unreported case is *Musammat Jasodha Kuar v. Lal Ishri Prasad Narain Singh*—(F. A. No. 127 of 1884, decided on 3rd February 1886)—in which the ruling in *Afzal-un-nissa Begam's Case* was simply followed, and the whole trial was declared to be bad in law, and the proceedings being annulled, the case was remanded to the Court below, to be placed on the register of original suits and disposed of "according to law." The same was the view followed in another unreported case—*Shaikh Ghulam Imam v. Shaikh Jafar Ali*, (S. A. No. 980 of 1885, decided on 26th March 1886)—and this is the last of the unreported cases which have been cited by Mr. Colvin as having regulated the practice of this Court since the two rulings of PETHERAM, C.J., which have been reported and already referred to.

As there has been much difference of opinion as to the exact meaning and effect of these rulings, I think it is necessary to analyze the various steps of reasoning upon which the judgments of PETHERAM, C. J., seem to proceed according to my interpretation. The various points which indicate the line of His Lordship's argument are:—

(1).—"A trial must be one, and must be held before one Court only."

(2).—"When a suit is tried the "original date would be the date of hearing, and all subsequent dates would be those of adjournments;" so that where a trial goes on for more than one day, every hearing after the original date "would be a proceeding held by adjournment in the trial *heard on the original date*."

(3).—"There is nothing to authorize a Judge to take up a case which has been partly heard before his predecessor, and to continue it from the point at which his predecessor left off."

[587] (4).—"Where the Judge who had partly heard a case died or was removed, "the trial, so far as it had gone before him, was *abortive*, and, as a trial, became a *nullity*, because the person conducting it had ceased to be a Judge, and could not give judgment in a trial heard before him."

(5).—"The new Judge must, therefore, "fix a day for the *entire hearing* of the suit before himself," and must "re-hear it from beginning to end;" for the law does not "enable a new Judge to take up a trial which has been partly heard by his predecessor, and to proceed with it as if it had been commenced before himself."

(6).—"There would thus be two separate trials and two different hearings of the cause; and "the law nowhere says that the two hearings may be *linked together* and virtually made one."

(7).—"Every succeeding Judge, who is appointed before the conclusion of the trial, must therefore fix a new day for commencing the trial *de novo*, and when the time arrived "the trial would proceed in the ordinary way, as if the day were the *first* on which the case had ever come on for hearing."

(8).—"The evidence taken by the preceding Judge would not, by the mere fact of being upon the record, be evidence in such new trial, nor could it be dealt with as material upon which a judgment might proceed."

(9).—"But in the trial before the new Judge "the parties would be allowed, by s. 191 of the Civil Procedure Code, to prove their allegations in a different

manner;" that is, "by putting in the depositions which had been taken before his predecessor."

(10).—But if the depositions are not so "put in," that is, proved as evidence in the new trial, the Judge using them would be deciding "a case upon materials which are not before him," because such Judge had not "taken the evidence" himself.

(11).—The former trial having already become a nullity, and the evidence taken therein not being put in as evidence in the new trial, the judgment and decree which may proceed upon such evidence would be "absolute nullities;" because a Judge who, in trying a case, adopts such a procedure "had no jurisdiction to try it at all."

[588] (12).—And when such judgment or decree is passed, the appellate Court, regarding the whole proceedings in the case as nullities, should set them aside and remand the case for a new trial.

These seem to me to be the various points laid down in the rulings to which I have referred, so far as I can understand them, and I have stated each proposition, as closely as I could, in the words of PETHERAM, C.J.

In this state of things it is important, for realizing the full bearing and effect of these cases, to observe that all of them, whether reported or unreported (with the exception of that last mentioned), were more or less heavy first appeals involving complicated questions of fact and troublesome questions of law; and also that in none of those cases did the appellant object in the Court of First Instance to the course which that Court adopted, nor did he complain of the course in his grounds of appeal by taking the point upon which this Court set aside all the proceedings of the Court below and ordered trials *de novo*. Indeed, in the case of *Malik Fakir Bakhsh*—to use the words of PETHERAM, C. J.—"the parties appear to have given a sort of consent to the adoption of this course"—the very course which the learned Chief Justice declared, apparently, *suo motu*, to be so null and void in law as to render the whole trial a nullity, and to necessitate the case being remanded to the first Court to begin the trial anew. The reason why I mention this circumstance is, that it is only in very exceptional cases that this Court, ever since I have had the honour of being associated with it, either as a member of the Bar or as a temporary Judge, allows parties appellants to obtain reversals of the decrees of the Courts below upon grounds not taken either as objections in the Court below or as grounds in the memorandum of appeal. And it is only in equally exceptional cases that this Court exercises the power which, as a Court of appeal, it undoubtedly possesses, of basing its judgment upon grounds which the parties do not urge, and which do not form part of the *ratio decidendi* upon which the judgment of the Court below proceeds. Further, this Court, so far as I am aware, has been accustomed, till the new practice introduced by PETHERAM, C.J., during the [589] last year, to bear in mind the enormous delay and expense which fresh trials involve, and the usual course has been to abide by the express mandate of the Legislature as contained in s. 564 of the Civil Procedure Code, which prohibits the remand of cases for second decision, except under conditions covered by s. 562 of the Code.

The policy of the law, as apparent from these sections, is obvious. Delay in the disposal of litigation and the expense to the parties, are considerations which the Legislature has not ignored, and the appellate Court, at least in first appeals, is invested with authority, under s. 566 of the Code, to remand issues for trial, if those issues have never been duly framed or tried; and s. 568 empowers the Court of Appeal to take further evidence itself, or to order such further evidence to be taken by the lower Court when necessary. It is only

when the erroneous view of the lower Court upon a preliminary point has prevented it from taking the evidence in the case, within the meaning of s. 562 of the Code, or where there is want of jurisdiction or absolute illegality, that trials *de novo* are ordered, and it must therefore be taken that in the heavy first appeals above referred to, in which such fresh trials were directed, the only *ratio* could have been that the proceedings of the first Court in those cases were taken without jurisdiction and amounted to absolute nullity. * * *

Now, in the case of *Jagram Das*, what happened was, that Maulvi Sami-ul-la Khan was the presiding Judge of the Court in which the suit was instituted, and a day was fixed for hearing of the case. Then, to use the language of PETHERAM, C.J., "the plaintiff's counsel opened his case, and called witnesses to prove it, who were cross-examined by counsel for the defendant. After this the defendant's counsel called his witnesses, and they were cross-examined by the other side. All that remained was for the plaintiff's counsel to sum up and for the defendant's counsel to reply. At this point Maulvi Sami-ul-la Khan was sent on a special mission to Egypt and another Subordinate Judge, named Rai Cheda Lal, was appointed to officiate in his place, and the present case came before him among others which were pending in his Court." Under this state of things the learned Chief Justice, referring to the new Subordinate [590] Judge, went on to say:—"His business was to try the case according to law; and if he did not so try it, he had no *jurisdiction* to try it at all." I am bound to hold that the learned Chief Justice, in using the word "*jurisdiction*," duly realized the meaning of that expression as a term of law as distinguished from "*irregularity*," another term of law. Then the learned Chief Justice went on to say, with reference to the new Subordinate Judge:—"All that he could properly do was to take up the case at the point which it had reached before the commencement of the hearing, under Chapter XV, of the Code. He should have fixed a day for the *entire hearing* of the suit before himself, and, in that case, the regular course would have been for the plaintiff's counsel to have opened his case and proved it by evidence, and for the defendant's counsel to have followed him. The Subordinate Judge should then have heard arguments on both sides, and should finally have decided the case which he had himself heard and tried. He might have called in aid the provisions of s. 191 of the Civil Procedure Code, which enacts that a Judge, in the hearing of a cause which was partly heard by another, may allow the evidence which was previously taken to be used before himself. If he had taken that course, the trial would have been perfectly regular; and if, upon the day fixed for the hearing, he had first heard the opening statement on behalf of the plaintiff and then allowed the plaintiff to prove his case by putting in the depositions which had been taken before his predecessor, his proceedings would not have been open to objection. But he did nothing of the kind. He fixed no date for the hearing of the case as for a *new trial*; but he practically arranged that it should be heard from the point at which his predecessor left off. In my opinion this was an *absolutely illegal* course, and one which cannot be justified by any system of law, and certainly not by the Civil Procedure Code."

Now, with profound respect for the eminent legal authority from whom these observations emanate, I cannot help feeling that they proceed upon some misapprehension of the procedure of the Courts of First Instance in the Mufassal; and that the procedure taken by the Subordinate Judge, which was characterized by the learned Chief Justice as "one which cannot be justified by any system of law," was scarcely liable to such condemnation.

[591] I think in dealing with a question of this kind it is important to consider first principles, and they are nowhere discussed better than in a whole

chapter in the "*Rationale of Judicial Evidence, specially applied to English Practice*," by Jeremy Bentham, who has been justly called the father of English jurisprudence, and upon whose writings are undoubtedly based the modern doctrines of judicial evidence and trials, not only in England, but in the neighbouring countries of Europe. The chapter is the VIIth of Book III in that celebrated work, and in dealing with the question whether the evidence should be collected by the same person by whom the decision is to be pronounced, shows the *pros* and *cons* of the matter, leaving the result, on the whole, to be that delay and expense in the disposal of litigation is a worse evil than that of having judgments pronounced by persons who have not themselves taken the whole oral evidence in the case. But it is almost unnecessary to refer to such an eminent authority who deals with first principles of jurisprudence, because PETHERAM, C.J., might have been referred to a Full Bench ruling of the Bombay High Court, in which the judgment of COUCH, C.J., now one of the Lords of the Privy Council, was concurred in by the rest of the Court, and in which that learned Chief Justice expressed the view that there is "no rule of jurisprudence which requires that the evidence in the suit shall be taken by the Judge who pronounces the judgment, and the practice in many Courts being, as is well known, to the contrary." This was said in the case of *Naranbhai Vrijbhukandas v. Naroshankar Chandroshankar*, 4 Bom. H. C. Rep., A. C. J., 98, to which I shall have to refer again in the course of this judgment.

I make these observations with all the respect which is due to one who, till lately, occupied the position of Chief Justice of this Court; and I make them because the rest of the judgment in the ruling which I am now considering uses expressions which, I humbly think, are not clearly intelligible to the Mufassal Courts of this country, and which, speaking for myself, I can but faintly understand from the little that I may claim to know of English technical law. The learned Chief Justice said in his judgment that "the law nowhere says that the two hearings may be linked together and virtually made one." I frankly confess I find it [592] difficult to understand what this sentence exactly means; for I am unable to realize that when there are two hearings what the *link* between them can be. The only way in which I can respectfully render this intelligible to myself, is to say that the learned Chief Justice, in delivering that judgment, was thinking of those technicalities of special pleading in English Common Law procedure which no longer find favour, even in the Courts of Justice in England, at least since Lord SELBORNE'S Judicature Acts, amalgamating the jurisdiction of Courts of Equity with those of Common Law, were passed. The learned Chief Justice probably had in his mind trials by jury in civil cases—trials which have a historical origin of their own in England, and the principles of which on such points are wholly inapplicable to the administration of justice in British India. In cases of trials by jury, it is of course important that the whole evidence upon which the parties rely should be produced before the jury which has to deal with it, and it is only in this sense that I can understand what the learned Chief Justice meant when he referred to two hearings being "linked together and virtually made one." And I may respectfully and frankly say that in no other sense is the phrase intelligible to me. Yet that phrase is the turning point of the whole effect of the ruling; for it was upon that ground that the learned Chief Justice declared himself to be of opinion that the judgment and decree in that case were "*absolute nullities*," which opinion constituted the reasons for trial *de novo*.

But the learned Chief Justice went further, and in delivering his judgment, gave expression to views as to sound policy in such matters, and indicated the distinction which he drew between the duties of the Court of First Instance and

those of the Court of Appeal, as to evidence not taken before the Court, which deals with such evidence. He observed :—" I am glad to have an opportunity of expressing my disapproval of any system which makes it possible for a man to decide a case upon *materials which are not before him*. It may be said that these observations are applicable to the proceedings of an Appellate Court, which is obliged to decide questions of fact upon evidence which it has not itself heard. But it must be remembered that the Appellate Court has the advantage of the judgment of the Judge of first instance who [593] had the evidence before him. It is probable that the Subordinate Judges themselves will be glad to be told that they are not to decide questions upon which they have not themselves taken the evidence; and it is obvious that such a course is not in accordance with the interests of justice."

Now because considerations of justice have been referred to in this passage, I feel it my duty, as the only native Judge presiding in this Court, to express, as respectfully as I can, a protest against any such assumption. The cases before the learned Chief Justice were more or less heavy first appeals, in which the parties had produced all the evidence that they had to produce, and neither party took the objection that because the Judge deciding it was not the Judge who took the evidence in the case, the trial was an absolute nullity. The contention was not urged in the grounds of appeal, and it could scarcely be either the interests of justice or of the parties that all the proceedings in the Court below should be declared an absolute nullity. The legal aspect of these observations I shall presently consider; but I think I may, with propriety, say here that the parties are not likely to gain but lose by the delay and expense of new trials ordered in the manner in which they were done in those cases, on grounds which neither party made the subject of objection in the Court below or took before this Court as a ground of appeal.

A few days before I had the honour of coming to this Court as an Officiating Puisne Judge, I held the substantive appointment of District Judge of Rae Bareilly, in Oudh, which required me to act as the Judge of the Court of First Instance in all the important litigations of that division. Two cases were then, in the ordinary course, put up before me, in which my predecessor, who had been officiating for me, had recorded the evidence of a considerable number of witnesses, and I should have proceeded with the trial of those suits but for the two rulings of PETHERAM, C. J., which have been reported. These rulings were cited to me as authorities for the proposition that I could not go on with the trial, but that I should—in the words of the learned Chief Justice—"fix a day and re-hear it from beginning to end;" because the learned Chief Justice, who presided over the administration of [594] justice in these Provinces, had declared that any judgment or decree by me would be a "nullity," unless I fixed another date for the trial, and gave the parties another opportunity of re-summoning their witnesses and having them re-examined before me. It was also urged before me that the depositions recorded by my predecessor could be made evidence only by being put in as documentary evidence containing the depositions of witnesses examined in a former trial which had proved *abortive*, and had become a *nullity*, and that if those depositions were not so put in, I could not refer to them, although they already existed upon the record which was then before me. Sitting there as the Judge of an inferior Court, I felt, out of respect, bound to accept this enunciation of the law, coming as it did from the Chief Justice of this Court; but I felt then, as I respectfully do now, that for me to regard the proceedings of my predecessor as "absolute nullities" would have been in those cases a pure waste of time, and cause unnecessary delay and expense to the parties. Yet, though

not bound as a Judge in Oudh to accept the ruling of this Court upon all questions of this nature, I deferred to the eminent authority of PETHERAM, C. J., and ressumoned the witnesses whose evidence had already been taken by the Court. I did so because of what the learned Chief Justice had said in the case of *Afzal-un-nissa Begam*: "The Judge who had originally heard it had gone, and therefore the trial, so far as it had gone before him, was abortive, and, as a trial, became a nullity, because the person conducting it had ceased to be a Judge, and could not give judgment in a trial heard before him." Then my attention was called to another passage in the same learned judgment, which contains the conceptions of the learned Chief Justice as to the requirements of our law of Civil Procedure. After stating that the appointment of a new Judge had rendered all the proceedings taken by his predecessor a "nullity"—I suppose in the legal sense—the learned Chief Justice went on to indicate how that "nullity" might be cured, for the nullity having already occurred according to the former part of the judgment, it could, of course, not be avoided. I will quote the whole passage because it contains the latest enunciation of the law by so eminent a legal authority. The learned Chief Justice said:—

[595] "The question then arises—What was the duty of Maulvi Zain-ul-abdin? I think that when the case was called on before him on the 9th December, he ought to have fixed a date for the hearing; that is to say, for the *entire hearing* and trial of the case before him. He might, at the request of the pleaders, have *fixed the same day*, the 9th December, and proceeded to try the case *at once*. But by the act of fixing a date he would have avoided the danger of making it appear possible that he was deciding a case which he himself had not heard. Then when the time fixed—either the same day, by such an arrangement as I have suggested, or a future date—arrived, the trial would proceed in the ordinary way as if the day were the first on which the case had ever come on for hearing, except that the parties would be allowed, by s. 191 of the Civil Procedure Code, to prove their allegations in a different manner. The Code has provided a mode of avoiding the inconvenience which might arise if the witnesses had to be called twice over, if neither the parties nor the Judge consider such a course to be necessary. But no Court can, in my opinion, extend the operation of the statute so as to enable a new Judge to take up a trial which has been partly heard by his predecessor, and to proceed with it as if it had been commenced before himself."

With reference to this learned passage and the earlier portions of the judgment, it was suggested to me by one side of the Bar, in the cases which I had before me, that I should record an order, saying, in the words of the learned Chief Justice, that as "the Judge who had originally heard it had gone, and therefore the trial, so far as it had gone before him, was abortive, and, as a trial, became a nullity," it was my duty to "fix a day and re-hear it from *beginning to end*;" that in order to achieve this result I might "try the case at once" on the same day by fixing that very day, because, as the learned Chief Justice had said in the case before him, the new Judge, by "the act of fixing a date, would have avoided the danger of making it appear possible that he was deciding a case which he himself had not heard." And it was argued that these enunciations of the requirements of the law would be fully satisfied if, taking up the case at 11 A. M., I fixed the same day for the new trial to take place at five minutes after 11, and it was said that by this interpretation of the two learned rulings with which I had to deal, I might utilize all the [596] proceedings which my predecessor had taken in the case, and proceed with the trial as I should otherwise have done. This is the manner in which these two learned rulings have been understood in the Mufassal, and so far as I am concerned, as I have

respectfully said before, they leave but a vague and uncertain impression upon my mind as to the principles on which they exactly proceed. It would be almost a want of due respect to point out what constitutes a *nullity* in law, and that to speak of a trial which, "so far as it had gone, was abortive, and, as a trial, became a *nullity*," as capable of becoming anything other than a nullity, would be to violate the elementary principles of general jurisprudence and of English law itself. A "*nullity*" is a "*nullity*," and cannot become anything else either by the consent of the parties or by the desire of the Judge. The proposition is too clear to require any authorities, and out of respect for the learned Chief Justice, I cannot but hold that, in using the expression that the trial, so far as it had proceeded, had become a "*nullity*," he was not using the expression in the strictly legal sense in which it is understood in the English law itself.

Our Civil Procedure Code repudiates all technicalities of special pleading at one time so favoured by the English Common Law. And what is the method of trial which the principal sections of that Code indicate? I must answer these questions with special reference to such phrases as were used by PETHERAM, C.J., in the two reported rulings, to the effect that the new Judge had "fixed no date for the hearing of the case as for a *new trial*;" that "this was an *absolutely illegal* course and one which cannot be justified by any system of law, and certainly not by the Civil Procedure Code;" that the trial before the former Judge was an "*abortive*" trial; that "the law nowhere says that two hearings may be *linked* together and virtually made one;" and that the judgment and decrees passed on evidence recorded by his predecessor were therefore "*absolute nullities*." The last, of course, is an expression of strength and positiveness as to the exact rule of law laid down in those cases, and words to the same effect are repeated in the second reported case, which, it is contended, by lucidity of exposition, mitigates the rigour of the rule laid down in the first reported case.

Now, under the Civil Procedure Code (s. 48), a suit commences with a *plaint*, and thereupon follow certain processes for the [597] appearance of the parties and other subsidiary matters, such as the filing of written statements, the examination of the parties by the Court. Section 138 imperatively directs the parties to keep their documentary evidence in readiness "*at the first hearing*," which clearly means, as s. 146 indicates, the day on which the issues are settled. Then follows Chapter XII of the Code, authorizing the Court, under certain conditions, to dispose of the suit at such first hearing. The next Chapter (XIII) relates to adjournments of the hearing of the suit. Chapter XIV lays down rules as to the summoning and attendance of witnesses, and then follows Chapter XV, to which PETHERAM, C.J., has attached so much importance, for, according to him, the trial begins at the stage when the examination of the witnesses is taken under that chapter. According to the learned Chief Justice, all proceedings taken by a Judge under that chapter are not available for his successor, because "the Judge who had originally heard it had gone, and therefore the trial, so far as it had gone before him, was *abortive*, and, as a trial, became a *nullity*, because the person conducting it had ceased to be a Judge, and could not give judgment in a trial held before him." The duty of the succeeding Judge under these circumstances would, according to PETHERAM, C.J., be to fix "a day for the *entire hearing* of the suit before himself," though, "at the request of the pleaders," he might fix "the same day," and proceed "to try the case at once." But if this technical formality is not gone through, the learned Chief Justice's reasoning is, that because by the removal of the preceding Judge, the trial, so far as it had gone before him, had become a "*nullity*," therefore the judgment and decrees passed by the succeeding Judge

upon the result of such a nullity would themselves be "*absolute nullities*;" for, as the learned Chief Justice argues, "the law nowhere says that the two hearings may be *linked together* and virtually made one," but regards every second or subsequent hearing to be "a proceeding held by adjournment in the trial heard on the original date." These observations are in keeping with the observations made by the same learned Chief Justice in *Queen-Empress v. Peshad*; I. L. R., 7 All., 414, and, though they related to criminal procedure, throw light upon his way of regarding such matters of procedure. The learned Chief Justice observed:—

[598] "As I understand the law, a case is supposed to be tried on the day the trial commences, and after that day the case proceeds by adjournment. The only date to be looked at as the date of trial is the date of the first day of trial.

These observations may no doubt be sound English technical law, but no attempt was made to show that those technicalities had been imported into our law of procedure, and the rest of the Full Bench which heard that case, including myself, were unable to accept the learned Chief Justice's conclusions to be such as were warranted by our Criminal Procedure Code. Here the case is very analogous, for the *ratio decidendi* adopted by the learned Chief Justice upon this point, as to the trial dating from the original date, and as to what he calls the linking of hearings, is identical with the one to which the above quoted observations related.

The question then is, whether there is anything in the Civil Procedure Code to warrant the conclusion that the first, second or third hearing of a suit, held by a Judge having jurisdiction to hear it, ceases to be first, second or third hearing by the simple fact of another Judge having succeeded the one who had held those hearings. The learned Chief Justice has ruled that under such circumstances the trial, so far as it had gone, becomes a "*nullity*;" but I think I may respectfully say that there is nothing in the whole Code to justify such a conclusion. For what does the argument amount to? It amounts to saying that many hearings may have taken place in the suit, and those hearings are perfectly valid up to the forenoon of a day when the Judge who held them may be still presiding in the Court; in the afternoon, when the succeeding Judge takes his seat, all those proceedings become *ipso facto* "*nullities*." Surely, express words in the Code itself are required to sustain this proposition; and upon general principles, which show that the identity of the Court does not change by the change of persons, I should say that very strong authority indeed is required to reduce that which is admittedly a valid proceeding, when taken, into a mere *nullity* by a circumstance which lies out of, and is foreign to, the proceeding itself. The learned counsel who argued this case before the Full Bench in support of [599] the appeal, confessed himself wholly unable to cite any authority, even of the English technical law, which would go to support this proposition, and I respectfully confess I am unable to accept it either as good law or sound jurisprudence. And I think this is the appropriate place for pointing out, as supporting my view, that our own Civil Procedure Code, wherever it attaches significance to the identity of individuals in the person of the Judge presiding in a Court, it expressly mentions it, obviously as an exception to the general principle of jurisprudence, that the identity of the Court is not altered by a new Judge being appointed. Of this a good illustration is afforded by s. 624 of the Code, which lays down that, except under certain conditions, no application for a review of judgment "shall be made to any Judge other than the Judge who delivered it." The Code says nowhere that a Judge shall not deliver a

judgment upon evidence taken by his predecessor. On the contrary, the Code contains express provisions indicating that such a rule as to the identity of the Judge is not applicable to taking or recording of evidence in the course of civil trials.

This brings me to the most important point in the case, namely, the exact interpretation of s. 191 of the Civil Procedure Code.

It must, in the first place, be observed that the section occurs in Chapter XV of the Code, which lays down rules relating to the hearing of the suit and examination of witnesses. The first section of the Chapter is 179, which lays down that "on the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove." This section clearly shows that the "hearing of the suit" may take place either on the original day fixed for such hearing, or on any subsequent adjourned date; and I suppose no one would maintain that if the Judge before whom the case came on for hearing on the original date dies or is transferred, and the case then comes on for hearing before his successor on the adjourned date, it would be necessary for the new Judge to fix another date for the first hearing on the hypothesis of PETHERAM, C.J., that the trial must be understood to have been "heard on the original date." Then comes s. 180, which relates to the statement of his case by the other party and the [600] production by him of his evidence. Section 181 provides that witnesses should be examined in open Court, and the next section (182) lays down that "in cases in which an appeal is allowed, the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence, and under the personal direction and superintendence, of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and when completed shall be read over in the presence of the Judge and of the witness, and also in the presence of the parties or their pleaders, and the Judge shall, if necessary, correct the same and shall sign it." The next eight sections deal with minor details which need not be noticed, but they leave no doubt that the evidence of the witnesses so taken becomes part of the record. Then follows s. 191 itself, which lays down that "where the Judge taking down any evidence, or causing any memorandum to be made under this chapter, dies or is removed from the Court before the conclusion of the suit, his successor may, if he thinks fit, deal with such evidence or memorandum *as if he himself had taken it down or caused it to be made.*"

Now, to use the language of PARKE, B., in *Becke v. Smith*, 2 M. and W. 195, "it is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the Legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further." This, indeed, is one of the principles of what has been called the "*golden rule*" for the construction of statutes. It is as old as the time of Lord COKE; and Mr. Wilberforce in his useful work on *Statute Law* (pp. 112-115) has cited numerous cases to support the rule laid down by PARKE, B. And applying that rule to the interpretation of s. 191 of the Civil Procedure Code, it may well be asked why the words which I have emphasized in quoting the section are not to be understood in the sense which they naturally convey. That those words clearly mean that the Judge pronouncing the Judgment need not be the same as the Judge recording or taking the evidence, [601] seems to me, so far as I can understand the English language, wholly

beyond doubt. For if, in the two above-mentioned cases which I had before me at Rae Bareilly, I could deal with the evidence taken and recorded by my predecessor, as if I myself had taken down or recorded such evidence, I fail to see why the trial, so far as it had gone before my predecessor, should have been treated by me as a "nullity."

It must be remembered that to put any interpretation other than the natural one upon s. 191 of the Code, it must be shown that such interpretation leads to a manifest absurdity or repugnance to be collected from the statute itself." PARKE, B., has said so in the case to which I have just referred, and his ruling being supported by numerous other authorities, I have looked in vain for any provision in the Civil Procedure Code which would show that the natural meaning of s. 191 is not to be adopted. Indeed, the "manifest absurdity or repugnance" seems to me to lie in interpreting that section in any sense other than that conveyed by the simple English words which I have emphasized in quoting that section. Nor do the judgments of PETHERAM, C. J., satisfy me that he discovered anything in the Code which would justify the view that the evidence of witnesses taken down by a Judge cannot be dealt with by his successor as part of the record, and as if such successor himself had recorded such evidence. And I cannot help feeling with due respect that the learned Chief Justice, in delivering those judgments which have been reported as to the interpretation of s. 191 of the Code, was all along thinking of trials by jury in the English Courts of Common Law; and starting with the hypothesis that no rule of jurisprudence justified a Judge to pass judgment upon evidence not taken by himself, held that such judgment or decree must, *ipso facto*, be null and void, because "this was an absolutely illegal course, and one which cannot be justified by any system of law, and certainly not by the Civil Procedure Code."

That this view cannot be accepted, but is rather contradicted by the general principles of jurisprudence, appears from what I have already said with reference to Jeremy Bentham and the *dictum* of COUCH, C. J., which I have already quoted. And it will now [602] be useful to examine whether our own Civil Procedure Code does not in itself contain many provisions which proceed upon the principle that the Judge taking the evidence need not, in all cases, be the same as the one who has to pronounce the judgment upon such evidence.

Now, in the first place, it appears to me clear that the whole system of first appeals provided by Chapter XLI proceeds upon the principle just enunciated; for it is obvious that the Judge presiding in the Appellate Court has to decide questions of fact, both as to admissibility and weight of the evidence taken by the Judge of the Court below. PETHERAM, C. J., in the case of *Jagran Das*, I. L. R., 7 All., 857, in drawing a distinction of principle, went on to say:—"It must be remembered that the Appellate Court has the advantage of the judgment of the Judge of First Instance, who had the evidence before him." But I respectively think that these observations seem to ignore some of the most important provisions of the Code relating to appeals, because the express words of s. 565 make it imperative upon the Appellate Court to decide the case itself upon the evidence on the record, even though the judgment of the Court below may have proceeded solely upon a preliminary point (such as limitation, &c.), and have been wholly silent as to the weight of evidence. The section no doubt operates as throwing labour upon the Appellate Court, but it has always been so understood as to prevent unnecessary remands of cases by the Appellate Court. The case of *Bandi Subbaya v. Madalapalli Subanna*, I.L.R., 3 Mad., 96 is only one of many other reported cases which go to support what I have said; and the practice of this Court in first appeals has not been different in this respect, unless it has been altered during the last year. There is thus a clear instance of the Code requiring

the appellate Judge to decide questions of fact upon evidence not taken by himself, and in regard to which evidence the Judge who took it has never expressed any opinion. Then again, apart from the provisions of s. 566, which contemplates a finding upon the remanded issue by the Judge taking the evidence, there are ss. 563 and 569, which lay down rules for the taking of additional evidence and the latter section provides that:—"Whenever additional evidence is allowed to be received, the Appellate Court may either take such evidence, or direct the [603] Court against whose decree the appeal is made, or any other subordinate Court, to take such evidence, and to send it, when taken, to the Appellate Court." The section does not contemplate any expression of opinion upon the evidence taken by such subordinate Court, and yet the Appellate Court has to decide the case upon such evidence. Section 390, relating to the examination of witnesses by commission, is another illustration of the principle that the Judge deciding the case may found his judgment upon evidence not taken by himself; and I have failed to find any provision in the Civil Procedure Code which would justify the view that in all cases where a Judge passes a judgment and decree upon evidence taken by his predecessor, such judgment and decree are "absolutely nullities."

This brings me back to s. 191 of the Code which I have already quoted. I have before now said, sitting as a Judge of this Court, that the general principles of Lord COKE's celebrated *dictum* in *Hrydon's Case* are applicable to the interpretation of our own Indian enactments, and that in construing the rules of such departments of law as Civil Procedure, which has repeatedly been the subject of repealing, amending, and consolidating legislation, it is important to consider the previous state of the law, the mischief and defect which that law did not provide for, the remedy which the Legislature adopted to remove the mischief, the true reason of the remedy, and (to use Lord COKE's own words) "then the office of all the Judges is always to make such construction as will suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act *pro bono publico*."

I respectfully think that these principles of construction, which have never been doubted in England, but have passed almost into maxims of law, were not kept in view in the rulings which have necessitated this reference to the Full Bench. For whilst those cases afford no indication of any attempt being made to consider the previous state of the law, either as represented by the old Civil Procedure Code of 1859, or by the case-law upon the subject, the conclusions at which those rulings have arrived are, in my opinion, [604] such as continue the mischief which s. 191 was clearly intended to remove, and that their practical effect is to encourage in the Mufassal what Lord COKE has called "subtle inventions and evasions for continuance of the mischief."

Now, the rule contained in s. 191 of the present Code was totally absent from the old Civil Procedure Code of 1859, and whilst that Code was in force considerable difficulty and doubt arose as to whether, in cases where a Judge had partly taken the evidence in a case, his successor was bound to recall and examine the witnesses *de novo*, as if the trial commenced anew. This is indicated by many cases to be found in the Reports, and the general effect of them may be stated to be that, under circumstances such as those contemplated by s. 191, the new Judge was bound by law to take the evidence *de novo*, unless the parties waived such right and assented to the evidence taken by the former Judge being dealt with as evidence taken by the new Judge. The same is the effect of two unreported rulings of this Court in *Shaikh Jalal-ud-din*

v. *Damodar Das*, S. A. No. 972 of 1869, decided on 1st December 1869, and *Nasir-ud-din v. Thakor*, S. A. No. 315 of 1869, decided on 31st May 1869, to which Mr. Colvin has called our attention. So stood the law when the Code of 1877 was passed, and it was in s. 191 of that Code that the Legislature for the first time gave expression in explicit words to the rule which has been enunciated in s. 191 of the present Code, which I am now discussing. To say that the new section did not alter the law is to say that the new section was wholly a superfluous action on the part of the Legislature. But it seems to me impossible, upon a comparison of the state of the law antecedent to the Code of 1877, to hold any such view. There was clearly a mischief created by the difficulty and uncertainty which the words of the old Code did not remove, and it seems obvious that the new section aimed at suppressing the evil. Yet the effect of the two rulings of this Court, which I am now considering, is to interpret the law as if s. 191 of the Code had never been passed.

Indeed, the effect of those rulings is almost retrogressive, for whilst under the old law the action of a Judge, in pronouncing a judgment upon evidence taken by his predecessor, was regarded as an *irregularity*, capable of being cured by the assent of the parties, in the rulings which have given rise to this reference such action [605] has been denominated as a "*nullity*," which of course neither the consent of the parties nor the desire of the Judge can cure. Indeed, in the case of *Malik Fakir Bakhsh and Afzal-un-nissa Begam*, such consent was actually given in the Court below, and yet the trials were set aside as absolute nullities. I have already said with due respect that there is absolutely no warrant in the Civil Procedure Code to justify the view, and the learned counsel who appeared in support of that view confessed himself unable to cite any principle of jurisprudence or any rulings of the English or the Indian Courts which would even approximately support the rule which PETHERAM, C.J., laid down in those cases.

On the contrary, even under the law as it stood under the Code of 1859, which, as I said before, contained no rule such as s. 191 of the present Code, we have the authority of a Full Bench ruling of the Bombay Court in *Naranbhai Vrijbhukandas v. Naroshankar Chandrosankar*, 5 Bom. H. C. Rep., A.C.J., 93, where four learned Judges concurred in the judgment of COUCH, C.J., from which I have already quoted a passage to show that there is no rule of jurisprudence which requires that the evidence of the suit shall be taken by the Judge who pronounces the judgment, and the practice in many Courts is, as is well known, to the contrary. I will, however, at the risk of prolixity, quote further from that judgment, in order to make clear the distinction between a *nullity* and an *irregularity*, and to show that what PETHERAM, C.J., denominated as "*absolute nullities*" were regarded by COUCH, C.J., and the four learned Judges who concurred with him, as mere *irregularity*, even when s. 191 did not exist as a rule of our law of procedure. COUCH, C.J., observed:—

"The plaintiff has appealed to this Court, stating, as one of the grounds, that the suit has been illegally decided by a different Judge upon evidence recorded by the Principal Sadr Amin. Now, the evidence taken by the Principal Sadr Amin, even if taken in a former suit between the same parties, and not, as this was, in the same suit, would have been admissible as secondary evidence, if the witnesses had been incapable of being called; and the use of it by the Munsif was, in my opinion, only an irregularity, which was waived by the plaintiff's not requiring the witnesses to be again examined, and proceeding with the suit, and producing other [606] witnesses to be examined in support of his claim. The plaintiff now asks this Court to reverse not

only the decree of the District Court, which is against him, but also the decree of the Munsif, which was in his favour, and was founded on the evidence which he now contends was inadmissible. I think he is not entitled to this." The judgment then went on to consider the effect of s. 350 of the Code of 1859 (which corresponds to s. 578 of the present Code), and held that that section covered the irregularity, disentitling the appellant to obtain reversal of the decree of the Court below. And then the judgment went on to say, as indicating the proper and sensible course to be adopted in such cases:—"Whenever it is practicable, the witnesses should be examined before the Judge who is to pronounce the judgment; and care should be taken, in the transfer of suits, and in the disposal generally of the business of the lower Courts, to prevent the necessity of re-summoning witnesses; but where a deposition taken by another Judge is read, instead of the witness being examined, I think it is only an irregularity, which may be waived by the parties, and which would not be a ground for reversing the decree on special appeal, unless it appeared that the appellant had been prejudiced by it."

These observations, as well as those which precede them, command the highest respect from the Indian tribunals, because they proceed from an eminent Judge, who, after having acted as a Puisne Judge of the Bombay Court, was made Chief Justice of that same Court, and afterwards became Chief Justice of the High Court of Bengal, and is now one of the Lords of the Privy Council. And I am bound to say that I accept the authority of such an eminent Judge, though it is wholly inconsistent with the rulings which have regulated the practice of this Court during the last year in connection with such cases. For I find that in every one of those cases the parties had never objected to the action of the Judge in the Court below as to his reading the evidence recorded by his predecessor, nor was the question urged in the grounds of appeal. So that it could only have been by the exceptional exercise of power granted by s. 542 of the Code that PETHERAM, C.J., decided those cases upon grounds which were never taken in the memorandum of appeal before him, and which never formed the subject of objection in the Court below.

[607] Now, there is another aspect of the matter, namely, the one to which COUCH, C.J., referred, and which is now regulated by s. 33 of the Evidence Act. That section lays down that evidence taken in a former judicial proceeding or "in a later stage of the same judicial proceeding" may, under certain conditions, be admitted in evidence. And COUCH, C. J., has pointed out that where such conditions are not fully satisfied, the admission of such evidence does not amount to a "*nullity*," but only to an "*irregularity*." He further points out, relying upon the practice of the English Courts as indicated in s. 1681 of Taylor's celebrated work on *Evidence*, that where evidence is allowed by a party without objection to be used in a trial, such party "would not be at liberty afterwards to object to its being used, or obtain a new trial on that ground, even if the original decree had been against him." In the cases before PETHERAM, C.J., the parties evidently raised no such objection in the Court below, and indeed they did not raise it here in their grounds of appeal.

Again, even if it be granted for a moment that, notwithstanding s. 191 of the present Code, the manner in which the succeeding Judge dealt with the evidence taken by his predecessor amounted to an irregularity, there was surely no authority to declare the whole trial as a *nullity*, and to remand those cases for trials *de novo*. No attempt appears to have been made to consider whether s. 578 of the Civil Procedure Code affected the question. The terms of that section are imperative, and it lays down that "no decrees shall be reversed or substantially varied, nor shall any case be remanded in

appeal, on account of any error, defect or irregularity, whether in the decision or in any order passed in the suit, or otherwise, not affecting the merits of the case or the jurisdiction of the Court." To a similar effect are the terms of s. 167 of the Evidence Act, which prohibits, in express language, new trials being ordered for rejection or improper reception of evidence.

But if I am right, following the view of COUCH, C.J., in thinking that the action of the Court below in the case before PETHERAM, C.J., could at its best be regarded as an *irregularity*, it may well be asked where the authority was for setting aside the decrees in [608] those cases and remanding them for trial *de novo*. Section 562 of the Civil Procedure Code is the only authority available to the first appellate Court for such an action, and that section was clearly inapplicable to all those cases. Then there were also the provisions of ss. 564 and 565, giving clear indications of the policy of the law that the delay and expense of new trials must, as far as possible, be avoided; but those sections do not seem to have been either cited or considered in the rulings which have given rise to this reference. And I think I may here say, with profound respect, that those rulings can be understood only as proceeding upon technicalities foreign to our Civil Procedure Code, and which, so far as I can understand the exigencies of the administration of justice in India, are not calculated to promote either the interests of the parties or the interests of justice. For, to use the words of Lord PENZANCE in *Combe v. Edwards*, L. R., 3 P. D. 103, "the spirit of justice does not reside in formalities or words, nor is the triumph of its administration to be found in successfully picking a way between the pitfalls of technicality. After all, the law is, or ought to be, but the hand-maid of justice, and inexibility, which is the most becoming robe of the latter, often serves to render the former grotesque."

I now proceed to consider whether the present case is in any manner distinguishable from the rulings to which I have referred at such length, and in order to answer this question, I have examined the records of those cases. In the unreported case of *Malik Fakir Bakhsh v. Chauhan Bakhsh Singh*, F.A. No. 88 of 1884, decided on 7th July 1885, I find that the parties had—to use the words of PETHERAM, C.J.,—"given a sort of consent to the adoption of this course;" that is, the course which induced the learned Chief Justice to hold "that this trial must be treated as a nullity, that therefore all proceedings subsequent to fixing the issues must be set aside, and that the Subordinate Judge must reinstate the case upon his file and try it according to law." Again, in the case of *Afzul-un-nissa Begam v. Al Ah*, ante, p. 35, which is supposed to have mitigated the rigour of the rule laid down in the earlier case of *Jagram Das v. Narain Lal*, I. L. R., 7 All., 857, I find that the Subordinate Judge, whose judgment was treated as a nullity, necessitating a trial *de novo*, had, [609] before recording his judgment, expressly put down upon the record the following observations:—

"I found this case complete in every way; the evidence on both sides has already been filed. I therefore proceed to try the case, as requested by the pleaders for the parties, on the existing evidence, after hearing the arguments on both sides, and perusing all the papers on the record and the evidence produced by both parties."

These observations appear at page 11 of the printed English record which was before PETHERAM, C. J., and they are important as furnishing reasons for realizing the length to which the ruling in that case has gone. In the present case the facts are exactly similar, and indeed not so strong as they were in the case just referred to. What happened here was that the suit was filed on the 31st March 1883, written statement in defence was filed and issues were framed

on the 15th January 1884, one witness was examined on the 18th and 19th of the same month, and the case was postponed to the 22nd of the same month. On that day another witness was examined, and the examination of other witnesses continued up to the 29th of that month, when the defendants applied for proceedings being taken, under s. 170 of the Civil Procedure Code, against a witness, and the 12th February 1884, was fixed for further hearing of the case. Upon that day the witness in question did not appear, and the 3rd March 1884, was fixed, and the case coming on for hearing on that day, some more witnesses were examined, and the Subordinate Judge then recorded an order saying—“As this case is complete, it is ordered that the 14th March 1884, be fixed for hearing arguments. Pleaders to be informed.” The Subordinate Judge who made this order (Babu Ram Kali Chaudhri) then ceased to be the Judge of the Court, and was succeeded by another Judge (Babu Abinash Chandar Banarji), who on the 10th May 1884, recorded the following proceeding:—

“In this case Munshi Ram Prasad stated to-day that Lala Raj Bahadur, plaintiff's pleader, was not present, and as he was fully acquainted with the facts of the case, it could not be argued in his absence. Ordered that the case be adjourned to-day, and 13th May 1884, be fixed for decision.”

[610] Upon the day so fixed another proceeding was recorded, referring to the witness who had not appeared in Court, and the case came on for hearing on two more occasions; and on the 24th June 1884, the judgment was delivered by the Judge after the final hearing of the case, which, according to the Mufassal practice, of course, includes the hearing of the arguments of the parties or their pleaders.

No objection of any sort appears to have been raised in the Court of First Instance to the course which the Judge of that Court adopted, nor was the question urged as a ground of appeal before the Lower Appellate Court. Indeed, for the first time in this Court it is argued, upon the authority of the two reported cases to which I have already referred, that the judgment in this case must be treated as a nullity.

I cannot help holding that the circumstances of this case are not distinguishable in principle either from the unreported case of *Malik Fakir Bakhs* or from the reported case of *Afzal-un-nussy Begam*, ante, p. 35, in which the previous ruling in the case of *Jagram Das*, I. L. R., 7 All., 857, was followed. And further, I hold that if in those cases the judgments and decrees of the Courts below were nullities, as was there held, the judgments and decrees in this case are also nullities *a fortiori*. But I have already stated the reasons why I am unable to accept the rule of law laid down in those cases, and I must, with reference to the various points already enumerated by me as the effect of the rulings which have given rise to this reference, now summarize the view which I take of the law under the present Civil Procedure Code. As I understand that Code, I hold—

(i)—that although it is true that “a trial must be one and must be held before one Court only,” the identity of the Court is not altered by a new Judge being appointed to preside in such Court;

(ii)—that when a trial goes on for more than one day, each day constitutes a separate hearing, and that such hearings cannot be treated as a “trial heard on the original date;”

(iii)—that the Civil Procedure Code does authorize a Judge to take up a case which has been partly heard before his predecessor, [611] and to continue it from the point at which his predecessor left off;

(iv)—that where the Judge who has partly heard a case dies or is removed, the trial, so far as it has gone before him, is neither abortive nor becomes a nullity;

(v)—that the new Judge is not required to fix a day for the entire hearing of the suit before himself, nor is there anything to prevent him from taking up a trial which has been partly heard by his predecessor, and to proceed with it as if it had been commenced before himself;

(vi)—that the Code does not recognise such procedure as amounting to separate trials;

(vii)—that the Judge who succeeds another after a trial which has partly proceeded before his predecessor is not bound to fix a new day for commencing the trial *de novo*, nor should the trial proceed before the new Judge as if the day were the first on which the case had ever come on for hearing;

(viii)—that the evidence recorded by the preceding Judge, by the mere fact of being upon the record, is, *ipso facto*, evidence in the cause, and could, under s. 191 of the Code, be treated by the succeeding Judge "as if he himself had taken it down or caused it to be made;"

(ix)—that when the case comes on for hearing before the new Judge, there is no necessity for putting in the depositions of witnesses which, though taken by his predecessor, are already upon the record;

(x)—that such depositions must be dealt with as materials of evidence before the new Judge;

(xi)—that a judgment and decree upon such evidence are neither illegal nor absolute nullities, there being no want of jurisdiction;

(xii)—that when such judgment and decree are passed, the Court of First Appeal is prohibited, by s. 564 of the Code, to order a trial *de novo*, but is bound by s. 565 of the Code to decide the appeal upon the evidence in the record;

(xiii)—that where further issues are required to be tried, or additional evidence is to be taken, the Court of appeal is bound [612] to act according to the provisions of ss. 566, 568, and 569 of the Code, but cannot order a new trial;

(xiv)—that even when there has been an irregularity on the part of the first Court in receiving or rejecting evidence, the provisions of s. 578 of the Civil Procedure Code and s. 167 of the Evidence Act prohibit the reversal of a decree and the remand of a case for new trial, unless the irregularity affects the merits of the case or the jurisdiction of the Court.

Such being my view of the law as it now stands, I hold, with due respect for the rulings which have given rise to this reference, that in none of those cases could a new trial be ordered. And I think I must say that I have regarded it my duty to deal with this matter at such elaborate length, partly because I understand that the Legislature is contemplating the amendment of the Civil Procedure Code, but mainly because I have very little doubt that the two reported rulings of PETHERAM, C.J., which I have had to consider at such length, have practically resulted in retarding the administration of justice in all parts of India where those rulings are respected, as they were by me at Rae Bareilly in Oudh. Indeed, the very cases in which those judgments were passed afford good illustrations of what I have just said. For example, in the case of *Malik Fakir Bakhsh*, the litigation began on the 18th March 1882, in the Court of the Subordinate Judge of Allahabad; proceedings in the case were taken by two or three Subordinate Judges in the Court of First Instance; the litigation did not come to an end in that Court till the 24th December 1883, and the order of PETHERAM, C.J., in this Court, on the 7th of July 1885 declared that all that had taken place in the Court of First Instance "must be treated as a nullity." Similar were the facts in the case of *Afzal-un-nissa*.

Began and the other cases, and I cannot help feeling that such a view of the law, though it may tend to reduce the labour of the Appellate Court in dealing with cases which have been pending in the Court of First Instance for a lengthened period and in which more than one Judge has taken the evidence, is not calculated to reduce either the expense or the dilatoriness of litigation. And I think I may add that if my view of the law, as it now stands, is inaccurate, the Legislature, in considering the amendment of the Civil [613] Procedure Code, might consider the principal results of the rulings from which I have ventured to differ, and which have tended to throw back the administration of justice in this part of the country, wherever, by death or transfer, new judicial officers have been appointed.

I have no hesitation in answering the question referred to the Full Bench in the affirmative.

Tyrrell, J.—The order of reference is as follows :—

"In this case, which has been taken up as bringing forward in a more cogent form the question referred in F. A. No. 52 of 1885, we refer the following question to the Full Bench :—Whether, with reference to the first and second grounds of appeal, and having regard to the circumstances disclosed in the proceedings of the Court of First Instance, that Court or the officer presiding therein who passed the decree had jurisdiction to deal with and determine the suit in the mode in which he did. This reference has been made for the special purpose of considering the effect of two judgments of this Court, reported in I. L. R., 7 All., 857, and I. L. R., 8 All., 35 "

My learned brother **OLDFIELD**, in his answer to the former portion of the reference, has given a precise and succinct exposition of the law laid down by Sir **COMER PETHERAM** on the procedure to be followed in the trial of a suit or appeal, when the Judge who began the hearing is removed from the Court before the conclusion of the suit or appeal. I fully concur in that exposition and in its application to the second appeal referred to us. And I am of opinion that the question relating to this second appeal, which is a pending case in our Court, is the only matter we can legally attend to in this reference. We are not competent, I think, to review or pronounce judicial opinions on our judgments in cases finally decided by us, unless they are brought before us by or on behalf of the parties in any of the modes provided by the law. It would be certainly unprecedented on our part to review or consider our judgments behind the backs of the parties at the invitation only of some of ourselves.

It was for this reason that at our sitting in Full Bench in regard to the Second Appeal No. 1155 of 1885 we abstained from going [614] into the latter or subsidiary part of the order of reference. I am unable therefore to follow my learned brother **MAHMOOD** into his discussion of this Court's judgments given in cases not the subject of this reference. But perhaps it may not be irregular to remark, with reference only to the literary aspect of his criticisms on the phraseology used by Sir **COMER PETHERAM** and me in those judgments, that when we said that the Court in question "had not jurisdiction" to follow the procedure we disapproved, and therefore its proceedings were "null," we meant and said the same as my learned brother **MAHMOOD** recently did when he annulled the trial of a first appeal, and remanded the case for new trial, because the Judge, having unquestionable jurisdiction in the case, had omitted to formulate his judgment in the mode required by s. 574 of the Civil Procedure Code [*Mahadeo Prasad v. Sarju Prasad*, Weekly Notes, 1886, p. 171]. The proceedings were treated as null and void, the judgment and decree were pronounced "illegal," and a new trial in first appeal was ordered. We did the same in our cases and in similar language, but for different irregularities. In all the cases alike—in those remanded by us and in those remanded by my

learned brother MAHMOOD—the Courts had unquestionable jurisdiction, but they had not jurisdiction, that is to say power, in the popular use of the phrase, to try them and decide them as they did.

NOTES.

[The decision in 8 All., 35 *supra* has been discussed in this Full Bench case.

• See also (1886) 9 All., 26 ; (1887) 10 All., 80.

As regards the waiver of irregularities in the recording of evidence, see also (1913) 25 M. L. J. 360.]

[8 All. 614]

APPELLATE CIVIL.

The 22nd May, 1886.

PRESENT :

MR. JUSTICE BRODHURST AND MR JUSTICE MAHMOOD.

Dharup Nath.....Defendant

versus

Gobind Saran.....Plaintiff.

Gobind Saran.....Plaintiff.

versus

Dharup Nath..... Defendant.

*Hindu Law—Daughter's son—Missing person—Act I of 1872
(Evidence Act), ss. 107, 108.*

Sections 107† and 108‡ of the Evidence Act, taken together, do not lay down any rule as to the exact time of the death of a missing person. Whenever the question as to the exact time of death arises, it must be dealt with according to the evidence and circumstances of each case, when the death is alleged to have occurred at any time not affected by the presumption of law as to the seven years.

• [615] In the case of a sonless Hindu, his separate estate devolves, in the first instance, upon his widow or widows, and thereafter upon the daughter or daughters, and it is not till the death of the daughter or daughters that the daughter's son's right of inheritance

* Second Appeals Nos. 1622 and 1750 of 1885, from decrees of R. G. Leeds, Esq., District Judge of Gorakhpur, dated the 26th May 1885, modifying decrees of Munshi Raghu Nath Sahai, Subordinate Judge of Gorakhpur, dated the 22nd December 1884.

Burden of proving death of person known to have been alive within thirty years.

† [Sec. 107 :— When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.]

Burden of proving that person is alive who has not been heard of for seven years.

‡ [Sec 108 :— When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is on the person who affirms it.]

initiates; and the death of a daughter's son antecedent to the death of a daughter would prevent the estate from devolving upon the son of such daughter's son.

Upon the death of a sonless Hindu, his separate estate devolved upon his two widows, the first of whom had a daughter, who had two sons *G* and *S*, *G* having a son *D*. After the death of the first widow, the second came into sole possession of the property, and so continued till her death in 1882. At that time *S* was still living, but *G* had not been heard of by any of his relatives or friends since 1869 or 1870. In 1884, a purchaser from *S* claimed possession of the whole estate, and was resisted by *D*, on the ground that the estate had, on the death of the second widow, devolved on his father and *S* jointly, and *S* was not competent to alienate it.

Held that the question whether the defendant's father was living at the time of the second widow's death in 1882 was a question of evidence governed by ss. 107 and 108 of the Evidence Act; that under the circumstances the defendant's father must be held to have died prior to the time referred to; that consequently, according to the Hindu Law, the right of succession to his grandfather's estate did not vest in him jointly with the plaintiff's vendor, so as to enable the defendant to claim through him; that the plaintiff's vendor was therefore competent to alienate the entire estate, and the claim must be allowed.

Mazhar Ali v. Budh Singh, I. L. R., 7 All., 297, *Jannajay Majumdar v. Keshab Lal Ghose*, 2 B. L. R., A. C., 134, *Guru Das Nag v. Matilal Nag*, 6 B. L. R., Ap., 16, and *Parmeshwar Rai v. Bisheshwar Singh*, I. L. R., 1 All., 53, referred to.

ON the 10th October 1882, Musammatt Sheo Kuaria, the surviving widow of one Hanuman Dat, died. On the 24th December 1882, Gopal Saran, the daughter's son of Hanuman Dat, sold certain landed property to the plaintiff, to which he alleged himself to be entitled as the sole heir of Hanuman Dat. The plaintiff's claim to possession of the property was resisted by Dharup Nath, the son of Gobind Saran, Gopal Saran's brother, and daughter's son of Hanuman Dat, and the plaintiff accordingly sued him for possession. The defendant defended the suit as to a portion of the property, on the ground that it had, on the death of Sheo Kuaria, descended on his father and Gopal Saran, the plaintiff's vendor, jointly, and Gopal Saran was not competent to alienate it; and as to the rest, that it formed no portion of Hanuman Dat's estate, and Gopal Saran had no title to it.

[816] It appeared that Gobind Saran, the defendant's father, was missing. The plaintiff alleged that Gobind Saran had not been heard of for seven years prior to the death of Sheo Kuaria, and contended that it must be presumed that at that time he was dead. The defendant alleged that his father had been heard of within that period, and contended that the presumption relied on by the plaintiff did not arise.

The Court of First Instance (Subordinate Judge of Gorakhpur) held that it was proved that the defendant's father had not been heard of for seven years prior to the death of Sheo Kuaria, and it must be presumed that he was dead at the date of her decease; and it gave the plaintiff a decree as claimed. On appeal by the defendant the Lower Appellate Court (District Judge of Gorakhpur) affirmed the decree of the Court of First Instance, except as regards the property which the defendant contended did not form part of the estate of Hanuman Dat. As to this property the Court held that it did not form part of that estate, and dismissed the plaintiff's claim. The plaintiff and defendant both preferred second appeals to the High Court, the defendant's appeal being numbered 1622, and the plaintiff's 1750, of 1885.

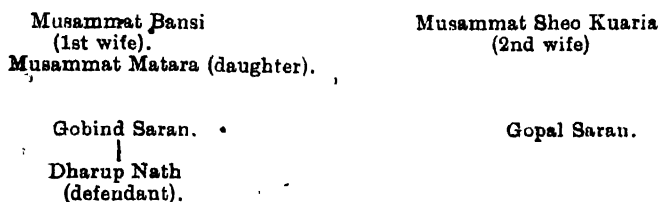
Mr. J. Simeon, for the Defendant.

Lala Lalia Prasad, for the Plaintiff.

Mahmood, J.—These two connected appeals, numbered 1622 and 1750 of 1885, can be disposed of together, as they arise out of one and the same decree

and suit; and the following pedigree shows the relative position of persons whose rights have to be considered in this case :—

Hanuman Dat.



Hanuman Dat had two wives, one of whom was Musammat Bansi, who gave birth to Matara, a daughter, who had two sons, [617] Gobind Saran and Gopal Saran. Gobind Saran had a son named Dharup Nath, who is the defendant in the suit.

The property in suit to which S. A. No. 1622 relates has been found to have formed the estate of Hanuman Dat, and upon his death without a son, it would, by the usual course of Hindu law, devolve upon his two widows, who would take together as a single heir with the right of survivorship, and no part of the estate would pass to any more distant relation till both were dead. This is shown by Mr. Mayne in s. 468 (2nd ed.) of his work on Hindu law, where he has cited numerous authorities in support of the proposition. And it has been found in this case that, after the death of Musammat Bansi, the other widow, Musammat Sheo Kuaria, came into sole possession of the property, and continued as such till 10th October 1882, when she died. The main question in this case is—On whom did the property devolve upon the death of Musammat Sheo Kuaria ?

It is a principle of Hindu law, as Mr. Mayne has stated in s. 422 (2nd ed.) of his work, that "the right of succession under Hindu law is a right which vests immediately on the death of the owner of the property. It cannot, under any circumstances, remain in abeyance. And the rightful heir is the person who is himself the next of kin at that time. No one can claim through or under any other person who has not himself taken, nor is he disentitled because his ancestor could not have claimed. For instance, under certain circumstances a daughter's son would be heir, and would transmit the whole estate to his issue. But if he died before his grandfather, his son would never take."

One of the sons of Musammat Matara, namely, Gopal Saran, was alive at the time of Musammat Sheo Kuaria's death in October 1882; but his brother, Gobind Saran, father of the defendant, was admittedly missing; and it has been found by the learned Judge of the Lower Appellate Court that neither the brother nor the son of Gobind, nor any one else, had heard of him ever since he left home fifteen years ago; and the learned Judge has fortified this conclusion by the fact that on the 24th February 1882, the defendant Dharup Nath himself stated on oath that his father Gobind had gone away ten years before, and had not since been heard of. And upon this state of things the learned Judge, applying the provisions [618] of ss. 107 and 108 of the Evidence Act (I of 1872), held that the missing Gobind Saran, father of the defendant, could not be regarded as having been alive at the time of Musammat Sheo Kuaria's death in 1882, and that the whole estate which she held by inheritance from her husband Hanuman Dat, devolved entirely upon Gopal Saran, to the exclusion of the defendant Dharup Nath.

Now, upon these findings of fact, which we are bound to accept in second appeal, the first point which has to be considered is, whether the provisions of ss. 107 and 108 of the Evidence Act are applicable to the present case with reference to the missing Gobind Saran. The learned Judge has applied those sections to this case by parity of reasoning deduced from the Full Bench ruling of this Court in *Mazhar Ali v. Budh Singh*, I. L. R., 7 All., 297, where it was held that the rule contained in s. 108 of the Evidence Act governs the case of a Muhammadan who has been missing for more than seven years, when the question of his death arises in cases to which, under the provisions of s. 24 of Act VI of 1871 (Bengal Civil Courts Act), the Muhammadan law is applicable. That ruling would not by itself be applicable to this case, which is governed by Hindu law, though the principle laid down in that case would apply, if the question of the death of a missing person is simply a question of evidence and not of succession. In the case of *Janmajay Mazumdar v. Keshab Lal Ghose*, 2 B. L. R., A. C., 134, it was held by the High Court of Calcutta that when a Hindu disappears and is not heard of for a length of time, no person can succeed to his property as heir until the expiry of twelve years from the date on which he was last heard of; and a similar rule appears to have been adopted by the same Court in *Guru Das Nag v. Matilal Nag*, 6 B. L. R., Ap., 16. But both these rulings are antecedent to the Evidence Act which now regulates all questions of evidence; and the ruling which seems to come nearer to the present case than either of the other two cases is the Full Bench ruling of this Court in *Parmeshwar Rai v. Bisheshwar Singh*, I. L. R., 1 All., 53, where it was held that in a suit by a reversioner next after a missing reversioner the death of such missing reversioner might, for the purposes of such a suit, be presumed under the provisions of s. 108 of the Evidence Act, though the learned Judges [619] doubted whether, in a suit for the purpose of administering the estate of a missing Hindu, the rule contained in the above-mentioned section of the Evidence Act would be applicable.

In the present case the learned pleader who has appeared in support of the appeal, has made no attempt to show that the rule which I am now considering is regarded by the authorities of Hindu law as a rule of succession and inheritance, to which the provisions of s. 24 of the Civil Courts Act (VI of 1871) would be applicable; and under such circumstances I must hold that the question, whether the missing Gobind Saran was alive in 1882, at the time of Musammat Sheo Kuaria's death, is a simple question of evidence governed by ss. 107 and 108 of the Evidence Act; specially as the question in this case does not relate to the admitted property of the missing Gobind Saran; but the point is, whether Gobind Saran was alive at the death of Musammat Sheo Kuaria, so as to inherit any portion of the estate of his maternal grandfather after the death of the widow.

Now, ss. 107 and 108 of the Evidence Act may be read together, because the latter is only a proviso of the rule contained in the former, and both constitute one rule when so read together. The sections are thus worded:—

"When the question is, whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it. Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it." The rule so enunciated has obviously been borrowed, with hardly any modification, from the English law of evidence as stated in Taylor's celebrated work (s. 157, 2nd ed.), from which I may quote the following passage:—"In such case, after the lapse of seven years, the presumption of life ceases, and the burden of proof is devolved

on the other party. This period was inserted, upon great deliberation, in the statutes respecting bigamy, and the statute concerning leases for lives, and has since been adopted, by analogy, in other cases. But although a person who has not been heard of for seven [620] years is presumed to be dead, the law raises no presumption as to the time of his death; and therefore, if any one has to establish the precise period during those seven years at which such person died, he must do so by evidence, and can neither rely, on the one hand, upon the presumption of death, nor, on the other, upon the presumption of the continuance of life."

I am prepared to accept this as a good explanation of the rule contained in ss. 107 and 108 of the Evidence Act, and I do not think that those sections, taken together, lay down any rule as to the exact time of the death of a missing person. So that whenever the question as to the exact time of death arises, it must be dealt with according to the evidence and circumstances of each case, when the death is alleged to have occurred at any time not affected by the presumption of law as to the seven years. In the present case the Court of First Instance, upon the evidence before it, found that "the plaintiff's witnesses fully prove that he (Gobind Saran) has not been heard of for fifteen years," and the Court went on to discredit the allegation of defendant that his father disappeared only ten years ago. This finding, as I have already said, was accepted by the Lower Appellate Court as justified by the evidence and circumstances of the case; and that Court found that the missing Gobind Saran was dead at the time when, by the death of Musammat Sheo Kuaria in 1882, the estate of her deceased husband, Hanuman Dat, would devolve upon his daughter's sons, the widow's estate having then terminated.

* I accept this finding, which I regard as one of fact and not open to any objection, on the ground of illegality or irregularity, and I take it that Gobind Saran was not alive when Musammat Sheo Kuaria died on the 10th October 1882. This being so, Gopal Saran was the only daughter's son of Hanuman Dat upon whom the estate of his maternal grandfather would devolve, to the exclusion of the defendant. The Hindu law upon the subject seems to me to be perfectly clear; and I may refer to ss. 477-479 (2nd ed.) of Mr. Mayne's valuable work as enunciating the principles upon which a daughter's son inherits the property of his maternal grandfather. What is regarded in Hindu law as *woman's estate* is described by Mr. Mayne in ss. 536 and 537 of his work, and the nature of such estate is applicable alike to a widow and a daughter, both [621] being a sort of *life-tenant*—a phrase which I use only by way of analogy. In the case of a sonless Hindu, his separate estate devolves, in the first instance, upon his widow or widows, and thereafter upon the daughter or daughters, and it is not till the death of the daughter or daughters that the daughter's son's right of inheritance initiates. And I may here quote a passage from s. 479 (2nd ed.) of Mr. Mayne's work, which, in principle, is fully applicable to the rights of the defendant Dharup Nath; for even his father Gobind Saran's right of inheritance could not initiate till after the death of not only the widows of Hanuman Dat, but also of any daughters, if such were in existence at the time of the death of the widow Sheo Kuaria. Mr. Mayne says:—

"A daughter's son, on whom the inheritance has once actually fallen, takes it as full owner, and thereupon he becomes a new stock of descent, and on his death the succession passes to his heir, and not back again to the heir of his grandfather. But until the death of the last daughter capable of being an heiress, he takes no interest whatever, and therefore can transmit none. Therefore, if he should die before the last of such daughters, leaving a son, that son would not succeed, because he belongs to a completely differen

family, and he would offer no oblation to the maternal grandfather of his own father."

This passage, which is fully supported by authority, shows that the death of a daughter's son, antecedent to the death of a daughter, would prevent the estate from devolving upon the son of such daughter's son; and this rule applies *a fortiori* to a case such as the present, where Gobind Saran, the father of the defendant, namely, the grandson of Hanuman Dat, has been found to have died before the death of Hanuman Dat's second widow, Musammat Sheo Kuaria. Gopal Saran was therefore the only existing son of a daughter of Hanuman Dat when the latter's widow, Sheo Kuaria, died in 1882; and upon this state of things, I have no doubt that the whole estate of Hanuman Dat devolved, upon the death of the widow, on Gopal Saran. But Gopal Saran, by a deed of sale of the 24th December 1882, conveyed his rights and interests in the estate of his maternal grandfather to the plaintiff-respondent, and that deed has been found by the lower Courts below to have been genuine and valid,—a finding which we cannot [622] disturb in second appeal. And this being so, the plaintiff is entitled to all that his vendor conveyed to him, and for these reasons I would dismiss this appeal No. 1622 with costs.

The cross-appeal No. 1750 of 1885 relates to the property which has been found, as a question of fact, by the Lower Appellate Court not to have belonged to the estate of Hanuman Dat; and that being so, it could not devolve upon the plaintiff's vendor, Gopal Saran, and the latter had no title to convey. The finding being one of fact, cannot be disturbed in second appeal, being open to no legal objection, and for this reason I would also dismiss the plaintiff's appeal No. 1750 with costs.

Brodhurst, J.—I concur in dismissing these two appeals with costs.

Appeals dismissed.

NOTES.

[This case was dissented from and observed upon in (1911) 34 All., 36 as follows:— "With all respect to the learned Judge who delivered the judgment in the case, I (RICHARDS, C.J.) think that he misinterpreted and misunderstood the passage from *Taylor on Evidence* which he quotes. The period of seven years which the learned author speaks of, is, in my opinion, the minimum period during which it is necessary for the plaintiff to show that the person whose life or death is in question has not been heard of, and that if the evidence shows the person has not been heard of for 14 or 15 years instead of seven, the presumption would not be carried one bit further. There would be merely the presumption that the man was dead; but there would be no presumption that he died at any particular moment of the period during which he has not been heard of &c."

See also (1898) 23 Bom., 296; 8 Bom. L. R., 226; 37 Cal., 103; 35 Cal., 26; 11 C. L. J., 580; 33 Cal., 173; 19 M. L. J., 502; (1911) 34 All., 36; (1910) 8 I. C., 55 (All.).]

[8 All. 623]

APPELLATE CRIMINAL.

The 26th June, 1886.

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, AND
MR. JUSTICE BRODHURST.Queen-Empress
versus
Mohan*Murder—Culpable homicide not amounting to murder—Grave and sudden provocation—Act XLV of 1860 (Penal Code), ss. 300, Exception 1, 302, 304.*

Upon the trial of a person charged with the murder of his wife, it was proved that the accused had entertained well-founded suspicions that his wife had formed a criminal intimacy with another person; that one night the deceased, thinking that her husband was asleep, stealthily left his side; that the accused took up an axe and followed her, found her in conversation with her paramour in a public place, and immediately killed her.

Held, that the act of the accused constituted the crime of murder, the facts not showing "grave and sudden provocation" within the meaning of s. 300, *Exception 1* of the Penal Code, so as to reduce the offence to culpable homicide not amounting to murder.

Queen-Empress v. Damarua, Weekly Notes, 1885, p. 197, distinguished by STRAIGHT, OFFG. C.J.

THIS was an appeal from a judgment and order of Mr. H. P. Mulock, Sessions Judge of Shahjahanpur, dated the 4th January 1886, convicting the appellant of murder and sentencing him to transportation for life. The facts of this case are stated in the judgment of BRODHURST, J.

The Appellant was not represented.

[623] The Public Prosecutor (Mr. C. H. Hill), for the Crown.

Brodhurst, J.—The prisoner, Mohan, was committed to the Sessions on alternate charges under ss. 302 and 304 of the Indian Penal Code; that is, for the offences of murder and culpable homicide not amounting to murder. The assessors, for reasons stated by them, were of opinion that Mohan was guilty of culpable homicide not amounting to murder. The Sessions Judge convicted Mohan of the offence of murder, and sentenced him to transportation for life. From this conviction and sentence Mohan preferred an appeal which came before me for disposal, and I referred it to a Bench of two Judges for consideration of two points of law; first, whether the confession of the accused before the Assistant Magistrate was, owing to certain defects in recording it, inadmissible in evidence; secondly, whether the offence committed was murder or culpable homicide not amounting to murder. The case then came before the Officiating Chief Justice and myself, and we remanded it for certain evidence under s. 533 of the Criminal Procedure Code. That evidence has now been received, the confession is duly proved, and is, I consider, true. The second point of law remains to be disposed of.

The facts of this case are briefly as follows :—

The accused suspected that his wife had, during his absence, formed a criminal intimacy with one Fakruddin, and the latter person has admitted that the accused's suspicions were well-founded. It appears that on the night in

question the deceased woman, thinking that her husband was asleep, stealthily left his side with the intention of going to her paramour; that the accused took up an axe and followed her, found her in conversation with Fakruddin, and immediately killed her. Fakruddin meanwhile had run away to the room he occupied in his employer's compound; the accused followed him there, entered the room, and struck him, but without seriously injuring him. Fakruddin effected his escape from the room, and the accused then fastened the door and made a desperate attempt on his own life by cutting his throat. Two of the assessors were of opinion that accused found his wife in the act of criminal intercourse with Fakruddin. Were that proved, Mohan's offence would be reduced to culpable homicide not amount-[624]ing to murder, but even Mohan did not in his confession urge as much in his own favour. He alleged that he had reason to believe that his wife had an intrigue with Fakruddin, that seeing her stealthily leave his bed at night, he armed himself, followed her, and found her sitting and conversing with Fakruddin, and he therefore immediately killed her. I have now had the advantage of consulting the learned Officiating Chief Justice and of referring to certain English and American cases bearing on this point of law.

In "Bishop's Commentaries on the Criminal Law," Vol. II, 6th ed., p. 711, is the following:—"A man suspecting adultery followed his wife, and found her talking with her paramour; she ran off, but the latter remained. He fell on him with a stone and knife, inflicting wounds which produced death, and it was held that the offence was murder—*The State v. Avery*, 64 N. C., 608;" and in *Kelly's Case*, referred to on page 786, Vol. I, 4th ed., "Russell on *Crimes and Misdemeanours*," ROLFE, B., in summing up, observed:—"It is said that if a man find his wife in the act of committing adultery and kill her, that would be only manslaughter, because he would be supposed to be acting under an impulse so violent that he could not resist it. But I state it to you without the least fear or doubt, that to take away the life of a woman, even your own wife, because you suspect that she has been engaged in some illicit intrigue, would be murder: however strongly you may suspect it, it would most unquestionably be murder; and if I were to direct you, or you were to find otherwise, I am bound to tell you, either you or I would be most grievously swerving from our duty." I am now satisfied that Mohan is guilty of murder, and I concur in dismissing his appeal.

At the same time I think that, with reference to the circumstances of the case, transportation for life is too severe a sentence. Natives of this country, in cases of this description, appear to be generally unable to exercise that control over themselves that Europeans usually succeed in doing. The prisoner, moreover, is an ignorant man, and, in my opinion, he received provocation, though not such as to bring his case within *Exception I*, s. 300 of the Indian Penal Code. I therefore concur with the learned Chief Justice [625] in recommending that his sentence be commuted to ten years' rigorous imprisonment.

Straight, Offg. C. J.—I have had an opportunity of reading the observations of my brother BRODHURST in reference to the case of this appellant, and it is unnecessary for me to recapitulate the facts which are clearly and fully set out in his judgment. I entirely approve of the order he proposes, and from the moment that I had an opportunity of perusing the evidence against the appellant, I never entertained any doubt that the Judge of Shahjahanpur was right in law in the view he took as to the legal quality of the act committed by the appellant. That act was most undoubtedly one that constituted the crime of murder, and I think that had the learned Judge countenanced the

view that, looking to the facts, there was enough by reason of grave and sudden provocation, to reduce the offence to that of culpable homicide not amounting to murder, he would have been improperly construing and applying the law

Notes, 1885, p. 197, gone to the extreme limit that I am prepared to go in cases of this description, in holding upon the facts there disclosed, that the husband's offence in killing his wife or her paramour, or both, was, by reason of grave and sudden provocation, reduced from murder to manslaughter. In that case the circumstances were of such a character and description that there were reasonable grounds for the accused man believing or imagining that an act of adultery had been committed immediately before he saw his wife with her paramour; and I therefore, though not without doubt and with some elasticity, applied the principle which has been sanctioned in cases of this description by the rulings of the most eminent English Judges. In the present instance, none of those circumstances exist. On the contrary, it is clear that the appellant, having first armed himself with a weapon, followed his wife some distance, and all that he saw taking place before his attack upon her, was a meeting between her and the man with whom she had had improper relations, and some conversation passing between them. That state of things was wholly inadequate to the resentment with which it was met on the part of the appellant, and his act was altogether out of proportion [626] to the provocation given. The law does not sanction or approve a man taking into his own hands the duty of punishing his wife in the mode adopted by the prisoner, and it would be most dangerous to society if the Courts of this country were to adopt the doctrine that he might. "No man under the protection of the law is to be the avenger of his own wrongs. If they are of the nature for which the laws of society will give him an adequate remedy, thither he ought to resort"—"Russell on *Crimes and Misdemeanours*," Vol. I, 4th ed., p. 725. The conduct of the deceased woman in meeting her paramour was no doubt most improper; but the meeting took place in a public place and under circumstances that, while they might arouse the appellant's anger, they cannot be regarded of such a character that they can properly be held to have deprived him of his self-control to the extent and degree required by the law, before the nature of his crime can be reduced from murder to culpable homicide.

I approve of the order of my brother BRODHURST that this appeal should be dismissed, and I also agree in the recommendation that he proposes. While it is essential that in cases of this kind the true legal nature of the act, of which the person has been guilty, should be recorded against him, the question of punishment may, I think, with propriety, be brought to the notice of His Honor the Lieutenant-Governor, in whose hands resides the exercise of the prerogative of mercy. I agree with my brother BRODHURST that there are circumstances in this case which show it to be of a somewhat exceptional character, and I therefore concur in his recommendation.

Appeal dismissed.

NOTES.

[See also (1886) 8 All., 635, *infra*.]

APPELLATE CIVIL.

The 2nd August, 1886.

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE AND

MR. JUSTICE MAHMOOD.

Bahori Lal.....Appellant

versus .

Gauri Sahai.....Respondent.*

Civil Procedure Code, ss. 244 (c), 278-283—Question for Court executing decree—Separate suit—"Representative" of judgment-debtor.

The decree-holder under a decree for enforcement of lien against the zamindari rights and interests of *K*, applied for execution by attachment and sale of [627] certain shares, one of which was recorded in the *khevat* in the name of *K*, and two others in the name of *B*, his brother's widow. The shares having been attached, the judgment-debtor died, and *J*, his brother, and *L*, his son, were substituted as his representatives. In execution of the decree, only the share which had stood recorded in the name of the deceased judgment-debtor, and which was in possession of *J* and *L* as his representatives, was sold; and the decree-holder then applied for sale of the other shares which had been attached. To this *B* objected under s. 281† of the Civil Procedure Code, claiming to be the owner of the shares in question. Before the hearing of her objections she died, and *L* applied to have his name brought upon the record in her place for the purpose of supporting the objections. An order having been passed disallowing the objections which had been filed by *B*, *L* appealed to the High Court. A preliminary objection was taken on behalf of the decree-holder to the hearing of the appeal, on the ground that as the first Court's order related to *L*'s claim as the heir of *B*, to have the shares entered in her name released from attachment, it must be regarded as passed under s. 281 of the Civil Procedure Code, and as conclusive, subject to *L*'s bringing a suit to establish his right. On the other side, it was contended that, *L* being the representative of the deceased judgment-debtor *K*, the first Court's order must be regarded as passed under s. 244 of the Code, and the appeal would therefore lie.

Held, that the preliminary objection must prevail, and the first Court's order must be regarded as passed under s. 281 and not under s. 244 of the Code, inasmuch as *L*'s claim which was rejected by it was nothing more than to come in as *B*'s representative for the purpose of supporting her objections; and it was in right of a third person, whose interest he asserted to have passed to him, that he prayed admission to the proceedings, and this character was wholly distinct from that he filled as the legal representative of his deceased father. Because *L* happened, for the purpose of the execution-proceedings, to be his father's legal representative, and to be liable to satisfy the decree to the extent of any assets which might have come to his hands, it did not follow that any rights claimed by him through a third person must be dealt with, and could only be dealt with, between him and the decree-holder in the execution-proceedings.

* First Appeal No. 112 of 1886, from an order of Mirza Abid Ali Khan, Subordinate Judge of Shahjahanpur, dated the 7th December 1885.

† [Sec. 281 :—If the Court is satisfied that the property was, at the time it was attached, in possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.]

* *Wahed Ali v. Jumaq*, 11 B. L. R., 149; *Ram Ghulam v. Hasaru Kuar*, I. L. R., 7 All., 547; *Sita Ram v. Bhagwan Dass*, I. L. R., 7 All., 733; *Shankar Dial v. Amir Haidar*, I. L. R., 2 All., 752; *Nath Mal Das v. Tajammull Husain*, I.L.R., 7 All., 36, and *Kanai Lal Khan v. Sashi Bhuson Biswas*, I. L. R., 6 Cal., 777, referred to.

THE facts of this case are stated in the judgment of STRAIGHT, Offg. C.J.

Munshi *Hanuman Prasad* and Pandit *Nand Lal*, for the Appellant.

• Mr. *Carapiet*, for the Respondent.

• **Straight, Offg. C.J.**—In order to make the questions that have been raised in this appeal intelligible, it is necessary to state the [628] following facts, and the accompanying table may facilitate the doing so:—

Jawahir.

Kashi Ram.

Kalian Singh,
married Musammat Janki.

married (1) Bhagirathi,
(2) Bijai Kuar.

Bahori Lal (appellant).

On the 2nd January 1875, Kalian Singh executed a bond in favour of Gauri Sahai, respondent, hypothecating his zamindari rights and interests in mauza Deva Kanchan. He was at that time recorded in the *khewat* as proprietor of a 5 biswas share in that mauza, and Musammats Bhagirathi and Bijai Kuar, the widows of his deceased uncle, Kashi Ram, were respectively described therein as owners each of a 5 biswas share. On the 28th September 1883, Gauri Sahai obtained a decree for enforcement of lien against the entire zamindari rights of Kalian Singh in mauza Deva, hypothecated in the bond of the 2nd January 1875, but his claim against the person and other property of the obligor was dismissed. Owing to some antecedent litigation that had taken place between Bijai Kuar on the one side, and Kalian Singh and Musammat Janki on the other, in reference to the 5 biswas share recorded in Janki's name, a compromise was arrived at between them, by which it was agreed "that mutation of names in respect of the property in dispute should be effected in favour of Musammat Bijai Kuar, and that she should remain as heretofore in possession of the said property and other properties situate in mauza Deva and mauza Ghasita, and that the said property shall be responsible for any debts due from us Kalian Singh and Musammat Janki." On her side Bijai Kuar said:—"I shall have no right to transfer any property, nor shall the said property be liable for any debt due from me. I shall have a life-interest in all the estate left by my deceased husband." This arrangement was given effect to by the removal of Janki's name from the *khewat* as to the 5 biswas share, and the substitution of Bijai Kuar's, who thus stood entered in respect of two shares of 5 biswas each.

On the 14th April 1884, Gauri Sahai made his first application for execution by attachment and sale of the hypothecated rights and interests of his obligor, which he described as "5 biswas entered in [629] the name of Kalian Singh, judgment-debtor, and 5 biswas in the name of Janki and 5 biswas in that of Bijai Kuar, in mauza Deva, of which Kalian Singh is the owner." As I have already stated, Janki's name had been expunged and no share stood in her name at all. On the 23rd April 1884, the Court issued an attachment against the whole 15 biswas, and on the 11th of May following they were attached. On the 8th June 1884, Kalian Singh, the judgment-debtor, died, and Janki, his widow, and Bahori Lal, his son, were substituted as his representatives on the 18th of the same month.

On the 29th of November 1884, the Subordinate Judge transferred the execution-proceedings to the Collector of the district, and on the 20th June 1885,

the Collector put up and sold only the 5 biswas share which had stood recorded in the name of the deceased judgment-debtor, and which was in the possession of Janki and Bahori Lal as his representatives. Subsequently, Gauri Sahai applied for sale of the 5 biswas which he described as entered in the name of Janki and the 5 biswas in the name of Bijai Kuar. On the 19th September 1885, Bijai Kuar filed objections, stating that Janki had no interest in the property, that she (Bijai Kuar) was the owner, and that any interests derived by Janki from her deceased husband had already been sold by the decree-holder. The 14th November 1885, was fixed for the hearing of these objections, but before that date Bijai Kuar died, and on the 11th November Bahori Lal, under the guardianship of his mother, applied to have his name brought on the record in her place with the object of supporting her objections. This was done subject to anything that might hereafter be urged by the decree-holder. On the 5th December 1885, he in his turn put in objections to the effect that any interest Bijai Kuar might have had in the property died with her, and that she left no rights that could pass to Bahori Lal as her heir; on the contrary, that anything she had was in reality the property of Kalian Singh, that it was hypothecated in the bond of the 2nd January 1875, and that by the terms of the compromise between Bijai Kuar and Kalian Singh and Janki, the first-named had agreed that the property should be liable for the debts of Kalian Singh. These objections were heard and disposed of by the Subordinate Judge on the 7th December 1885; and he held that [630] "no specified share of Kalian Singh has been charged under the decree sought to be executed and under the bond dated the 2nd January 1875, the basis of the decree; on the contrary, a charge was created on the whole right and interest in mauza Deva Kanchan; therefore the share of Kalian Singh in the property, standing in the name of Bijai Kuar, should also be considered hypothecated. The objection that the property of Bijai Kuar had been exempted should not have been allowed. She might have perhaps continued in possession during her life, but she died while the suit was pending. The son of Kalian Singh, the heir of the judgment-debtor, wishes to become the representative of Bijai Kuar, but the Court thinks none can become her representative, her interest having been merely life interest: *ordered* that the *claim* be disallowed with costs."

It is obvious therefore, from the terms of the order of the Subordinate Judge, that the proceeding before him had reference to the objections which had been filed by Bijai Kuar, and supported by Bahori Lal, through his guardian, pursuant to the order granted on the application of the 11th November 1885. The decision of the Subordinate Judge was appealed from by Bahori Lal to the Judge, and among the pleas was the fourth to the following effect:— "As applicant is the representative of Kalian Singh, judgment-debtor, and the execution is taken out against him, all the objections raised by him *should have been set at rest under s. 244 of the Civil Procedure Code*, and he should not be made to prefer a claim." The Judge disposed of the case upon a preliminary point of jurisdiction, holding that as "the decree, in the execution of which the objection is taken, is over Rs. 5,000 in amount," this Court, and not his Court, was the proper appellate tribunal. He accordingly returned the memorandum of appeal for presentation here, and this is the motion, in which the matter comes before us. When the case came on for hearing, Pandit Bishambar Nath, for the respondent, took a preliminary objection to the effect that the proceeding before the Subordinate Judge having taken place in reference to the claim of Bahori Lal, as the heir of Bijai Kuar, to have the 10 biswas share released from attachment, his order must be regarded as passed under s. 281 of the Civil Procedure Code, and such being the case, and it

being conclusive, [631] subject to Bahori Lal's bringing a suit to establish his right, no appeal lay to this Court. In reply for the appellant, it was urged that the proceeding before the Subordinate Judge must be regarded as held under s. 244, Bahori Lal being the representative of Kalian Singh, and in support of this contention a ruling of the Privy Council—*Wahed Ali v. Jumae*, 11 B. L. R., 149,—and one of this Court—*Ram Ghulam v. Hazaru Kuar*, I. L. R., 7 All., 547,—were referred to.

I think that the preliminary objection urged for the respondent is a valid one and must prevail. It is clear that the objections filed by Bijai Kuar on the 19th September 1885, were put in under s. 278 of the Code, and that, whether rightly or wrongly, she claimed to be entitled to the two shares of 5 biswas each, and on that ground to have the decree-holder's attachment released. Had she survived, those objections would have had to be considered and disposed of in the manner provided in ss. 280 and 281, and had the decision been adverse to her, her remedy, and her only remedy, would have been a suit of the kind mentioned in s. 283. All that Bahori Lal sought to be allowed to do was to come in as the representative of Bijai Kuar for the purpose of supporting those objections, and it was his claim to do this that was rejected by the Subordinate Judge, and nothing more. It was in right of a third person, whose interest he asserted to have passed to him, that he prayed admission to the proceedings, and this character was wholly distinct and apart from that he filled as the legal representative of his deceased father, in which capacity he had been cited after the passing of Gauri Sahai's decree. No application had been put in by the decree-holder, which would have made the second paragraph of s. 234 applicable, and in my opinion it is impossible to hold that the question decided by the Subordinate Judge, which is sought to be impeached on appeal here, was one that fell within the purview of cl. (c), s. 244; on the contrary, if any section covers the Subordinate Judge's order, it must be s. 281. I do not think that because Bahori Lal happens, for the purpose of the execution-proceedings under Gauri Sahai's decree, to be the legal representative of his father Kalian Singh, and to be liable to satisfy it to the extent of any assets which may have come to his hands, that any rights claimed by him through a third person must be [632] dealt with, and can only be dealt with, between him and the decree-holder in the execution-proceedings, in which, he it observed, only for the property of the deceased which has come to his hands, and has not been duly disposed of, can any personal responsibility attach to him. I do not understand the Privy Council ruling, or the judgment of this Court referred to by the appellant's learned pleader, to lay down the proposition that the legal representative of the judgment-debtor, brought in after decree, is constrained to have his title, possibly to a large property, determined by the summary method adopted in execution-proceedings, and that because he is another man's legal representative, he is placed in a worse position than other people, and has no remedy by suit. Both the cases had reference to persons who had been cited in the suit as representatives of a deceased person before decree, and so far as the ruling of their Lordships of the Privy Council was concerned, its direct object was to determine that such persons were parties to the suit for the purpose of s. 11 of Act XXIII of 1861, and their remarks referred to by my brother OLDFIELD in *Ram Ghulam v. Hazaru Kuar*, I. L. R., 7 All., 547, are directed to that point and that point only. I allowed the preliminary objection, that the order here was not passed under s. 244 of the Code, and dismiss the appeal with costs.

Mahmood, J.—I confess that I have had considerable doubts upon the question of law raised in this case, and the difficulty is considerably enhanced by

the fact that there exists a long conflict of decisions in the published reports as to how far the representative of a judgment-debtor can be dealt with as a party to the suit for purposes of execution-proceedings relating to the questions under s. 244 of the Civil Procedure Code. The most important case upon the subject is *Wahed Ali v. Jumae*, 11 B. L. R., 149, where the Lords of the Privy Council held that a party sued in a representative character, against whom a decree is obtained, is a party to the suit for purposes of execution of such decree. The same is the effect of *Oseem-un-nissa Khatoon v. Ameer-un-nissa Khatoon*, 20 W. R., 162. The rule appears to have been carried further by a Division Bench of the Calcutta High Court in *Ameer-un-nissa Khatoon v. Meer Mozuffer Hossein Chowdhry*, 12 B. L. R., 65, where the same rule was applied to the case of a person [638] who was not a party to the decree, but had been brought upon the record as representative of the deceased judgment-debtor in the execution-proceedings. The view is in accord with a much older ruling of the Madras High Court in *Buddu Ramaiya v. C. Venkaiya*, 3 Mad. H. C. Rep., 263, where it was held that questions arising between the parties to the suit cannot be limited to questions arising between those who were parties to the suit at the date of the decree; but after decree the representative of a decree-holder, or the representative of a defendant against whom an execution is sought, become parties to the suit for the purposes of execution. The same is the effect of a later ruling of the same Court in *Kuriyah v. Mayan*, I. L. R., 7 Mad., 255. On the other hand, the rulings of this Court in two cases—*Abdul Rahman v. Muhammad Yar*, I. L. R., 4 All., 190, and *Awadh Kuari v. Raktu Tiwari*, I. L. R., 6 All., 109, seem to proceed upon a *ratio decidendi* which appears to be inconsistent with the rulings above referred to. Indeed, in *Nimba Harishet v. Sita Ram Paraji*, I. L. R., 9 Bom., 458, SARGENT, C.J., referring to the former of these cases, declined to follow it, regarding it to be inconsistent with the Privy Council ruling, and he adopted the ruling of the Madras Court in *Arundadhi Ammyar v. Natesha Ayyar*, I. L. R., 5 Mad., 391. Again, the rulings of this Court in *Ram Ghulam v. Hazaru Kuar*, I. L. R., 7 All., 547, and *Sita Ram v. Bhagwan Das*, I. L. R., 7 All., 733, in both of which I concurred with my brother OLDFIELD, laid down the rule that the representative of the judgment-debtor who had objected that the property attached had been acquired by himself, and not inherited from the judgment-debtor, and was therefore not liable in execution, must be treated as a party to the suit within the meaning of s. 244 of the Civil Procedure Code, and the objection must be dealt with in execution of the decree. I must also here point out that whilst in the latter of these cases the representative of the judgment-debtor was brought upon the record in the execution-proceedings subsequent to the decree, in the former case the representatives were themselves impleaded in the original suit in that capacity, and the decree had been obtained against them. In delivering my judgment in the case, whilst concurring with my brother OLDFIELD, I expressed the view that the turning point upon which the application of the rule contained in s. 244 of the Civil [634] Procedure Code, barring adjudication in a regular suit, depends, is, whether the judgment-debtor, in raising objections to execution of decree against any property, pleads what may analogically be called a *jus tertii*, or a right which, although he represents it, belongs to a title totally separate from that which he personally holds in such property. And I also held that this view was consistent with the *ratio decidendi* which had been adopted by my brother OLDFIELD in *Shankar Dial v. Amir Haidar*, I. L. R., 2 All., 752, and which I followed in *Nath Mal Das v. Tajammul Husain*, I. L. R., 7 All., 36, and at the same time I expressed my dissent from the ruling of a Division Bench of the Calcutta Court in *Kanai Lal Khun v. Sashi Bhuson Biswas*, I. L. R., 6 Cal., 777, which goes the length of holding that even where a person, upon the death of a Hindu widow, is made

a party to the suit as reversionary heir to the estate, and a decree is passed against him, he may in a subsequent suit claim to establish that the decree covered only the life-interest of the widow. The *ratio decidendi* adopted in the ruling seems to be that, although the plaintiff was impleaded in the decree as the representative of the widow, the nature of his claim was such as to exclude it from the operation of s. 244 of the Code—a view which I could not reconcile with the ruling of the Lords of the Privy Council in *Wahed Ali v. Jumae*, 11 B. L. R., 149. These are not the only reported cases which complicate the question; and in this state of the case-law, I felt inclined to ask the learned Chief Justice to refer this case to the Full Bench. But I am not prepared to dissent from him in the distinction which he has drawn between this case and the rulings to which I have referred. The present appellant was no party to the original decree of the 28th September 1883, and he was impleaded in execution-proceedings as the representative of the original judgment-debtor, Kalian Singh, and in that capacity he might, according to the rulings to which I have already referred, be treated as a party to the suit for purpose of s. 244 of the Code. But the case, as it has come before us, does not, as the learned Chief Justice has shown, relate to such capacity. In the execution-proceedings a third party, Musammat Bijai Kuar, who could under no conditions be regarded as the representative of the judgment-debtor, Kalian Singh, raised objections on the 19th September 1885, to the attachment of the property, and her objections were undoubtedly such as are contemplated by ss. 278-281 of the Civil Procedure Code. The 14th November 1885, was fixed for the hearing of the objections; but the objector died in the meantime, and the present appellant had his name substituted as the representative of the objector, and the objections were disposed of on the 7th December 1885, and this is the order from which this appeal has been preferred.

Upon this state of things, I am not prepared to dissent from the learned Chief Justice in the view that the case is not on all fours with the Privy Council ruling in *Wahed Ali's case*, 11 B. L. R., 149, and that it is distinguishable from the other rulings to which reference has been made. Nor am I prepared to dissent from him in the view that the mere circumstance of the representative of a deceased judgment-debtor becoming the representative also of a deceased third party, who was objector in the execution-proceedings, will not preclude him from prosecuting those objections, and that the adjudication upon such objections falls beyond the scope of s. 244 of the Code. Indeed, as the learned Chief Justice has pointed out, the matter was dealt with in the Court below as objections by a third party, and there can be little doubt that the order of the 7th December 1885 now under appeal, was passed under s. 281 of the Code, as it disallowed the objections upon the ground that the appellant had inherited nothing from the original objector, Musammat Bijai Kuar. And this being so, I am not willing to disagree with the learned Chief Justice in holding that, under the circumstances of this case, the proper remedy for the appellant would be a suit such as is contemplated by s. 283 of the Code.

For these reasons I concur in the order which the learned Chief Justice has made.

Appeal dismissed.

NOTES.

[See the Notes to 7 All., 547 *supra*.

See also (1901) 6 C.W.N., 62; (1898) 23 Bom., 237.]

[8 All. 636]
CRIMINAL REVISIONAL.*The 2nd August, 1886.*

PRESENT :

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE, AND
MR. JUSTICE MAHMOOD.

Queen-Empress

versus

Lochan.

*Murder—Culpable homicide not amounting to murder—Grave and
sudden provocation—Act XLV of 1860 (Penal Code),
ss. 300, Exception 1, 302, 304.*

An accused person was convicted of culpable homicide not amounting to murder in respect of the widow of his cousin, who lived with him. The evidence [636] showed that the accused was seen to follow the deceased for a considerable distance with a *gandasa* or chopper, under circumstances which indicated a belief on his part that she was going to keep an assignation, and with the purpose of detecting her in doing so. He found her in the act of connection with her paramour, and killed her with the chopper.

Held, that the conviction must be altered to one of murder, as the accused went deliberately in search of the provocation sought to be made the mitigation of his offence, and under the circumstances disclosed it could not be said that he was deprived of self-control by grave and sudden provocation. *Queen-Empress v. Damarua*, Weekly Notes, 1885, p. 197, and *Queen-Empress v. Mohan*, ante, p. 642, referred to.

THIS was a case the record of which was called for by STRAIGHT, Offg. C.J., in the exercise of the High Court's powers of revision. The case was one in which one Lochan had been convicted by Mr. R. J. Leeds, Sessions Judge of Gorakhpur, of culpable homicide not amounting to murder, and sentenced to five years' rigorous imprisonment, the Sessions Judge's order being dated the 11th March 1886.

The facts of the case are stated in the order of the Court.

Neither the prisoner nor the Crown was represented.

Straight, Offg. C.J.—This is a case of revision in reference to a decision of the Judge of Gorakhpur, convicting the accused Lochan of culpable homicide not amounting to murder, and sentencing him to five years' rigorous imprisonment. The case was called up by me, on perusal of the Gorakhpur sessions statement for March, and we have had notice issued to the accused to show cause why the conviction recorded against him should not be altered to one of murder under s. 302 of the Penal Code, and why his sentence should not be enhanced to that provided for that offence.

The circumstances of the case are shortly these. The accused Lochan, son of Janki, Sainthwar by caste, aged 25, resided at the village of Balohi in the Tarkalwa Police circle. Along with him lived Musammat Jadni, deceased, aged about 25, the widow of his deceased first cousin Ramphal. On the evening of Thursday, the 10th of December last year, about 8 o'clock, the accused was near his house, cutting up sugar-cane with a *gandasa* and near by him were two men, Wali Julaha and Musa Ahir. According to the evidence of these persons the deceased, Musammat Jadni passed [637] close to them alone going in a southerly direction, and soon after she had gone on her way, the accused followed, taking his *gandasa* with him. As to what then happened we learn

from the evidence of one Beni Madho, a caste-fellow of the accused, who says that on the night of the 10th the accused came to him and stated that Musammat Jadni was lying dead in the *arhar* field. "She was committing fornication with Phul, Panthwar. I went up, and Phul ran away. I then killed her with my chopper." The body of Musammat Jadni was found on the 11th lying under a mango tree, with a number of wounds upon the neck, head, and arms, and it was obvious that death must have supervened almost immediately upon the infliction of these injuries. Complaint was lodged at the Tarkalwa police station on the morning of the 12th, and the accused was, in due course, arrested. Before the Magistrate Phul, the man referred to by the accused in his statement to Beni Madho, deposed to the effect that he was in the act of having connection with Musammat Jadni under the mango tree when he was surprised by the accused; that he thereupon jumped up and ran away, and as he ran he turned round and saw the accused striking the deceased woman. In the Sessions Court he denied that he was in the act of having connection with Musammat Jadni when the accused came up, and stated he was only conversing with her. The assessors did not believe the evidence for the prosecution, but such reasons as they gave for not doing so appear to be quite insufficient. The learned Judge was of opinion that the guilt of the accused, of having caused the death of Musammat Jadni, was fully established; but he considered that, having regard to all the facts, the act of the accused in doing so was, by reason of grave and sudden provocation, reduced to culpable homicide not amounting to murder. He therefore convicted him of that lesser offence, and sentenced him to five years' rigorous imprisonment. With regard to this decision, all I have to say, in the first place is, that the evidence and all the surrounding circumstances, to my mind, place it beyond doubt that the hand of the accused did the unfortunate act which caused the deceased woman's death. I see no reason whatever for distrusting the testimony of Beni Madho, and I think the learned Judge gives a reasonable explanation of his somewhat singular conduct in not at once reporting what the [638] accused had said to him on the night of the commission of the crime. No doubt there is the contradiction to which I have already adverted in Phul's two depositions; but the learned Judge has preferred that made in the first instance before the Magistrate, and it was in the prisoner's interest that he did so, for the purpose of measuring the nature of his offence; and though he may have so far discredited his later statement, I do not think this discrepancy should invalidate the rest of his evidence. But I think the learned Judge was wrong in holding that there was grave and sudden provocation of the kind that reduced the offence of the accused from murder, with which he was charged, to culpable homicide not amounting to murder. I have already, in the case of *Queen-Empress v. Damarua*, Weekly Notes, 1885, p. 197, stated the rule, as I believe it to be, which governs the matter, and my brother BRODHURST and I have recently acted on the same view in *Queen-Empress v. Mohan*, ante, p. 622. In the first place, the relation in which the accused stood to the deceased was not that of a husband, though it is quite possible, from her living in the house with him, that they were on intimate terms, and that his act may have been animated by jealousy. But there is no proof of this, and I must take the accused's own version of the matter; and even adopting the learned Judge's view that he caught Musammat Jadni in the very act of connection, I am of opinion that there was no grave and sudden provocation proved of the character that a Court of Justice ought to accept as reducing the crime of murder to that of culpable homicide. The accused taking the chopper with him, and thereby indicating that he contemplated resorting to violence, followed the deceased woman a considerable distance, obviously, to my mind, with the belief that she was going to keep an

assignation, and with the deliberate purpose of detecting her in doing so. He neither called her to come back, nor remonstrated with her, nor sought to induce her to return, but silently pursued her, and marked her down at the spot where he killed her. In other words, he went deliberately in search of the provocation, which is now sought to be made the mitigation of his offence. As I have already observed, he was not the husband of the woman, and there was no moral obligation upon him to constitute himself her executioner for her transgression. I cannot for a moment hold that, under the circumstances disclosed, he was deprived of self-control by grave and sudden provocation, for (to quote a passage cited from *Oneby's Case*, 2 Lord Raymond, 1485, in "Russell on Crimes and Misdemeanours," Vol. I, 4th ed., p. 725) "in cases of this kind the immediate object of the inquiry is, whether the suspension of reason arising from sudden passion continued from the time of the provocation received to the very instant of the mortal stroke given; for if, from any circumstance whatever, it appears that the party reflected, deliberated, or cooled any time before the fatal stroke given; or if, in legal presumption, there was time or opportunity for cooling, the killing will amount to murder, as being attributable to malice and revenge, rather than to human frailty." Such being the view I take of the case here, the conviction of the accused must be altered to one of murder under s. 302 of the Penal Code, and in accordance with s. 439 of the Criminal Procedure Code, the sentence will also be altered to that provided for the offence, namely, transportation for life. I think, however, that, having regard to the facts, and making allowance for the peculiarities of native character in reference to the misconduct of women of their families, especially among the less advanced and more ignorant residents of the rural districts, I may properly recommend the Government to commute the sentence to fourteen years' transportation.

Mahmood, J., concurred.

[8 All. 639]

APPELLATE CIVIL.

The 3rd August, 1886.

PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE MAHMOOD.

Hardeo Das.....Appellant

versus

Zaman Khan.....Respondent.*

*Execution of decree—Security for restitution of property taken
in execution—Reversal of decree—Execution against surety—*

Civil Procedure Code, ss. 253, 545, 546.

Section 253† of the Civil Procedure Code contemplates a suit pending at the time security is given for performance of the decree, and does not apply to a case where the litigation in the

* Second Appeal No. 58 of 1886, from an order of W. H. Hudson, Esq., District Judge of Farukhabad, dated the 15th April 1886, reversing an order of Rai Chedi Lal, Subordinate Judge of Farukhabad, dated the 6th January 1886.

† [Sec. 253 :—Whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant:

Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety.]

Courts of First Instance and of first appeal has ended, and no second appeal has been instituted in the High Court when security is given.

[640] The holder of a decree affirmed on appeal by the District Court took out execution to recover costs awarded. Costs were deposited by the judgment-debtor and paid to the decree-holder, and a surety gave a bond by which he undertook to refund the amount to the judgment-debtor in the event of the latter succeeding in appeal to the High Court, and of the decree-holder failing to repay him. The judgment-debtor subsequently filed an appeal to the High Court and was successful, and he then applied in the execution department to recover the amount from the surety.

Held, that the Court executing the High Court's decree had no jurisdiction to execute it against the surety.

THE facts of this case are stated in the judgment of the Court.

Munshi *Kashi Prasad*, for the Appellant.

Shah *Asad Ali*, for the Respondent.

Oldfield, J.—One Dwarka Prasad obtained a decree against the respondent Muhammad Sahib Zaman Khan, and it was affirmed in appeal by the District Court on the 10th December 1881. After this he took out execution to recover costs awarded. The respondent applied to stay execution on the ground that he proposed to file an appeal to the High Court.

Execution was not, however, stayed and the costs were deposited by the respondent and paid to Dwarka Prasad, and the appellant gave a bond, by which he undertook to refund the amount to the respondent, in the event of the latter succeeding in his appeal to the High Court and of Dwarka Prasad failing to repay to him the amount. The respondent subsequently filed an appeal to the High Court and was successful; and he then applied in the execution department to recover the sum from the appellant, and his application was disallowed by the Court of First Instance, but has been allowed in appeal by the Judge. The appellant appeals to this Court on the ground that the Court executing the decree had no jurisdiction in the matter. I think the plea is valid. Sections 545 and 546, and 253, Civil Procedure Code, have been referred to as enabling the Court to deal with the respondent's application, but they do not appear to be applicable. Section 545, Civil Procedure Code, contemplates proceedings to stay execution of decree on security being given by the applicant, and s. 546 is a provision for staying execution when an appeal is pending, but the security given in the case before us was not made under circumstances to which the provisions of that section are applicable.

[641] Section 253 provides that whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same, or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant. But this section contemplates that there shall be a suit pending at the time security is given for its performance, and would not seem to apply to a case like this, where no suit can be said to have been pending, as the litigation in the Court of First Instance and Court of appeal had ended, and no second appeal had been instituted in the High Court when security was given.

I do not therefore think that s. 253 will apply so as to allow the decree of the High Court to be executed against the surety.

I would decree the appeal, and set aside the order of the Court below with costs, and restore the order of the Court of First Instance.

Mahmood, J.—I agree.

Appeal allowed.

NOTES.

[See also 2 Bom. L. R., 203.]

[8 All. 641]

The 6th August, 1886.

PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE TYRRELL.

Achobandil Kuari.....Defendant

versus

Mahabir Prasad.....Plaintiff.*

Vendor and purchaser—Non-payment of consideration money—Burden of proof.

In a suit for possession of land alleged to have been purchased under a registered deed of sale, the defendant-vendor admitted the execution and registration of the deed, but denied receipt of consideration. The deed was dated in January 1876, and the suit was instituted in 1884. It was found that the vendor had been in possession during the whole of that period. The plaintiff produced no evidence in proof of the payment of consideration.

Held, that although under ordinary circumstances the party to a deed duly executed and registered who alleges non-payment of consideration is bound to prove his allegation, the fact that the plaintiff and his predecessor had silently submitted to the withholding of possession for upwards of eight years, combined with the continuous possession of the vendor, favoured the allegation of the latter that possession had been withheld because of the non-payment of consideration, and raised such counter-presumption as to make it incumbent on the plaintiff to give evidence that consideration had in fact passed.

[642] *Held*, therefore, that in the absence of such evidence, and of evidence to explain the fact of the plaintiff being out of possession, the suit failed.

THE facts of this case are stated in the order of remand.

Babu Baroda Prasad, for the Appellant.

Mr. J. Simeon, for the Respondent.

Tyrrell, J.—The plaintiff brought this suit as heir to his brother, who, in January 1876, is said to have purchased from the appellant and her mother and other persons a two annas and eight pies share in mauza Nagpur. The plaintiff alleges that his brother got possession after the purchase, and held possession until his death, and after his death, he held possession until (Asarh 1288) 1881, when he was forcibly ejected by the vendors, of whom appellant is one. He therefore sued for reinstatement and for mesne profits. The appellant defended the suit, admitting that the deed of January 1876 had been executed and registered by the vendors, but alleging that the transaction stopped there, no consideration having been received, and no possession transferred, the plaintiff's allegation as to his possession being untrue. The first Court gave the plaintiff-respondent a decree, and the defendants appealed to the District Judge, who found that the appellant's allegation was true as to possession never having been given to the plaintiff-respondent or to his brother, the original vendee. On the plea as to consideration, the Judge found that execution of the sale-deed being admitted by the defendants, who also had acknowledged receipt of consideration before the Registrar, the burden of proving non-payment of consideration rested on them, and that they had failed to prove its non-payment. The Judge thereupon decreed the suit against the appellant in favour of the plaintiff, exempting Musammut Chundar Balion on the ground of minority.

It is doubtless true that the party to a deed duly executed and registered, who alleges non-payment of consideration, is ordinarily bound to prove his

* Second Appeal No. 1509 of 1885, from a decree of B. J. Leeds, Esq., District Judge of Gorakhpur, dated the 3rd August 1885, modifying a decree of Rai Raghu Nath Sahai, Subordinate Judge of Gorakhpur, dated the 26th December 1884.

allegation; but we think the Judge has overlooked the peculiar circumstances of this case. He had found that possession had never been transferred, and that the plaintiff and his predecessor had silently submitted to the withholding of possession for upwards of eight years.

[643] This state of things, combined with the continuous possession of the vendors, favoured their allegation that possession had been withheld because of the non-payment of consideration, and raised such a counter-presumption as to make it incumbent on the plaintiff-vendee to give evidence that consideration had in fact passed.

In order that an inquiry may be made on this point, we must remand this case for trial of the following issue:—

Did the brother of the respondent pay the consideration of the sale-contract to the appellant and the other vendors under the deed of January 1876; and if he did, how does it come to pass that he has been kept out of possession till the present time?

On return of the finding, ten days will be allowed for objections.

Oldfield, J.—I concur.

The Lower Appellate Court found on this issue against the respondent, as he produced no evidence to prove payment of the purchase-money. On the return of its finding the High Court delivered the following judgments:—

Oldfield, J.—We must decree this appeal. It was for the plaintiff-respondent, under the circumstances of this case, to prove that consideration-money passed on the sale-deed of January 1876, and to account for being out of possession of the property since the alleged purchase. No evidence was adduced by him on this point in the first Court, nor in the Lower Appellate Court, although we remanded the case for that purpose. The Judge says that the respondent had ample opportunity afforded him of adducing evidence, but no evidence of any kind was adduced by him, and as he has not established that any consideration was paid, the suit fails.

The decisions of both the lower Courts must be set aside and the plaintiff's suit dismissed with costs in all the Courts.

Tyrrell, J.—I am quite of the same opinion. We remanded the case in the interest of the respondent, to enable him to adduce proof of payment of consideration and explain the fact of being out of possession. In the absence of any evidence, the Judge was obliged to find the issue against him, and under these circumstances we have no alternative than to hold that his suit fails.

Appeal allowed.

NOTES.

[This case was followed in (1889) 14 Bom., 222; (1911) 33 Bom., 483.]

[644] The 6th August, 1886.

PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE TYRRELL.

Basdeo.....Defendant

versus

Gopal.....Plaintiff.*

Limitation—Suit to obtain a declaration that an alleged adoption is invalid or never took place—Suit for possession of immoveable property—Act XV of 1877 (Limitation Act), sch. ii, Nos. 118, 141.

Article 118† of the Limitation Act applies only to suits where the relief claimed is purely for a declaration that an alleged adoption is invalid or never in fact took place. Such a suit is distinct from a suit for possession of property, and the latter kind of suit cannot be held to be barred as a suit brought under art. 118, † merely by reason of its raising a question of the validity of an adoption, but is separately provided for by art. 141.‡ It is discretionary in a Court to grant relief by a declaration of a right, and consequently the fact that a person has not sued for a declaration should not be a bar to a suit for possession of property on any ground of limitation prescribed for the former.

In a suit by a person who had objected to an attachment of immoveable property in execution of a decree, and whose objection had been disallowed, to set aside the order disallowing the objection, for removal of the attachment, and for possession of the property, the defendants, at whose instance the attachment had been made, set up a title based on the adoption of the judgment-debtor by the widow of the person whom the plaintiff claimed to succeed by right of inheritance.

Held that the limitation applicable to the suit was art. 141 and not art. 118 of the Limitation Act (XV of 1877), the suit being not to obtain any declaration that the alleged adoption was invalid, but for recovery of possession of immoveable property, for which there was a special limitation.

THE facts of this case are stated in the **judgment** of the Court.

Babu Jogindro Nath Chaudhri, for the Appellant.

Babu Ratan Chand, for the Respondent.

Oldfield and Tyrrell, JJ.—The plaintiff claims certain immoveable property by right of succession to one Bhagirath, on the death of the latter's widow, Musammatt Rajo. The defendant Basdeo attached the property as belonging to his judgment-debtor, Chatarbhuj, defendant, and the plaintiff's

* First Appeal No. 124 of 1886, from an order of Lala Banwari Lal, Subordinate Judge of Aligarh, dated the 31st May 1886.

† [Art. 118 :—

Description of Suit.	Period of limitation.	Time from which period begins to run.
To obtain a declaration that an alleged adoption is invalid, or never in fact took place.	Six years.	When the alleged adoption becomes known to the plaintiff.]

‡ [Art. 141 :—

Like suit by a Hindu or Muhammadan entitled to the possession of immoveable property on the death of a Hindu or Muhammadan female.	Twelve years.	When the female dies.]
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objection was disallowed by the Court executing the decree, under s. 281 of the Civil Procedure Code. The plaintiff has brought his suit to set aside the order, remove the attachment, and obtain possession. The defendant set up a title based on the adoption of Chatarbhuj by Musammat Rajo.

[645] The question before us is whether the suit is barred by limitation.

The suit has been brought within one year of the order of the Court under s. 281 of the Civil Procedure Code, and is not barred with reference to art. 11 of the Limitation Act, but the Court of First Instance held that it was barred by art. 118, treating it as a suit to obtain a declaration that an alleged adoption is invalid or never took place. The Lower Appellate Court, on the other hand, held that it was a suit for possession of immoveable property, governed by art. 141, and was within time.

We are of opinion that the Subordinate Judge is right. The suit is not to obtain any declaration that the alleged adoption set up is invalid, but it is for recovery of possession of immoveable property, for which there is a special limitation. Art. 118 only applies to suits where the relief sought is of a purely declaratory nature; it is discretionary in a Court to grant this sort of relief, and the suit for a declaration is distinct from a suit for possession of property, and it is instituted on a stamp of much smaller value, and the suit for possession of property cannot be held to be barred as a suit brought under art. 118, merely by reason of its raising a question of the validity of an adoption.

The Privy Council decision in *Jagadamba Chowdhrani v. Dakhina Mohun*, decided 9th April 1886, has no application. That decision dealt with the limitation in art. 129 of the old Act IX of 1871, which referred to suits to set aside an adoption, and their Lordships held that the terms "to set aside an adoption" referred to and included suits which bring the validity of an adoption into question, and applied indiscriminately to suits to have an adoption declared invalid and for possession of land, when the validity of an alleged adoption is brought into question.

But that decision had peculiar reference to the terms in which art. 129 was framed. The present law of limitation has made an alteration. It contains no such article as 129. On the other hand, we have arts. 118 and 119, the former for suits to obtain a declaration that an alleged adoption is invalid or never took place, and the latter to obtain a declaration that an adoption is valid; [646] and the period of limitation is reduced to six years, and the time from which it will run is altered, and the Act provides separately for suits for possession of property by art. 141.

There is no ambiguity about art. 118 as there was about art. 129 of the old law, and it can be held only to refer to suits purely for a declaration that an alleged adoption is invalid or never, in fact, took place; and where the suit is for possession of property, to which another limitation law is applicable, it will be governed by it, although the question of validity of adoption may arise. As already observed, it is discretionary in a Court to grant relief by declaration of a right, and consequently the fact that a person has not sued for a declaration should not be a bar to a suit for possession of property on any ground of limitation prescribed for the former.

It is observable that, in the case we have referred to, their Lordships of the Privy Council remarked upon the difference between the language of art. 129 of Act IX of 1871, which they designate as being of a loose kind, and the precise terms of arts. 118 and 119 of Act XV of 1877, which we have described above. We dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[See the very lucid and exhaustive treatment of the subject in *Mitra on Limitation*, Vth Ed., Vol. II, pp. 1044, 1045.

As regards the question whether Art. 118 refers to suits for *declarations* only, there is a conflict of opinion in the various High Courts.

Madras and Bombay hold that the article is *not* so restricted. This opinion is based upon two Privy Council rulings—20 Cal., 487 P.C.; 22 Cal., 609; 22 I.A., 51. The following cases are of this opinion:—(1896) 20 Mad., 40; (1902) 26 Mad., 291 (BHASHYALI AYYANGAR, J. *dissenting*); (1899) 24 Bom., 260 F. B., overruling (1895) 21 Bom., 159; (1895) 21 Bom., 376; (1900) 25 Bom., 26.

But Calcutta, Allahabad and the Punjab High Courts do not construe the above Privy Council decisions in that way but hold that the article is restricted to *declarations merely*:—(1897) 25 Cal., 354; (1899) 27 Cal., 242; (1904) 9 C.W.N., 222; (1910) 7 I.C., 427 (Cal.); (1901) 24 All., 195; (1895) 17 All., 167; (1903) 26 All., 40; 1903 P. L. R. 373.

But see (1913) 37 Bom., 513; (1907) 27 Bom., 614; (1914) P.R. 81; 28 All., 727; 39 Cal., 418; 11 C.P.L.R. 49.]

[6 All. 646]

The 9th August, 1886.

PRESENT :

MR. JUSTICE OLDFIELD AND MR. JUSTICE TYRRELL.

Gopi Chand and another.....Defendants

versus

Sujan Kuar and others.....Plaintiffs.

Hindu Law—Sadhs—Partition between widow and mother, both claiming Life interest—Alienation by mother—Reversioner—Declaratory decree.

Upon the death of a Hindu a dispute as to his separate estate took place between his mother and his widow, which was referred to arbitration, and an award was made dividing the property between the disputants. It did not appear that either of them claimed the property absolutely, but they disputed as to who should have a life-interest in it, and this was the subject of the arbitration and of the award. Subsequently the mother executed a deed of gift of part of the property which came to her in favour of her nephews. The daughter and the daughter's sons of the deceased, as reversioners, sued the donees to set aside the gift, asserting that the donor had no power to make it, having under the Hindu law a life-interest only in the property. The parties were Sadhs.

[647] *Held* that the Hindu law of inheritance was presumably applicable to the parties, and the defendants had not shown that any custom among the Sadhs, having the force of law, prevailed opposed to the Hindu law.

Held that inasmuch as the donor was in any circumstances entitled to maintenance, and the decision came to upon the arbitration was to put her in possession of half the property, but only on the footing of a woman's interest for life, the defendants could not set up any title by adverse possession on her part to defeat the claim of the reversioners.

Held also that the plaintiffs were competent to maintain the suit as reversioners to the widow, and were entitled to a decree for a declaration that the gift should not affect any of their rights as reversioners after the widow's death.

THE facts of this case are stated in the **judgment** of the Court.

Mr. G. T. Spankie and Mr. Sinha, for the Appellants.

Mr. W. M. Colvin and Babu Ram Das Chakarbati, for the Respondents.

Oldfield & Tyrrell, JJ.—This suit has been brought to set aside a gift of certain property made by one Rani Bai, defendant, in favour of the

* Second Appeal No. 1847 of 1885, from a decree of C. J. Daniell, Esq., District Judge of Farukhabad, dated the 19th September 1885, confirming a decree of Munshi Rai Chedi Lal, Subordinate Judge of Farukhabad, dated the 17th June 1885.

co-defendants, her nephews. The property belonged to Gur Bakhsh; from him it passed to his son Kuar Chand, and at his death his heir was his widow Musammat Anandi. He left also a daughter, the plaintiff, and her sons, also plaintiffs. They sue as reversioners to set aside the gift.

It appears that on Kuar Chand's death, his mother, Rani Bai, and his widow Anandi, disputed as to the property, and the dispute was referred to arbitration. An award was made, by which the property left was divided between Rani Bai and Anandi. This was in 1868, and a decision given on the award, and the property, the subject of the gift, was part of what came to Rani Bai. The plaintiffs assert that Rani Bai had no power to give the property, having only a life-interest under Hindu law.

The parties are Sadhs, and the defence is that Hindu law does not govern the succession to the estate of Kuar Chand; that Musammat Rani got the property absolutely in 1868, and has held adversely to the heirs and reversioners; that the plaintiffs are remote reversioners and have no right of suit, and have no right as reversioners to Rani Bai, so as to be able to contest her acts.

These were the substantial defences which were set up, and were disallowed by the Courts below which decreed the claim, and [648] the defendants in second appeal have raised the same contentions.

We do not consider any of them to be valid. Presumably the Hindu law of inheritance is applicable to the parties, and the defendants have not shown that any custom among the Sadhs, having the force of law, prevails opposed to Hindu law. Under Hindu law, on the death of Kuar Chand, Musammat Anandi Bai would succeed to a life-interest as his widow; but a dispute arose between her and her mother-in-law, Rani Bai, and the property was divided by award of arbitrators. It does not appear that either Rani Bai or Anandi claimed to take the property absolutely, but only disputed as to who was to have a life-interest in it: and it was the latter that was the subject of dispute and of the arbitration. Rani Bai was, under any circumstances, entitled to maintenance, and the decision came to was to put her in possession of half the property, but only on the footing of a woman's interest for life; and this being so—and it is the view taken by the Courts below of the arbitration award—we are of opinion that the defendants cannot set up any title by adverse possession on Rani Bai's part to defeat the claim of reversioners.

There remains the question whether the plaintiffs can maintain this suit. We think they can as reversioners to Anandi Bai. The arbitration award only settled a dispute between Anandi and Rani Bai, and it gave Rani Bai no higher title than Anandi Bai could bestow; that is, an interest in the property rightfully belonging to Anandi, so long as Anandi lived, but no longer. So far as reversioners are concerned, Rani Bai's act is the act of Anandi; and the plaintiffs, as reversioners to Anandi, can sue to set it aside. The gift is the act of one whom Anandi has put in a position to deal with the property, and who has dealt with it injuriously to plaintiffs' reversionary interests.

The decree of the Courts below is in effect to render the gift operative so long as Rani Bai lives; but in the view we take of the case, the decree will be made for a declaration that the gift shall not affect any rights of the plaintiffs as reversioners after the death of Anandi Bai. We dismiss the appeal with costs.

Appeal dismissed.

[849] APPELLATE CRIMINAL.

The 5th August, 1886.

PRESENT:

MR. JUSTICE STRAIGHT, OFFG. CHIEF JUSTICE.

Queen-Empress

versus

Ismail Khan and others.

Act XLV of 1860 (Penal Code), ss. 459, 460.

Sections 459 and 460 of the Penal Code provide for a compound offence, the governing incident of which is that either a 'lurking house-trespass' or 'house-breaking' must have been completed, in order to make a person who accompanies that offence either by causing grievous hurt or attempt to cause death or grievous hurt responsible under those sections. The sections must be construed strictly, and they are not applicable where the principal act done by the accused person amounts to no more than a mere attempt to commit lurking house-trespass or house-breaking.

THIS was an appeal from a judgment and order of Mr. T. R. Wyer, Sessions Judge of Meerut, dated the 18th June 1886, convicting the appellant Ismail Khan under ss. 459 and 511 of the Penal Code, and the other two appellants under ss. 460 and 511 of the same enactment.

The facts of this case are stated in the **judgment** of the Court.

The appellants were not represented.

The *Government Pleader* (*Ram Prasad*), for the Crown.

Straight, Offg. C. J.—In this case the evidence against the appellants was, that on the early morning of the 13th April last, they were disturbed by a chaukidar while engaged in making a hole in the wall of the house of the complainant. Immediately upon being so disturbed they attempted to make their escape, the appellant Ismail Khan firing off a pistol, in what manner and direction it does not appear from the evidence, and the other two appellants attempting to prevent their apprehension by using their *lathis*. It is not suggested that these latter two appellants inflicted any serious hurt upon the police officers, and I do not think that any grave importance attaches to that part of the case. The learned Sessions Judge has convicted the appellant Ismail Khan of attempting to commit the offence provided for in s. 459, Indian Penal Code, and he has convicted the other two appellants of an attempt to commit the offence provided for in s. 460 of the same Act. I am very clearly of opinion that neither of these convictions can stand. Sections 459 and 460 provide for a compound offence, the governing incident of which is that either "a lurking house-[650]trespass" or "house-breaking" must have been completed, in order to make a person who accompanies that offence either by causing grievous hurt or attempt to cause death or grievous hurt responsible under those sections. In other words, the causing of the grievous hurt, or the attempt to cause death or grievous hurt, must be done in the course of the commission of the offence of lurking house-trespass or house-breaking, and at the time when such lurking house-trespass or house-breaking is being committed. The provisions of these sections being of a highly penal nature, and inflicting very severe punishment upon conviction, it is necessary that they should be construed strictly; and in my opinion it was not contemplated that where the principal act done by the accused person amounts to no more than a mere attempt

to commit the offences of lurking house-trespass or house-breaking, the section should be applicable. The convictions as recorded by the Judge are quashed, and I direct that they be recorded under ss. 452 and 511 of the Indian Penal Code, that is, for attempted house-breaking by night. The sentence passed on the prisoner Ismail Khan will be altered to transportation for the term of seven years. Inayat and Gullarh will be rigorously imprisoned for the term of five years. Such sentences to commence from the date of their conviction in the Sessions Court.

[8 All. 650]

APPELLATE CIVIL.

The 12th August, 1886.

PRESENT:

MR. JUSTICE OLDFIELD AND MR. JUSTICE TYRRELL.

Param Sukh and others.....Decree-holders

versus

Ram Dayal.....Judgment-debtor.*

Privy Council decree—Execution for costs—Rate of exchange—Civil Procedure Code, s. 610—Meaning of "for the time being."

Under the last paragraph of s. 610 of the Civil Procedure Code, the amount payable must be estimated at the rate of exchange "for the time being fixed by the Secretary of State for India in Council," and the words "for the time being" mean the year in which the amount is realized or paid or execution taken out, and not the year in which the decree was passed.

The decree-holders under a decree passed by Her Majesty in Council having taken out execution for a sum of £119-11, under s. 610 of the Civil Procedure [651] Code,—held that, the rate of exchange being fixed yearly by the Secretary of State for India in Council, the rate of exchange on the date of the application for execution was the proper rate of exchange the decree-holders were entitled to.

THE appellants, in whose favour a decree had been made by Her Majesty in Council, dated the 12th December 1884, which awarded them £119-11 as costs, applied, on the 6th January 1886, to the High Court, under s. 610 of the Civil Procedure Code, for transmission of the decree to the Court of First Instance for execution. This application was granted, and the decree was transmitted accordingly to the Subordinate Judge of Aligarh. In their application for execution the appellants, with reference to s. 610 of the Civil Procedure Code, estimated the sum of £119-11 at the rate of exchange current at the date of the application, and they claimed pleader's fees in respect of the application and also in respect of the application to the High Court.

The respondent—the judgment-debtor—objected that the sum of £119-11 should be estimated at the rate of exchange current at the date of the decree, and that no pleader's fees were chargeable under the existing practice in respect of applications for execution of decrees.

The Subordinate Judge held that the rate of exchange prevailing at the date of the decree, and not that prevailing at the date of the application for execution, was applicable, and further, that pleader's fees should not be allowed. On the latter point the Subordinate Judge observed as follows:—"I hold that

* First Appeal No. 132 of 1886, from an order of Lala Banwari Lal, Subordinate Judge of Aligarh, dated the 6th April 1886.

the pleader's fee for execution of the decree should not be allowed separately to the decree-holders on account of this Court and the High Court. The fee received, at the rate of 5 per cent., at the time of the institution of the suit or appeal, was sufficient; for under para. 67, Circular Order No. 7 of 1882, a pleader, already engaged, is bound to prosecute the suit till the end of it, and to make an application for execution of the decree; and the order of the High Court does not provide that the pleader's fee for the application, which was filed in the High Court on the 6th January 1886, under s. 610 of the Code of Civil Procedure, should be awarded."

The appellants contended that the Subordinate Judge was wrong in applying the rate of exchange prevailing at the date of [652] the decree, and that costs of execution incurred in the High Court and the Court below ought to have been awarded.

With reference to the latter contention, the Court (OLDFIELD and TYRRELL, JJ.) called for a report from the office as to the practice in allowing pleader's fees on applications for execution made to the High Court of decrees of that Court and of the Privy Council, with reference to rule 67, p. 287; General Rules and Circulars (Civil), N.-W. P.

The Registrar reported that "it is not the practice to allow any fees in cases of execution of—(i) decrees of this Court on its original side, (ii) decrees of the Privy Council. The orders in the former case and the decrees in the latter instance are merely transmitted to lower Courts for execution."

Babu Jogindro Nath Chaudhri, for the Appellants.

The Respondent did not appear.

Oldfield, J.—This appeal is preferred against the order of the Subordinate Judge of Aligarh, passed upon objections of the judgment-debtor, against whom a decree of the Privy Council was being executed. The decree-holders took out execution for a sum of £119-11 awarded to them, and the question is, at what rate of exchange that sum should be made available to the decree-holders in rupees.

It appears to me that, under the last paragraph of s. 610, the amount payable must be estimated at the rate of exchange "for the time being fixed by the Secretary of State for India in Council," and that the words "for the time being" mean the year in which the amount is realized, or paid, or execution taken out, and not the year in which the decree was passed. The rate of exchange being fixed yearly by the Secretary of State for India in Council, the rate of exchange on the date of the application for execution was the proper rate of exchange the decree-holders were entitled to. On this point, therefore, this appeal succeeds.

The appellants' pleader gives up the other plea as to the decree-holder's right to costs of execution.

The lower Court must be directed to proceed with the application for execution of decree in accordance with the view of the law recorded above.

[653] The decree-holders, appellants, are entitled to the costs of this appeal, which are fixed at one gold mohur or Rs. 16.

Tyrrell, J.—I concur.

Appeal allowed.

NOTES.

[This case was dissented from in (1896) 23 Cal., 357 and was observed upon as follows:—
"No reasons are stated in that judgment for the opinion expressed. After full consideration . . . we are unable to concur in the opinion expressed by the Allahabad Court."

See also (1897) 25 Cal. 283 and C.P.C., 1908, O. 45, r. 16, cl. 3.]

[8 All. 634]

APPELLATE CRIMINAL.

The 24th August, 1886.

PRESENT:

SIR JOHN EDGE, KT., CHIEF JUSTICE.

Queen-Empress

versus

Girdhari Lal.*

*Act XLV of 1860 (Penal Code), ss. 24, 25, 218, 464, clause 3—Forgery—
"Dishonestly"—"Fraudulently"—Public servant framing incorrect record.*

A Treasury accountant was convicted of offences under ss. 218 and 465 of the Penal Code under the following circumstances:—A sum of Rs. 500, which was in the Treasury and was payable to a particular person through a Civil Court, was drawn out and paid away to other persons by means of forged cheques. After the withdrawal of the Rs. 500, but before such withdrawal had been discovered, the representative of the payee applied for payment. The prisoner then upon two occasions wrote reports to the effect that the Rs. 500 in question then stood at the payee's credit as a revenue deposit, and that it was about to be transferred to the Civil Court. Upon the first of these reports, an order was signed by the Treasury Officer for the transfer of the money to the Civil Court concerned, and to effect such transfer a cheque was prepared by the sale-muharrir, which, as originally drawn up, related to the sum of Rs. 500 already mentioned. The signature of the cheque by the Treasury Officer was delayed for some time, and meanwhile the cheque was altered by the prisoner in such a manner as to make it relate to another deposit of Rs. 500 which had been made subsequently to the above, and to the credit of another person. The result of this was the transfer of the second payee's Rs. 500 to the Civil Court, as if it had been the first Rs. 500, and to the credit of the first payee's representative. The prisoner was convicted under s. 465 of the Penal Code in respect of the cheque, and under s. 218 in respect of the two reports above referred to.

Held, with respect to the charge under s. 465, that the prisoner's immediate and more probable intention,—which alone, and not his remoter and less probable intention, should be attributed to him—was not to cause wrongful loss to the second payee by delaying payment of the Rs. 500 due to her, though the act might have caused her loss, but to conceal the previous fraudulent withdrawal of the first payee's Rs. 500; that under these circumstances he could not be said to have acted "dishonestly" or "fraudulently" within the meaning of s. 24 or s. 25 of the Penal Code; and that therefore his guilt under s. 465 had not been made out, and the conviction under that section must be set aside.

Held, also, that the prisoner's intention in making the false reports was to stave off the discovery of the previous fraud and save himself or the actual perpetrator of that fraud from legal punishment, and that having prepared the reports in a manner which he knew to be incorrect, he was rightly convicted under s. 218 of the Penal Code.

[634] *Held*, further, that as the prisoner, who was a public servant, made these reports and assumed to make them in due course and as a part of his duty, and held them out as reports which were made by the proper officer, and as no question was put in the examination of the witnesses from the office which suggested that it was not his business to make such reports, it must be inferred that he made them because it was his business to do so, and as a public servant within the meaning of s. 218 of the Penal Code.

THIS was an appeal from a judgment of Mr. A. Cadell, Sessions Judge of Aligarh, dated the 10th May 1886, convicting the appellant of an offence under s. 465, and two offences under s. 218, of the Penal Code.

The appellant, Girdhari Lal, in August 1882, was employed as Treasury Accountant in the Etah Collectorate. On the 19th August 1882, a sum of Rs. 500, "decree-money payable to Sewa Ram of Janera, pargana Marahira," was paid into the Treasury by one Balwant Singh, and the name of the depositor, the date of receipt, and the nature of the deposit, as quoted above, were duly entered opposite Deposit No. 214 in the Revenue Deposit Register of the Etah Treasury. This money, payable to Sewa Ram, was subsequently all drawn and paid away to persons other than Sewa Ram by means of three forged cheques or repayment orders 49/1137, 70/332 and 48/1150. These payments were duly entered on the right-hand page for "details of repayment" of the Deposit Register already mentioned. These repayments appeared to have been made at the same time that the forged cheques were drawn and the money was paid. Cheque or repayment order No. 49 of Book 1137 was dated the 3rd July 1884; cheque No. 70 of Book 332 was dated the 8th September 1884; and cheque No. 48 of Book 1150 was dated the 30th January 1885. Thus on the 30th January 1885, the whole of Deposit No. 214, amounting to Rs. 500, and due to Sewa Ram, had been paid away to persons other than Sewa Ram or his representatives.

On the 20th April 1885, another sum of Rs. 500 was paid into the Treasury, and was duly entered in the Revenue Deposit Register of that date as received from Muhammad Itafat Husain, Vakil, as decree-money, *in re Musummat Chunni v. Mukhal Alam* of Salehpur, Rs. 500, Deposit No. 20.

[655] In the meantime, on the 30th June 1884, Sewa Ram asked that intimation in respect of his money might be sent to the Munsif of Etah and the Subordinate Judge of Mainpuri; and after various formalities Rs. 500 were transferred to the Civil Courts. This case arose out of the manner this money was transferred.

With reference to this money, Puran Mal, sale-muharrir, made a report on the 23rd April 1885, suggesting that the Rs. 500, which his own file showed to be due to Sewa Ram, should be transferred to the Civil Courts in certain proportions. Upon this followed the usual report from the appellant, the Treasury Accountant, dated the 25th April 1885, that the Rs. 500, Deposit No. 214, paid in by Balwant Singh on the 19th August 1882, stood at the credit of Sewa Ram in the Treasury as a revenue deposit. This report was in the handwriting of the appellant and was false.

After this report was written, an order signed by the Treasury Officer for the transfer of the money was written on the 28th April 1885, and cheque No. 45 of Book 1162 was drawn up by Puran Mal. As originally drawn the cheque related to the deposit of Rs. 500 made in favour of Sewa Ram on the 19th August 1882. Babu Jainti Prasad, the Treasury Officer, went on leave on the afternoon of the 28th April 1885, and did not return till the 28th July 1885. In ordinary course the cheque should have been signed by the Treasury Officer that day or the next. No steps, however, were taken to present it to Babu Jainti Prasad's successor, and it was not presented until after the return of Babu Jainti Prasad on the 28th July 1885. On that day a petition was presented by Ram Prasad Singh to the effect that his father, Sewa Ram, was dead, and asking that the Rs. 500 due in the case of *Sewa Ram v. Phulsi Kuar* might be given to him. The usual order was made by the officer acting for Babu Jainti Prasad for an office report. This was written by Puran Mal on the 3rd August 1885, to the effect that applicant would get his money from the Civil Court. On the same date the appellant added a further report to the effect that this money was in the Treasury as a revenue deposit, but would be transferred to the Civil Court. This was followed by an order to the effect

that no order could be given regarding applicant's right to the money, but that it was about to be sent to the Civil Court. This report by the appellant [656] was false, as the whole of the money due to Sewa Ram had been entered as repaid as mentioned above.

On the 5th August the cheque No. 45 of Book 1162 was presented to the Treasury Officer, Babu Jainti Prasad, for signature, and was signed by him. It then had been altered so as to relate to the Rs. 500 deposited on the 28th April 1885, in favour of Chunni Kuar.

The appellant was tried for forging this cheque No. 45 of Book 1162, and with preparing the two false reports mentioned above, marked at the trial as Exhibits O and Q, and was convicted in respect of the first charge under s. 465 of the Penal Code, and in respect of the other two charges under s. 218.

It was contended on behalf of the accused before the Court of Session that to support the charge of forgery a dishonest or fraudulent intent must be proved; and to support the charge under s. 218 the intent of the accused to cause, or his knowledge that he was likely to cause, loss or injury to the public must be proved.

Upon this contention the Sessions Judge observed as follows:—

"To take the second and third charges first, I do not think it necessary to follow in detail the decisions which have been appealed to, because it is necessary to admit that the law has been framed and interpreted in a manner so favourable to persons in the position of the accused, that even if it were proved that he had written false reports by the hundred to conceal his own malpractices, he would not be liable under s. 218 of the Indian Penal Code, unless it could be shown that he intended to cause or knew it to be likely that he would cause loss or injury to some one. It has also been contended that as the main intention of the accused was to conceal his own fault, this is the only intention that should be looked to. But this seems to be going a good deal further than our lenient laws warrant, and it is necessary to decide whether in the case of the accused there was the intention of causing loss, or the knowledge that such loss or injury was likely to follow. In order to form a judgment on this point it is necessary to follow the dates of the different transactions:—

30th January 1885.—The last portion of Sewa Ram's Rs. 500 was paid away.

[657] *20th April 1885.*—The payment of a sum of Rs. 500 rendered the temporary concealment possible.

23rd April 1885 —Report by Puran Mal to the effect that Sewa Ram's Rs. 500 should be sent to the Civil Court.

25th April 1885.—Report by Girdhari Lal to the effect that Sewa Ram's Rs. 500, which had been totally paid away, was still in deposit (revenue).

28th April 1885.—Preparation of cheque in sale department with a view to transfer Sewa Ram's Rs. 500 to the Civil Court.

29th April 1885 to 2nd July 1885.—Absence of Babu Jainti Prasad, Deputy Collector, on leave.

3rd August 1885 —Report by Girdhari Lal to the effect that Sewa Ram's Rs. 500 was still in the Treasury as a revenue deposit.

5th August 1885.—Preparation of altered cheque and transfer of Rs. 500 due to Chunni Kuar to Civil Court deposit.

The fact that the first false report followed so closely the payment of the money due to Chunni Kuar, and still more that the second false report of the

3rd August so immediately preceded the transfer of that money—only one day having intervened—seems to justify the conclusion that both false reports were made with the intention of making use of the Rs. 500 due to Chunni Kuar to fill the place of the Rs. 500 due to Sewa Ram, which had already been disposed of. The effect of this accused must have known would be to render the prompt payment of Chunni Kuar's money impossible, and that person must now trust to a civil suit for her remedy or appeal to the justice of Government. "And even if the money is eventually recovered, Chunni Kuar has suffered wrongful loss, for, according to s. 24 of the Indian Penal Code, 'a person is said to lose wrongfully when such person is kept out of any property, as well as when such person is wrongfully deprived of property.' It must therefore be decided that Chunni Kuar has suffered wrongful loss by the transfer of her money, which in consequence of such transfer has been, as is shown by Exhibit T, partially made over to Sewa Ram's representatives. And even if principal and interest should eventually be refunded [658] by Government, the wrongful loss will only be transferred to Government."

The accused appealed to the High Court.

Pandit *Ajudhia Nath* (with him *Babu Jogindro Nath Chaudhri*) for the Appellant. The conviction under s. 465 of the Penal Code is bad. "Forgery" means the making of a "false document" (s. 463), and the false document must be made "fraudulently or dishonestly" (s. 464). "Dishonestly" means with the intention of causing wrongful gain to one person or wrongful loss to another (s. 24), and "fraudulently" implies an intent to defraud (s. 25). Here it is not contended that the appellant, assuming him to have made the alterations in the cheque, did so with the intention of causing wrongful gain to any person: it is said that his intention was to cause wrongful loss. But the evidence shows no such intention on his part. His intention, assuming for the sake of argument that the act is proved, was merely to conceal the previous withdrawal of the Rs. 500 standing at Sewa Ram's credit. Such an intention is not fraudulent or dishonest within the meaning of s. 464: *Queen v. Jungle Lall*, 19 W. R., Cr., 40; *Queen v. Lall Gumul*, N.-W. P. H. C. Rep., 1870, p. 11; *Queen-Empress v. Foteh*, I. L. R., 5 All., 217; *Queen-Empress v. Jiwanand*, I. L. R., 5 All., 221, and, *Queen-Empress v. Shankar*, I. L. R., 4 Bom., 657.

Further, the conviction under s. 218 is also bad. That section applies only to a public servant who is charged "as such public servant" with the preparation of the record or other writing which he is said to have framed incorrectly. Here there is no evidence that the appellant was charged with the preparation of the reports dated the 25th April and 3rd August, 1885, respectively, or that the preparation of such reports was one of his duties. He therefore did not prepare them "as such public servant" within the meaning of s. 218. *Queen-Empress v. Mazhar Husain*, I. L. R., 5 All., 553, is in point.

The *Offg. Public Prosecutor* (Mr. A. Strachey) for the Crown. The conviction is good, because the appellant, in altering the [659] cheque, acted dishonestly and fraudulently within the meaning of ss. 24 and 25 and 464 of the Penal Code. His intention must be inferred from the nature of his act, and from his knowledge of its natural consequences. The inevitable consequence was that when *Musammam* Chunni Kuar applied for payment of the Rs. 500 due to her, she would certainly be delayed and might conceivably fail altogether in obtaining it. Her right to such payment, instead of being recognised as of course, would be disputed, and her success might be contingent upon the result of a suit for recovery of the money. Under the last sentence of s. 24 of the Penal Code, this amounts to "wrongful loss" being caused to Chunni Kuar. This being

the necessary consequence of his act, the prisoner must be presumed to have intended it. His position in the Treasury and his knowledge of the course of business therein make it certain that, when he altered the cheque so as to transfer Chunni Kuar's Rs. 500, he knew that her subsequent application for payment of the same would be delayed if not defeated. If he knew that, this would be the result he intended.

[EDGE, C. J.—I do not think that was his intention. I think that the possible loss to Chunni Kuar was not in his mind at all at the time when he altered the cheque. His intention was merely to conceal the fraud which had already been committed in the payment of Sewa Ram's Rs. 500 to other persons. That is not the kind of intention which s. 465 refers to.]

That no doubt was also his intention, but a more immediate intention is not inconsistent with a more remote one. He in fact intended both results. He must have expected both consequences as necessarily resulting from his acts, and intention is nothing more than the expectation of particular consequences at the moment of action. "The only possible way of discovering a man's intention is by looking at what he actually did, and by considering what must have appeared to him at the time the natural consequence of his conduct."—Stephen's *History of the Criminal Law*, vol. ii, p. 111. This agrees with Austin's analysis of "intention," which has been generally accepted. No doubt a common notion prevails that there is something more in intention than the expectation of consequences at the moment of action. This, however, is not correct.

[660] [EDGE, C. J.—The question is always one of the evidence in the particular case. I think you should distinguish between what a man would have in his mind if he adverted to the matter, and what he actually has in his mind. If the appellant had adverted to the matter, he probably must have known that his act would lead to delay in the payment of Chunni Kuar's money to her, but you must show that this consequence was actually in his mind, and was the actual intention with which he acted. No jury would find that the appellant intended to cause loss to Chunni Kuar.]

It must be presumed not only that the appellant knew what were the natural consequences of his act, but also that what he knew was present to his mind. The nature of the presumption of an "intent to defraud" in cases of forgery is shown in Stephen's *Digest of the Criminal Law*, art. 355. This intent is not disproved by showing that the principal object of the prisoner was his own or some other person's advantage, and not loss to the prosecutor. It is proved by showing that he intended "to deceive in such a manner as to expose any person to loss or the risk of loss."—Stephen's *History of the Criminal Law*, vol. iii, p. 187. See also vol. ii, p. 122.

[EDGE, C. J.—With great respect for Mr. Justice STEPHEN, I do not remember any case in which his *History* has been cited in a Court of Justice.]

It was cited as an authority in *Queen v. Dudley and Stephens*, L. R., 14 Q. B. D., 273, before the Court for Crown Cases Reserved, both in the argument and in the judgment.

The cases referred to on the other side are distinguishable. In most of them there were not sufficient grounds for supposing that there was any knowledge on the prisoner's part that loss or risk of loss was a probable result. They prove only that mere deceit is not fraud.

The conviction under s. 218 is also good. *Queen-Empress v. Parmeshar Dat*, Ante, p. 201, applies.

[EDGE, C. J.—You need not argue that point.]

Babu Jogindro Nath Chaudhri, in reply.

[661] Edge, C.J.—The prisoner in this case has been convicted of offences described in two sections of the Indian Penal Code, namely, s. 465 and s. 218. Against these convictions he has preferred this appeal, and in order to deal with the same, it will be convenient if I deal first with the conviction under s. 465 for forgery. It appears to me that the offence, if committed, comes under the third clause of s. 464 of the Penal Code. It is clear that an offence under s. 464 cannot be made out unless the act was dishonestly or fraudulently done; and in order to see how these words are to be construed, it is necessary to refer to ss. 24 and 25 of the Indian Penal Code. Section 24 defines the word "dishonestly" as follows:—"Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly." Section 25 in like manner defines "fraudulently" thus:—"A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise."

Here, in the arguments, which have been addressed to me, it has not been suggested that the prisoner made the alterations in the cheque to cause wrongful gain to any one, but it is contended that he did it to cause wrongful loss.

Mr. Strachey, the acting Government Prosecutor, contends that the prisoner's intention was to cause wrongful loss to Musammat Chunni Kuar by delaying the payment of the Rs. 500 due to her. The question of intention is one for a jury or for a Judge sitting as a jury. Of two probable intentions, the one immediate and more probable and the other remote and less probable, I do not think we should attribute to the prisoner the remoter intention.

In my opinion his intention was to conceal a fraud which had been previously committed. A sum of Rs. 500, due to Sewa Ram, and after his death to his representative, had been fraudulently withdrawn. Sewa Ram's representative had applied for payment, and it became an immediate consideration how to provide for this Rs. 500. The only way was to have another Rs. 500 ready. We find that two reports (which will be referred to presently), dated the 25th April and 31st August 1885, represented that Sewa Ram's money was in deposit. Ought I to infer from this that Girdhari [662] Lal's object and intention was to cause wrongful loss to Musammat Chunni Kuar? No doubt had the amount of the cheque been paid to Sewa Ram's representative, it would probably have caused a loss to her by causing the payment to her to be delayed. I cannot conceive that that was his intention. The intention was to stave off the evil day when the fraudulent withdrawal of Sewa Ram's money should be found out. That is not the intention referred to in s. 24. Although the act might have caused loss, the intention in reference to this cheque was to meet the claim of the representative of Sewa Ram. Under these circumstances, in my opinion, it cannot be said that the prisoner acted "dishonestly" within the meaning of s. 24. Then did he act "fraudulently" within the meaning of s. 25? He may have known that the probable consequence of his act would be to delay payment of the money due to Musammat Chunni Kuar, but it cannot be said that his intention was to defraud. Any loss that the Government could sustain had already been sustained by the fraudulent withdrawal of Sewa Ram's money. Section 464 of the Penal Code, therefore, which may be read as part of s. 465 under which the prisoner has been convicted, is not made out; and I must allow the appeal in this respect, and so far set aside the conviction and sentence.

Now we come to the other part of this case, namely, the prisoner's conviction and sentence in respect of the second and third charges under s. 218 of the Penal Code. This section reads as follows:—"Whoever, being a public

servant, and being, as such public servant, charged with the preparation of any record or other writing frames that record or writing in a manner which he knows to be incorrect, with intent to cause, or knowing it to be likely that he will thereby cause, loss or injury to the public, or to any person, or with intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, &c."

The first argument addressed to me by Pandit *Ajudhia Nath* for the prisoner was that this section did not apply, because he contended the prisoner Girdhari Lal did not frame the writing, the subject of the charge, "as such public servant." Now we find the prisoner, who was a public servant in fact, making these [663] two reports, and assuming to make them in due course and as a part of his duty; and, in fact holding out these reports as reports which were made by the proper officer. There is also the fact that when the two witnesses from the office were being examined, no question was put to them which suggested that it was not the prisoner's business to make these reports. From all this I am bound to infer that the prisoner made the reports because it was his business to do so; and as nothing was elicited from the two witnesses to the contrary, I hold there was evidence that he made these two reports as a public servant within the meaning of s. 218.

It is then urged that, allowing that he made these false reports as a public servant, he did not make them with intent to cause loss. How far this contention can avail the prisoner will be seen. When Sewa Ram's representative applied to have the sum standing to his credit paid, there was an officer of the Government Treasury to whom the prisoner was subordinate named Jainti Prasad. This officer called for a report, and Girdhari Lal made the first of these reports to the effect that there was a sum of Rs. 500 standing to the credit of Sewa Ram. The report is dated the 25th April 1885. The two witnesses above referred to were asked what the report meant, and they said that it meant that this sum stood in deposit to Sewa Ram's credit, and Girdhari Lal did not say at his trial, though every opportunity was given him, that the report had any other meaning. It is only here that it is suggested that the report does not mean what until now it has been taken to mean. Was it a false report, or was it incorrect, to his knowledge? It is asserted that he looked at one side of the account only, and therefore reported incorrectly; but for myself I do not believe he was misled. With what intention then did he make that report? If he had had no intention to defraud, or deceive any one, he could, within a week, have caused Musammatt Chunni Kuar's money to be transferred to the Civil Court deposit, instead of waiting until the Treasury Officer, Babu Jainti Prasad, had returned to his duties. Now Jainti Prasad was not a person, as it appears to me, who looked carefully into the papers put before him. He left on the 28th April, and returned to his duties on the 28th July 1885. His place was filled during that time [664] by another officer. The cheque, which was prepared on the 28th April, was not put before the officiating officer. Instead of putting it before this officer, Girdhari Lal waits; and why does he do that? The reason for delay no doubt was because the prisoner knew that Babu Jainti Prasad was a person who did not carefully look at the papers he signed. Does not this show intention? In August 1885, he makes another incorrect report. He again reported that Sewa Ram's money was in deposit? He must have had some intention; and now what was his intention. I have no moral doubt that what he wanted and what was in his mind was to stave off the evil day of the discovery of the previous fraud, and to save himself or the actual perpetrator of that fraud from legal punishment, and for that purpose and with that intention he made these false

reports. I come to the conclusion therefore that the prisoner did frame those reports in a manner which he knew to be incorrect, with intent within the meaning of s. 218 of the Penal Code.

It only remains to consider whether the punishment awarded by the lower Court for the two offences under s. 218 is sufficient. I think not. The Sessions Judge has convicted the prisoner of three charges. The conviction and sentence for forgery has been quashed here, and the convictions under s. 218 of the Code sustained.

The Sessions Judge passed two sentences of three months' rigorous imprisonment in respect of the latter offences. If I allow these sentences to stand, they would not, in my opinion, adequately represent the punishment that should be awarded for these two offences of which the prisoner has been found guilty. It has been very ably urged by the prisoner's junior counsel, Babu *Jogindro Nath Chaudhri*, that I ought to consider his youth, his loss of all chance of future Government employment, and the time that this case has been under investigation. I do not know what the prisoner's age may actually be. His age, as shown on the record, was 29 years, and he was apparently of sufficient age to be intrusted with the duty of an accountant, and as to the argument of loss of employment and loss of social position, it is sufficient to say that had Girdhari Lal not been of good character he would not have been employed and trusted by his superiors as he is [665] shown to have been, and would not have had the opportunity of perpetrating the offences. Under these circumstances the sentences passed by the lower Court in respect of the second and third charges must be increased as follows:—Six months' rigorous imprisonment and a fine of Rs. 500 in respect of the second charge and conviction; in default of payment of the fine, six months' rigorous imprisonment in addition. In respect of the third charge, six months' rigorous imprisonment to commence at the expiry of the sentence in respect of the second charge. This will make altogether twelve months' rigorous imprisonment and Rs. 500 fine, and in default of payment of the fine, six months' rigorous imprisonment in addition.

NOTES.

[This case was *dissented* from and not followed in (1894) 22 Cal., 313; (1908) 35 Cal., 450, where it was held that it would be forgery, if the intention with which a false document was made, was to conceal a fraud which had been previously committed.

See also (1892) 19 Cal., 380; (1873) 15 All., 310.

See (1899) 19 All., 805, as regards the offence of screening oneself from punishment.]

[8 All. 665]

The 30th August, 1886.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE.

Queen-Empress

versus

Kharga and others.

Sessions Court—Addition of charge triable by any Magistrate—Power of

Sessions Judge to add charge and try it—Criminal Procedure

Code, ss. 28, 226, 236, 237, 537.

Subject to the other provisions of the Criminal Procedure Code, s. 28 gives power to the High Court and the Court of Session to try any offence under the Penal Code; and the

provision it contains as to the other Courts does not cut down or limit the jurisdiction of the High Court or the Court of Session.

Three persons were jointly committed for trial before the Court of Session; two of them being charged with culpable homicide not amounting to murder of J, and the third with abetment of that offence. At the trial, the Sessions Judge added a charge against all the accused of causing hurt to C, and convicted them upon both the original charges and the added charge. The assault upon C took place either at the same time as or immediately after the attack which resulted in the death of J.

Held, that the case did not come within the terms of s. 226 of the Criminal Procedure Code, and the adding of the charge was an irregularity which was not covered by ss. 236 and 237, those sections having no application to such a state of things; but that inasmuch as the Sessions Judge was addressed by the pleader who appeared for the accused, and heard all the objections raised, and witnesses might have been called for the defence upon the added charge, the provisions of s. 537 were applicable to the case.

Held, also, that the Sessions Judge had power, under s. 28 of the Code, to try the charge, assuming that he had power to add it.

THESE were appeals from a judgment of Mr. A. Cadell, Sessions Judge of Aligarh, dated the 23rd June 1886, convicting the appellants, Kharga and Kuar Sen, of culpable homicide not amounting to murder and of causing hurt, and Nanhua of abetment of the former offence and of causing hurt.

Kharga, Kuar Sen, and Nanhua were jointly committed for trial before the Sessions Judge—Kharga and Kuar Sen charged with culpable homicide not amounting to murder of one Jaisukh, and Nanhua with the abetment of that offence. At the trial the Sessions Judge added a charge against all the appellants of causing hurt to one Chiddu, and he convicted them of the charges on which they were committed and on the charge which he added.

The main facts of the case, as found by the Sessions Judge, were as follows:—The deceased Jaisukh and the three appellants were near relatives, living in houses opening into a common courtyard. The deceased Jaisukh, his brother Chiddu, his cousin Nanhua, and some other *Kachis*, had gone to a wedding feast at a place about two miles from their home. On the way back there was some jesting about Nanhua having over-eaten himself and having been sick. When Jaisukh and his brother got home, the former told his own wife and Nanhua's wife the jest against Nanhua. On Nanhua's coming home his wife repeated the jest, and gave Jaisukh as her authority. Jaisukh came in about the time, and the dispute between the two resulted in Jaisukh being knocked down by a blow, which killed him. It appeared that Nanhua laid hold of Jaisukh's hands, and upon some abuse by Nanhua, Nanhua's brother Kharga hit Jaisukh over the head with the side-piece of a charpai, and Kuar Sen struck him also on the head with the end-piece of a charpai. Upon this Chiddu came down from the roof and was struck on the head by Kharga, and thrown down by Nanhua and Kuar Sen. Jaisukh died from the effect of the blows.

It was contended on behalf of the appellants that the Sessions Judge had no power to add the charge of causing hurt to Chiddu, or try them on that charge and the convictions on that charge were therefore illegal.

Babu Baroda Prasad Ghose, for the Appellants.

The Government Pleader (Munshi Ram Prasad), for the Crown.

[667] **Edge, C.J.**—The appellants here have been convicted under ss. 304 and 304/109 of the Indian Penal Code, and they have also been convicted of an offence under s. 323 of the same Code. They were committed to the Sessions Court—Kharga and Kuar Sen under s. 304 and Nanhua under ss. 304/109 but at the trial the Judge added the charge under s. 323, in respect of an

assault upon a man called Chiddu. This assault took place at the same time as, or at any rate immediately after, the attack which resulted in the death of Jaisukh. It was objected, both here and in the Sessions Court, that the Sessions Judge had no power to add the charge under s. 323; and it is further argued that even if he had such power, he had no power to try such a charge. The first objection is met by the *Government Pleader* by referring to s. 226, Criminal Procedure Code, under which section he argues the Sessions Judge would be empowered to add such a charge. I very much doubt whether, under the circumstances, the Judge had power to add this charge under s. 323. In this case the prisoners were not committed "without a charge," for they were sent up on a charge on which they have been actually convicted. Nor can it be said that the charge was an "imperfect" charge, for it disclosed a separate offence. Nor yet is it an "erroneous" charge, for the evidence shows that the offence, as charged, was established. I therefore consider that this case does not come within the terms of s. 226 of the Criminal Procedure Code, and I consider that the adding of this charge was an irregularity in the proceedings. I do not think that it is covered by ss. 236 and 237 of the same Code. Those sections apply to a different state of things entirely. As to the second point taken in argument, I am of opinion that the Sessions Judge had power, under s. 28 of the Criminal Procedure Code, to try the charge, supposing he had power to add it. This section is a general section, which, subject to the other provisions of the Code, gives power to the High Court and the Court of Session to try any offence under the Indian Penal Code; and it also enacts that any offence under the Indian Penal Code may be tried "by any other Court by which such offence is shown in the eighth column of the second schedule to be triable." The provision as to the other Courts does not cut down or limit the jurisdiction of the High Court or the Court of Session. Now, if it [668] could be shown to me that the action of the Sessions Judge had caused a failure of justice and had prejudiced the accused in their defence, I should without hesitation set aside so much of the proceedings as related to the charge under s. 323. That a party might in some cases be so prejudiced is quite clear; but in this particular case the Sessions Judge was addressed by the gentleman who appeared for the prisoners, and he heard all the objections raised, and if the pleader had so desired, he might have called fresh witnesses as to this charge. This being so, I do not think that the objections now urged are of sufficient weight, and I consider that the provisions of s. 537 of the Code meet the case. As to the merits, I am of opinion that there is ample evidence to support the findings, and I do not see how the Judge could have come to any other conclusion than that the men were guilty. The appeals are dismissed.

Appeals dismissed.

[8 All. 688]

CRIMINAL REVISIONAL.

The 20th September, 1886.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE STRAIGHT.

In the matter of the Petition of the *Rajah of Kantit*.

Witness for defence—Refusal by Magistrate to summon witness under Criminal Procedure Code, s. 216—Witness summoned by Sessions Court—Power of Sessions Judge to summon witness—Criminal Procedure Code, ss. 291, 540.

Upon the committal of certain persons for trial before the Sessions Court for offences under the Penal Code, each of the prisoners, under s. 211 of the Criminal Procedure Code, gave in a written list of the persons whom he wished to be summoned to give evidence at the trial. On each of these lists, the name of a particular person was entered, who objected under s. 216 * to being summoned, on the ground that the summons was desired for vexatious purposes only, and that there were no reasonable grounds for believing that any evidence he could give would be material. Upon this objection, the committing Magistrate passed an order requiring the prisoners to satisfy him that there were reasonable grounds for believing that the objector's evidence was material, and, having heard arguments on both sides, passed an order refusing to issue the summons. The only ground stated by the Magistrate for this order was that he thought the reasons assigned for the application to have the objector summoned were insufficient. Subsequent to the order, and before the trial in the Sessions Court had begun, the Sessions Judge, upon an application filed on behalf of the prisoners, passed an order directing that the objector should be summoned to give evidence. The order assigned no reasons, and was passed in the absence of the objector or of any person representing him, and without notice to show cause being issued to him. The objector [689] applied to the High Court for revision of the order on the ground that the Sessions Judge had no jurisdiction to make it.

Held, that when a Magistrate refuses, under s. 216 of the Criminal Procedure Code, to summon a witness included in the list of the accused, he must record his reasons for such refusal, and such reasons must show that the evidence of such witness is not material; that the ground stated by the Magistrate, viz., that the reasons assigned for the application to have the objector summoned were insufficient, did not show that the evidence was not material; that the Sessions Judge had jurisdiction to make the order complained of; and that, even if he had not, it would not under the circumstances be desirable to interfere with his order in revision.

Per STRAIGHT, J., that s. 540 is not the only provision of the Criminal Procedure Code which confers on a Sessions Judge powers of the kind exercised by him in this case. Under

* [Sec. 216 :—When the accused has given in any list of witnesses under Section 211 and has been committed for trial, the Magistrate shall summon such of the witnesses included in the list as have not appeared before himself, to appear before the Court to which the accused has been committed :

Summons to witnesses for defence when accused is committed.

Provided that where the accused has been committed to the High Court, the Magistrate may in his discretion leave such witnesses to be summoned by the clerk of the Crown, and such witnesses may be summoned accordingly :

Provided also that if the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay, or of defeating the ends of justice, the Magistrate may require the accused to satisfy him that there are reasonable grounds for believing that the evidence of such witness is material, and, if he is not so satisfied, may refuse to summon the witness (recording his reasons for such refusal), or may before summoning him require such sum to be deposited as such Magistrate thinks necessary to defray the expense of obtaining the attendance of the witness.]

Refusal to summon unnecessary witness unless deposit made.

s. 291*, though the summoning of witnesses by an accused through the medium of the Sessions Judge is not a matter of right, yet the Judge has an inherent power, if he thinks proper to exercise it, to sanction the summoning of other witnesses than those named in the list delivered to the committing Magistrate.

THIS was an application for revision of an order passed by Mr. W. Martin, Sessions Judge of Mirzapur, on the 11th September 1886, directing the Deputy Magistrate to summon the applicant, the Rajah of Kantit, as a witness in a case committed for trial before the Sessions Judge.

The applicant stated in his application as follows:—

"1. That on the 24th August 1886, certain persons, Lallu Singh, Sheo Singh, and others, were committed by the Deputy Magistrate of Mirzapur for trial by the Court of Session upon charges under ss. 147, 436 and 436/114 of the Penal Code.

"2. That under s. 211 of the Criminal Procedure Code, the said Lallu Singh and Sheo Singh each gave in a written list of the persons whom they wished to be summoned to give evidence at the trial, and that on each of the said lists the name of your petitioner was entered.

"3. That on the 24th August 1886, a petition was filed in the Court of the Deputy Magistrate on behalf of your petitioner, under s. 216 of the Criminal Procedure Code, objecting to the summoning of your petitioner on the ground that his name had been entered in the said lists for vexatious purposes only, and that there were no reasonable grounds for believing that any evidence he could give would be material.

[670] "4. That on the same date the Deputy Magistrate passed an order, requiring the said Lallu Singh and Sheo Singh to satisfy him that there were reasonable grounds for believing that your petitioner's evidence was material, and on the 25th August, having heard arguments on both sides, passed an order refusing to summon your petitioner.

"5. That on the 2nd September, an application was filed on behalf of the said Lallu Singh and Sheo Singh in the Court of the Sessions Judge of Mirzapur, praying that your petitioner might be 'summoned to give evidence for the defence,' and stating generally that his evidence was 'important,' but setting forth no grounds for the belief that it was material.

"6. That on the 11th September the Sessions Judge passed an order directing that a copy of the application should 'be sent to the Criminal Court in order to summon Rajah Bhupendra Bahadur Singh as a witness,' and in pursuance of this order a summons has been served upon your petitioner by the Deputy Magistrate.

"7. That the above-mentioned order of the Sessions Judge assigns no reason for reversing the decision of the Deputy Magistrate, and was passed in the absence of your petitioner, and of any person representing him, and without any notice being issued to him, or other opportunity afforded to him of showing cause against the passing of such order.

"8. That the trial in the Court of Session has not yet begun, and the 21st September 1886, is fixed for its commencement.

*[Sec. 291:—The accused shall be allowed to examine any witness not previously named by him, if such witness is in attendance; but he shall not, except as provided in Sections 211 and 231, be entitled of right to have any witness summoned, other than the witnesses named in the list delivered to the Magistrate by whom he was committed for trial.]

Right of accused as to examination and summoning of witnesses.

"9. That under the circumstances above set forth, your petitioner humbly submits that the Sessions Judge had no jurisdiction to make the above-mentioned order of the 11th September 1886.

"10. That for the reasons contained in the affidavits hereto annexed, your petitioner believes that the inclusion of his name among the witnesses desired to be summoned is purely vexatious, and that no evidence which he could give would be material to the case.

"11. Your petitioner therefore prays that this Hon'ble Court may be pleased to set aside the Sessions Judge's order of the 11th September 1886, and to exempt him from appearing under the summons issued in pursuance thereof."

[671] Mr. A. Strachey, for the Petitioner.

Edge, C. J.—I am of opinion that this application must be dismissed. I am not satisfied that the Sessions Judge did not act within his powers in passing the order he did. Under s. 216 of the Criminal Procedure Code, a Magistrate is not entitled to require an accused to satisfy him, the Magistrate, that there are reasonable grounds for believing that the evidence of a witness, whom the accused desires to be summoned and be included in the list, is material, unless the Magistrates think that such witness "is included in the list for the purpose of vexation or delay, or of defeating the ends of justice." When a Magistrate does refuse under this section to summon a witness included in the list of the accused, he must record his reasons for such refusal, and such reasons must show that the evidence of such witness is not material. The only ground stated by the Magistrate for refusing to summon the witness appears, from the uncertified copy of the Magistrate's order before me, to be that he thought the reasons assigned for the application to have the Rajah summoned as one of the defendant's witnesses were insufficient. This does not show that the Rajah's evidence was not material. Even if I thought the Sessions Judge had not jurisdiction to make the order complained of, which I do not, I should not interfere in this case. I think it desirable that it should be generally understood that these objections to appearing to give evidence in a Criminal Court cannot be entertained. It is the duty—and it should be a cheerful duty—of every one to attend a Court of Justice when summoned to give evidence as a witness, particularly on behalf of an accused.

Straight, J.—I am of the same opinion. It appears that the Sessions Judge, having to try certain persons committed by the Magistrate, and having been satisfied that the Rajah of Kantit was a material witness for the defence, ordered the Magistrate to summon him as a witness, and a summons was issued to that distinguished personage. I think the order of the Judge was right. The suggestion of the learned counsel for the applicant, that s. 540 alone confers powers on a Sessions Judge, appears to me an incorrect contention, and I am not prepared to adopt it; for to lay down any such rule might lead to great inconvenience and possible injustice to accused persons. It is clear to my mind, under s. 291 of the [672] Criminal Procedure Code, that though the summoning of witnesses by an accused through the medium of the Sessions Judge is not a matter of "right," yet that the Judge has an inherent power, if he thinks proper to exercise it, to sanction the summoning of other witnesses than those named in the list delivered to the committing Magistrate. It is impossible for me to say, upon the affidavits before me, that the Rajah will not be a material witness to the defendant's case, and though it may be distasteful and unpleasant to him to appear as a witness in a Criminal Court, it is his duty, as one of Her Majesty's subjects, living under the protection of the law, to obey that law, and attend before the Judge in obedience to the

summons. I have no doubt the Judge will make every arrangement to make such attendance as convenient and unobjectionable as is possible and consistent with the interests of the accused.

Application rejected.

[8 All. 672]
APPELLATE CRIMINAL.

The 21st September, 1886.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE AND MR. JUSTICE STRAIGHT.

Queen-Empress

versus

Ishri Singh.

*Criminal Procedure Code, s. 512—Act I of 1872 (Evidence Act), ss. 33,
157—Witness, threatening—Duty of Magistrate.*

In 1874, five out of six persons who were named as having committed a murder, were arrested and after inquiry before a Magistrate were tried before the Court of Session and convicted. At the time of the inquiry before the Magistrate, the sixth accused person absconded, as was recorded by the Magistrate. In their examination before that officer, the witnesses deposed to the absconder having been one of the participants in the crime charged against the prisoners then under trial. In the Sessions Court the Judge did not record that the sixth accused person had absconded, and the evidence was recorded against the prisoners then under trial only. In 1883 the absconder was apprehended and tried before the Court of Session upon the charge of murder. At that time most of the former witnesses were dead, and the Sessions Judge, referring to s. 33* of the Evidence Act, admitted in evidence against the prisoner the depositions given in 1874 before both the Magistrate and the Sessions Court. He also admitted the deposition of a surviving witness which had been given in 1874 before the Sessions Court. This witness now also gave evidence against the prisoner.

Held, that the depositions were not admissible in evidence under s. 33 of the Evidence Act, the prisoner not having been a party to the former proceedings and not having then had an opportunity of cross-examining the witnesses.

*[Sec. 33 :—Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable :

Provided that the proceeding was between the same parties or their representatives in interest; that the adverse party in the first proceeding had the right and opportunity to cross-examine; that the questions in issue were substantially the same in the first as in the second proceeding.

*Explanation :—*A criminal trial or enquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.]

[673] Held, however, that, under the circumstances, the depositions given in 1874 before the committing Magistrate, though not those given in the Court of Session, were admissible in evidence under s. 512 of the Criminal Procedure Code.

Per STRAIGHT, J., that, under the special circumstances, the deposition taken in 1874 of the surviving witness was admissible under s. 157* of the Evidence Act as corroboration of her evidence given at the trial of the prisoner.

In cross-examination before the Court of Session, a witness stated that, when she was before the committing Magistrate, that officer, addressing her, said :—"Recollect, or I will send you into custody."

Held, that if the Magistrate did so address the witness, he exceeded his duty.

THIS was an appeal from an order of Mr. J. C. Leupolt, Sessions Judge of the Bijnor-Budaun Division, dated the 18th August 1886, convicting the appellant of murder and sentencing him to death.

The facts of the case appeared to be as follows :—

On the 19th March 1874, one Fakir Chand was murdered at Gohta, in the Budaun district, and six persons, named Pahlad Singh, Ishri Singh, Moti Singh, Umrao Singh, Fauji Singh, and Mansukh, were accused of the offence. Of these, all except Ishri Singh, who had absconded, were arrested and, after an inquiry by the Magistrate of the District, were committed for trial by the Court of Session by which they were convicted. Among the witnesses examined both before the committing Magistrate and the Court of Session were Musammat Durga, Musammat Chittan, Shera, Imami, and Kanhai Lal, and before the committing Magistrate Dr. Rutledge, Civil Surgeon. The deposition of the last named was dated the 2nd April 1874, and he deposed to having examined the dead body of Fakir Chand and to the injuries which he found thereon. The deposition of Musammat Durga before the Court of Session was dated the 29th April 1874. The depositions of Musammat Chittan, Shera, Imami, and Kanhai Lal before the committing Magistrate, who examined each of them on three different occasions were dated in March 1874, and before the Court of Session the 29th April 1874. Musammat Durga and Musammat Chittan deposed to Ishri Singh having taken part in the murder with Pahlad Singh, Moti Singh, Umrao Singh, Fauji Singh and Mansukh. Shera deposed to seeing Pahlad Singh, Moti Singh, Umrao Singh, Mansukh, and a man [674] whose name he did not know, but whom he could identify, striking Fakir Chand. Imami deposed to have seen two men, whose faces were covered with cloth, running away in an easterly direction from the place where Fakir Chand had fallen down, and a little way behind them Umrao Singh also running in the same direction, and to have also seen Moti Singh, Fauji, and Mansukh running from the same place in a westerly direction. Kanhai Lal, son of Fakir Chand, deposed to have arrived on the spot while his father was still alive, but insensible, and to have heard at that time from Chittan and Shera that Pahlad Singh, Ishri Singh, Moti Singh, Umrao Singh, Fauji Singh, and Mansukh were the murderers.

In May 1886, the appellant was produced before the Magistrate of the District, and was subsequently committed for trial by the Court of Session for the murder of Fakir Chand. He denied that he was the Ishri Singh who had been accused of being concerned in that offence.

The Sessions Judge, referring to s. 33 of the Evidence Act (I of 1872), admitted in evidence against the appellant the depositions mentioned above of

Former statements of witness may be proved to corroborate later testimony as to same fact.

* Sec. 157 :—In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.]

Chittan, Shera, Imami, and Kanhai Lal, who were all dead. He also admitted in evidence, with reference to the same section, the deposition of Dr. Rutledge mentioned above. He also admitted in evidence the deposition of Musammam Durga before the Court of Session in April 1874, apparently in order to corroborate her testimony against the appellant in this case. He convicted the appellant and sentenced him to death.

The appellant was not represented.

The *Offg. Public Prosecutor* (Mr. A. Strachey), for the Crown.

Edge, C. J.—In this case I am of opinion that on the evidence of Musammam Durga and that contained in the deposition of Musammam Chittan taken before the Magistrate, there can be no doubt that one Ishri Singh took part in the murder of Fakir Chand, deceased. I have also no doubt on the evidence that the Ishri Singh who took part in the murder of Fakir Chand is the prisoner who has now been convicted.

Besides Musammam Durga, Lal Singh, who says he knew him for 20 years, Sita Ram, Ahir, who knew him for 12 or 13 [675] years, Ganga, Brahman, who says he taught him fencing—all speak to his identity. This is enough to say in reference to the appeal of the prisoner, which is dismissed and the conviction affirmed. As regards the sentence, considering the time that has elapsed, I think the ends of justice will be sufficiently met by reducing the sentence to one of transportation for life.

I have a few words to add regarding the proceedings and the evidence admitted in the case. It is said by Musammam Durga that the Magistrate, addressing her, said:—"Recollect, or else I will send you into custody." Her statement in this respect may be true or false. If the Magistrate did speak to the Musammam in this manner, he exceeded his duty. It is the duty of a Magistrate to protect a witness from coercion of that kind.

With regard to the depositions of the witnesses who were examined before the Magistrate in 1874, and who were proved to have died, I am clearly of opinion that these depositions were not admissible under s. 33 of the Evidence Act. In order to be admissible under that section, the proceedings in which the same evidence was given must have been between the parties or their representatives in interest, and the person against whom such depositions could be heard must have had an opportunity of cross-examining the witnesses.

Now the accused was not present when the evidence was given, nor was he a party to that proceeding. Does s. 512 of the Criminal Procedure Code make it admissible? The evidence of Musammam Chittan did come within the terms of the section, because we find it recorded by the Magistrate that the accused Ishri Singh was an absconder, and the Magistrate did record the depositions of the witnesses, and he was a Magistrate who was competent to try or commit for trial such absconder, if he had been present, for the offence complained of; and consequently, in my opinion, the deposition of Musammam Chittan before the Magistrate came within the terms of s. 512, and was admissible against the accused. As to the evidence given at the time before the Judge, that evidence was not taken as evidence against the absconder. It was recorded against the persons then being tried. Excluding, therefore, this inadmissible evidence, there is, as I have already pointed [676] out, ample evidence that the prisoner was one of those who took part in the murder of Fakir Chand in 1874.

Straight, J.—I am anxious to state the facts in this case which lead me to the same conclusion as the learned Chief Justice.

On the 19th March 1874, one Fakir Chand was undoubtedly murdered by some persons, and shortly after the murder, the parties who were named as the perpetrators were six individuals, namely—(1) Pablad Singh, (2) Ishri Singh, (3) Moti Singh, (4) Umrao Singh, (5) Fauji Singh, (6) Mansukh Chamar. Five of these persons, namely, Nos. (1), (3), (4), (5), and (6), were at once arrested, and taken before the Magistrate who held the inquiry, and on the 2nd April 1874, these were all committed for trial to the Sessions Court. Nos. (1), (3), (4), and (6), were subsequently convicted and hanged, while Fauji escaped with a sentence of transportation for life. At the time of the inquiry before the Magistrate, the person named as Ishri Singh absconded, as was then proved, and through the proceedings in that officer's Court, he was distinctly mentioned as one of the participators in the crime charged against the others, and the statements of the witnesses to that effect were, as the depositions show, fully recorded. I therefore do not think it will be placing a strained interpretation on the language of s. 512 of the present Criminal Procedure Code, read in conjunction with s. 327 of the old Act, to hold that, *qua* Ishri Singh, those depositions were recorded for the purposes and within the meaning of that provision of the law, and were admissible at the trial out of which the appeal before us arises. I quite agree with the learned Chief Justice, however, in the limitation he would impose, by which he would exclude the evidence given in the sessions trial of 1874, as under the circumstances being inadmissible in the present case, though I am by no means prepared to say that such a limitation would invariably apply. It is clear that the Judge, from whose decision the appeal before us is preferred, was in error in receiving the depositions taken in the former proceedings under s. 33 of the Evidence Act as proof on the trial held by him, and he either did not carefully read the section in conjunction with the provisos, or, if he did, he failed to understand its meaning. The appellant was no party to the former proceedings, and he had no [677] opportunity of cross-examining the witnesses, which circumstances removed the case from the operation of s. 33. But, as I have said, s. 512 of the present Criminal Procedure Code, taken in conjunction with s. 327 of the old law, meets the difficulty, and at least made the deposition of Musammam Chittan evidence at the trial. I also think that, under the special circumstances, the deposition of Musammam Durga, taken in 1874, was admissible, in advertence to the terms of s. 157 of the Evidence Act. I agree with the Chief Justice that there was good evidence before the Judge to show, first, that Ishri Singh was one of the persons who took part in the violence that led to the death of Fakir Chand, and secondly, that the appellant is that Ishri Singh. I concur therefore in dismissing his appeal, as also in the mitigation of the sentence to one of transportation for life. I can only add that if the statement of the girl Durga in the Court below, in cross-examination, as to the action of the committing Magistrate, is correct, the conduct of that officer was not only most improper, but absolutely illegal, and a repetition of it will involve very serious consequences.

QUEEN-EMPRESS v.
[8 AIL. 677]
CRIMINAL REVISIONAL.

The 25th September, 1886.

PRESENT:
MR. JUSTICE STRAIGHT.

Queen-Empress
versus
Yusuf Khan.

Act XV of 1883 (N.-W. P. and Oudh Municipalities Act), ss. 69, 71—Municipal rules—Infringement of rules—Prosecutions—N.-W. P. Government Notification No. 865, dated the 3rd November 1869,—Rule VI, legality of.

Municipal Boards and Magistrates should see that before prosecutions are instituted under the Municipal rules, care is taken that the requirements of s. 69 of Act XV of 1883 (N.-W. P. and Oudh Municipalities Act) are satisfied.

A District Magistrate, who was also Chairman of a Municipal Board, having information that a certain person had evaded the payment of octroi duty, directed his prosecution for breach of Municipal rules. The Magistrate in thus causing proceedings to be taken, acted wholly of his own motion and authority. The accused was tried and convicted under Rule 6, Government N.-W. P. Notification No. 865, dated the 3rd November 1869, read with s. 45 of Act XV of 1873 (N.-W. P. and Oudh Municipalities Act). This rule provided that any person evading or abetting the evasion of the octroi duties specified in a schedule, should be deemed to have committed an infringement of a bye-law. It purported to have been made under s. 12 of Act VI of 1868 (Municipal Improvements Act, N.-W. P.), which authorized the making of "rules as to the persons by whom, and the manner [875] in which any assessment of taxes under this Act shall be confirmed, and for the collection of such taxes."

Held that assuming the rule to have been legally made under s. 12 of Act VI of 1868, which was not clear, and that it was saved by s. 2 of Act XV of 1873, it would, as declared in s. 71 of Act XV of 1883 (N.-W. P. and Oudh Municipalities Act) continue in force until repealed by new rules made under such last-mentioned Act, and be deemed to have been made under that Act, and its operation was therefore subject to the provisions of that Act, and among them to s. 69, which made it a condition precedent to the institution of a prosecution against the petitioner, that there should be a complaint of the Municipal Board or of some person authorized by the Board in that behalf.

Held that the position of the Magistrate of the District in connection with s. 69 was neither better nor worse than that of any other member of the Board, and unless he had been duly authorized by the Board as a Board, he had no more *locus standi* to cause a prosecution to be instituted personally than any other individual member; and the words of s. 69 being mandatory, and the petitioner having from the outset urged this objection to the legality of the proceedings, he was entitled to the benefit of it now, and the conviction was illegal and must be set aside.

THIS was an application for revision of an order of Mr. J. Clarke, Deputy Magistrate, Bulandshahr, dated the 2nd April 1886, and of the order of Mr. H. G. Pearse, Sessions Judge of Meerut, dated the 12th May 1886, affirming the Deputy Magistrate's order.

It appeared that Mr. Addis, Magistrate of the Bulandshahr District, having, as Chairman of the Municipal Board of Bulandshahr, received information from one Chintaman that the applicant, Yusuf Khan, had evaded the payment of octroi duty on certain cloth at Bulandshahr, directed the

Tahsildar to report in the matter. On receiving the Tahsildar's report, the Magistrate made the following order:—"I think that the case against Yusuf Khan should be investigated criminally for breach of Municipal law. It is obviously unfitting that I should conduct the inquiry myself, as I am Chairman of the Board. I therefore make over the case to Mr. Clarke, Deputy Magistrate."

The Deputy Magistrate accordingly tried Yusuf Khan for evading the payment of octroi duty, under a rule made by the Lieutenant-Governor of the North-Western Provinces under s. 12 of Act VI of 1868—(Rule 6, Government N.-W. P. Notification No. 865, dated the 3rd November 1869), read with s. 45, Act XV of 1873, and convicted and punished him with a fine of Rs. 50. [679] That rule runs as follows:—"Any person evading or abetting the evasion of the octroi duties imposed in the schedule, shall be deemed to have committed an infringement of a bye-law."

Yusuf Khan having applied to the Sessions Judge of Meerut for revision of the order of the Deputy Magistrate, the Sessions Judge rejected the application, but modified the conviction so as to make it one under the rule quoted, read with s. 71 of Act XV of 1883.

It was contended before the Sessions Judge that the Deputy Magistrate acted contrary to law in taking cognizance of the offence, as there had been no complaint by the Municipal Board or any person authorized by the Board in that behalf as required by s. 69 of Act XV of 1883. As to this contention the Sessions Judge observed as follows:—

"In the absence of any definite rule as to who is to be considered a 'person authorized by the Board' under s. 69 of Act XV of 1883, this Court considers that on every assumption of common sense the President must be considered such a person. The alternative would be the deadlock of every minor prosecution for breaches of Municipal rules, standing over it might be for a month till the meeting of the Board for a solemn consideration and sanction by the whole collective wisdom."

Mr. G. T. Spankie, for the applicant, contended that the rule, with reference to which the applicant had been convicted, was not legally made under s. 12 of Act VI of 1868, that section only authorizing the Lieutenant-Governor to make rules as to the persons by whom, and the manner in which, any assessment of taxes should be confirmed, and for the collection of such taxes, and the rule in question was not such a rule; and being illegal that it was not saved by Act XV of 1873, s. 2. It was also contended that the Deputy Magistrate had no jurisdiction, as no complaint had been preferred by the Municipal Board or any person authorized by it in that behalf, within the meaning of s. 69 of Act XV of 1883.

The *Offg. Public Prosecutor* (Mr. A. Strachey), for the Crown, contended that the rule under which the applicant had been convicted might reasonably be considered a rule relating to the collection of taxes, within the meaning of s. 12 of Act VI of 1868. Even if it could not be so construed, and was consequently invalid in [680] its inception, s. 2 of Act XV of 1873, confirmed and legalized all rules whatever theretofore made and approved by the Local Government, irrespective of their validity or otherwise, under Act VI of 1868. The rule must therefore be regarded as thenceforth a rule "made under the North-Western Provinces and Oudh Municipalities Act of 1873," within the meaning of s. 71 of Act XV of 1883, and consequently must be deemed to have been made under the latter Act, and to continue in force until repealed by new rules made thereunder. The conviction was therefore good under s. 64 of Act XV of 1883. Upon the question of jurisdiction, he submitted that the

objection should be treated upon the same principle as objections on the ground of a defective sanction to prosecute, and that the conviction should not be set aside, unless it could be shown that there had been a failure of justice.

Straight, J.—Assuming the rule, in advertence to which the conviction of the petitioner was had, to have been legally made under s. 12 of Act VI of 1868, which is far from clear, and that it was saved by Act XV of 1873, it would, as declared in s. 71 of Act XV of 1883, continue in force until repealed by new rules made under such last-mentioned Act, and be deemed to have been made under that Act. Its operation was therefore, in my opinion, subject to the provisions of Act XV of 1883; and among them, to that contained in s. 69, which made it a condition precedent to the institution of a prosecution against the petitioner, that there should be a complaint of the Municipal Board or of some person authorized by the Board in that behalf. It is not pretended or suggested that the Magistrate of the District acted other than entirely of his own motion and authority in causing proceedings to be taken against the petitioner, which he had no right to do; and, for aught that appears to the contrary, every other member of the Board never so much as heard that a prosecution was to be instituted. The words of s. 69 are mandatory, and as the petitioner from the outset urged this objection to the legality of the proceedings, I think he is entitled to the benefit of it now. The position of the Magistrate of the District in connection with the terms of s. 69 was neither better nor worse than that of any other member of the Board, and unless he had been duly authorized by the Board as a Board, he had no more "*locus standi*" to cause a prosecution to be instituted personally than [684] any other individual member. The Judge's remarks on this point are quite erroneous and very misleading. It is as well that Municipal Boards and the Magistrates should see that before prosecutions are instituted under the Municipal rules, care is taken that the requirements of s. 69 are satisfied. Those rules encroach on the ordinary rights of the public, and where their enforcement is directed by the statute to be attended by a certain safe-guard, that safe-guard must be respected and observed.

The conviction of the petitioner is quashed, and the fine will be refunded.

Conviction set aside.

NOTES.

[The complaint should be instituted by the proper officer:—20 Cal. 448; 654; 11 A. L. J. 721.]

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Of making an unstamped receipt. See ACT XLV OF 1860, s. 107.

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1. *Corroboration—Dacoity—Possession of stolen property.* Criminal Courts dealing with an approver's evidence in a case where several persons are charged should require corroboration of his statements in respect of the identity of each of the individuals accused. *Queen-Empress v. Ram Saran, Queen-Empress v. Kure and Reg. v. Mullins* referred to. A, B, M, R and N were tried together on a charge under s. 460 of the Penal Code. The principal evidence against all of them was that of an approver. Against A, B and M there was the further evidence that they produced certain portions of the property stolen on the night of the crime from the house where the crime was committed. With regard to R, it was proved that he was present when B pointed out the place where some of the property was dug up, but he did not appear to have said anything or given any directions about it. *Held*, with reference to A, B and M, that it could not be said that their recent possession of part of the stolen property, so soon after it had been stolen, was not such corroboration of the approver's evidence of their participation in the crime as entitled the Court to act upon his story in regard to those particular persons. *Held* that, inasmuch as there was no sufficient material to warrant the inference of guilty knowledge on R's part, and, with regard to N, no property was found with him or produced through his instrumentality, both R and N ought to have been acquitted.

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2. *Evidence—Corroboration.* Observations on the necessity of requiring corroboration, in material particulars, of the evidence of an accomplice. *Empress v. Ram Saran* referred to.

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3. *Evidence—Corroboration—Act I of 1872, ss. 114 (b), 133.* The law in India, as expressed in s. 133 and s. 114 of the Evidence Act, and which is in no respect different from the law of England on the subject, is that a conviction based on the uncorroborated testimony of an accomplice is not *illegal*, that is, it is not *unlawful*; but experience shows that it is unsafe, and hence it is the practice of the Judges, both in England and in India, when sitting alone, to guard their minds carefully against acting upon such evidence when uncorroborated, and, when trying a case with a jury, to warn the jury that such a course is unsafe. There must be some corroboration independent of the accomplice, or of a co-confessing prisoner, to show that the party accused was actually engaged directly in the commission of the crime charged against him. A second accomplice does not improve the position of the first, and, if there are two, it is necessary that both should be corroborated. The accomplice must be corroborated not only as to one, but as to all of the persons affected by the evidence, and corroboration of his evidence as to one prisoner does not entitle his evidence against another to be accepted without corroboration. *R. v. Webb, R. v. Dyke, R. v. Addis, and R. v. Wilkes* referred to. The possession of property taken from a murdered person is not adequate corroboration of the evidence of an accomplice charging such person in possession with participation in the murder; though it would no doubt be corroboration of evidence that the prisoner participated in a robbery, or that he had dishonestly received stolen property. In the trial of R, S, and M, upon a charge of murder, the evidence for the prosecution consisted of (i) the confession of P, who was jointly tried with them for the same offence; (ii) the evidence of an accomplice; (iii) the evidence of witnesses who deposed to the discovery in R's house of property belonging to the deceased; and (iv) the evidence of witnesses who deposed that, on the day when the deceased was last seen alive, all the prisoners were seen together near the place where the body was afterwards found. *Held*, that there was no sufficient corroboration of the statements of the accomplice or of the co-confessing prisoner P.

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XL of 1858—

- s. 3. *Certificate of administration—Right of holder of certificate to defend suits connected with minor's estate.* Under s. 3 of the Bengal Minors Act (XL of 1858), the Civil Court has no power to refuse to admit a person who has obtained a certificate of administration under the Act to defend a suit on the minor's behalf, as guardian of such minor. Where a Subordinate Judge had so acted,—*held* that the High Court had no power to revise his order under s. 622 of the Civil Procedure Code.

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- s. 26. See MAJORITY 1.

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- s. 222. *Irregularity in warrant of attachment preceding execution-sale.* An execution-sale of the right, title and interest in land was set aside by the Court on the ground that the warrant for the execution of the decree and order of attachment of the property sold had not been signed by the Judge, but by the Munsarim of the Court; and at a second sale the property was sold to other purchasers, who, as well as the judgment-debtor, were sued by the purchaser at the first sale for a declaration of his right to have the first sale confirmed. The High Court having held that, with reference to s. 222 of Act VIII of 1859, the first sale had been rightly set aside, an appeal to the Judicial Committee was dismissed with costs.

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X of 1859, s. 6. See MORTGAGE 1.

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XLV of 1860—

- s. 21. *Public servant.* Any person, whether receiving pay or not, who chooses to take upon himself duties and responsibilities belonging to the position of a public servant, and performs those duties, and accepts those responsibilities, and is recognized as filling the position of a public servant, must be regarded as one, and it does not lie in his mouth to say subsequently that, notwithstanding his performance of public duties and the recognition by others of such performance, he is not a "public servant" within the definition contained in s. 21 of the Penal Code.

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- ss. 24, 25. See s. 471.

- ss. 24, 25. *Act XLV of 1860, s. 218—Forgery—"Dishonestly"—"Fraudulently"—Public servant framing incorrect record.* A Treasury accountant was convicted of offences under ss. 218 and 465 of the Penal Code under the following circumstances:—A sum of Rs. 500, which was in the treasury and was payable to a particular person through a Civil Court, was drawn out and paid away to other persons by means of forged cheques. After the withdrawal of the Rs. 500, but before such withdrawal had been discovered, the representative of the payee applied for payment. The prisoner then upon two occasions wrote reports to the effect that the Rs. 500 in question then stood at the payee's credit as a revenue deposit, and that it was about to be transferred to the Civil Court. Upon the first of these reports, an order was signed by the Treasury Officer for the transfer of the money to the Civil Court concerned, and to effect such transfer a cheque was prepared by the sale-muharrir, which, as originally drawn up, related to the sum of Rs. 500 already mentioned. The signature of the cheque by the Treasury Officer was delayed for some time, and meanwhile the cheque was altered by the prisoner in such a manner as to make it relate to another deposit of Rs. 500 which had been made subsequently to the above, and to the credit of another person. The result of this was the transfer of the second payee's Rs. 500 to the Civil Court,

Act—(continued.)

XLV of 1860—(continued.)

as if it had been the first Rs. 500, and to the credit of the first payee's representative. The prisoner was convicted under s. 465 of the Penal Code in respect of the cheque, and under s. 218 in respect of the two reports above referred to. *Held*, with respect to the charge under s. 465, that the prisoner's immediate and more probable intention,—which alone, and not his remoter and less probable intention, should be attributed to him—was not to cause wrongful loss to the second payee by delaying payment of the Rs. 500 due to her, though the act might have caused her loss, but to conceal the previous fraudulent withdrawal of the first payee's Rs. 500; that under these circumstances he could not be said to have acted "dishonestly" or "fraudulently" within the meaning of s. 24 or s. 25 of the Penal Code; and that therefore his guilt under s. 465 had not been made out, and the conviction under that section must be set aside. *Held* also, that the prisoner's intention in making the false reports was to stave off the discovery of the previous fraud and save himself or the actual perpetrator of that fraud from legal punishment, and that having prepared the reports in a manner which he knew to be incorrect, he was rightly convicted under s. 218 of the Penal Code. *Held* further, that as the prisoner, who was a public servant, made these reports an assumed to make them in due course and as a part of his duty, and held them out as reports which were made by the proper officer, and as no question was put in the examination of the witnesses from the office which suggested that it was not his business to make such reports, it must be inferred that he made them because it was his business to do so, and as a public servant within the meaning of s. 218 of the Penal Code.

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s. 39. See S. 296.

s. 40. See SS. 224, 225.

s. 71. See MAGISTRATE, POWERS OF.

s. 79. See S. 296.

s. 99. See S. 353.

s. 107. *Act I of 1879 (Stamp Act), s. 61—Abetment of making an unstamped receipt.* A debtor, having paid a sum of money to his creditor, accepted from the latter an unstamped receipt, promising to affix a stamp thereto. *Held* that this did not constitute abetment, within the meaning of s. 107 of the Penal Code, of the offence of making an unstamped receipt. *Empress v. Bahadur Singh* distinguished; *Empress v. Janki* and *Empress v. Bhairon* referred to.

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ss. 146, 147, 149. See OFFENCE.

s. 147. See CRIMINAL PROCEDURE CODE, s. 35.

s. 182. *Prosecution under s. 182—Criminal Procedure Code, s. 195.* A prosecution under s. 182 of the Penal Code may be instituted by a private person, provided that he first obtains the sanction of the public officer to whom the false information was given, or of his official superior. *Queen-Empress v. Radha Kishan* overruled. Where a specific false charge is made, the proper section for proceedings to be adopted under is s. 211 of the Penal Code.

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s. 189. *Threat of injury to public servant—Necessity of proving actual words used.* In a prosecution for an offence under s. 189 of the Penal Code, the witnesses differed as to the exact words used by the prisoner in threatening the public servant, though they agreed as to the general effect of those words. The Magistrate, however, considered that the offence was clearly proved, and convicted the prisoner. The Sessions Judge, on appeal, affirmed the conviction, observing that it was immaterial what the words used were, and that the intention and effect of the words were plain. *Held* that the Judge was mistaken in regarding it as immaterial what the words used actually were, and that, on the contrary, it was most material that those words should be before the Court to enable it to ascertain whether, in fact, a threat of injury to the public servant was really made by the accused.

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s. 193. *Criminal Procedure Code, sch. V, No. XXVIII (4)—Alternative charges—Contradictory statements—Assignment of false statements not necessary.* In a charge under s. 193 of the Penal Code it is not necessary to allege which of two contradictory statements upon oath is false, but it is sufficient, (unless some satisfactory explanation of the contradiction should be established), to warrant a conviction of the offence of giving false evidence to show that an accused person has made one statement upon oath at one time and a directly contradictory statement

Act—(continued.)**XLV of 1860—(continued.)**

at another. *R. v. Zumeerun, R. v. Palany Chetty, and R. v. Mahomed Hoomayoon Shaw* followed: *Empress v. Niaz Ali* overruled. *Per DUTHOIT, J.*—Every possible presumption in favour of a reconciliation of the two statements should be made, and it must be found that they are absolutely irreconcilable before a conviction can be had upon the ground that one of them is necessarily false. The English cases upon this subject are irrelevant to the interpretation of the law of India, since the Indian Legislature has not followed the law of England in regard to perjury. *Trimble v. Hill* and *Kathama Natchiar v. Dorasinga Tever* referred to. **QUEEN-EMPRESS v. GHULET** ... VII 44

- s. 201. In a trial upon a charge under s. 201 of the Penal Code, the accused made a statement to the effect that he was present at the commission of a murder by two other persons, that he himself took no part in the act, that before the murder was committed one of the persons named pulled off a *razai* from the bed on which the deceased was sleeping, and that, in his presence, the *razai* was subsequently concealed in a stack. It was proved that the *razai* belonged to the deceased, that it was found concealed in a stack and that it was pointed out by the accused to the Police. The accused was convicted of concealing evidence of the murder, with the intention of screening the offender from legal punishment under s. 201 of the Penal Code. *Held* that the conviction must be quashed, inasmuch as if the *razai* had not been concealed or destroyed, its presence or existence would have been no evidence of the murder. A person who is concerned as a principal in the commission of a crime cannot be convicted of the secondary offence of concealing evidence of the crime.

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- s. 201. Section 201 of the Penal Code does not apply to the case of a criminal causing disappearance of evidence of his own crime, but only to the case of a person who screens the principal or actual offender. *Queen v. Ram Soonder Shootar, Reg. v. Kashinath Dinkar, Empress v. Kishna, Empress v. Behala Bibi, and Queen-Empress v. Lalli* referred to.

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- s. 211. Prosecution for making a false charge—Opportunity to accused to prove the truth of charge—Criminal Procedure Code, s. 195. A complaint of offences under ss. 323 and 379 of the Penal Code was referred to the Police for inquiry. The Police reported that the charge was a false one, and thereupon the Magistrate of the District passed an order, under s. 195 of the Criminal Procedure Code, directing the prosecution of the complainants for making a false charge, under s. 211 of the Penal Code. *Held*, that the order under s. 195 of the Criminal Procedure Code should not have been passed until the complainants had been afforded an opportunity of proving their case, which had been thrown out merely on the report of the Police. *The Government v. Karindad* referred to.

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- s. 218. See ss. 24, 25.

- ss. 224, 225. Arrest of person required to give security for good behaviour—Escape from such arrest—Conviction for such escape illegal—Act XLV of 1860, s. 40—Criminal Procedure Code, ss. 55, 110, 117, 118. An order was issued to a Police officer directing him to arrest K, under s. 58 of the Criminal Procedure Code, as a person of bad livelihood. K, with the assistance of three others, resisted apprehension and escaped. *Held* that K was not charged with an "offence" within the meaning of that term as defined in s. 40 of the Penal Code, and that consequently no offence made punishable by s. 224 or s. 225 of the Penal Code had been committed in connection with his evasion of arrest. *Empress v. Shasti Churn Napit* followed.

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- s. 291. Public nuisance, repeating or continuing—Injunction by public servant not to repeat or continue—Criminal Procedure Code, ss. 134, 143, 144, sch. V, Form 20. To support a conviction under s. 291 of the Penal Code there must be proof of an injunction to the accused individually against repeating or continuing the same particular public nuisance. It must be shown that the person convicted had on some previous occasion committed the particular nuisance, had been enjoined not to repeat or continue it, and had repeated or continued it. The authority under which a Magistrate can order or enjoin a person against repeating or continuing a public nuisance is s. 143 of the Criminal Procedure Code. It is the infringement of this order that is punishable under s. 291 of the Penal Code. What is contemplated is an order addressed to a particular person. A Magistrate's powers to deal with public nuisances are contained in Chs. X

Act—(continued.)

Act of 1860—(continued.)

and XI of the Criminal Procedure Code. Chapter XI is only properly applicable to temporary orders in urgent cases. It is only in such cases that an order may be made *ex parte*, and any exception is allowed to the general rule that it shall be directed to a particular individual. In such emergent cases an order may, under s. 144 of the Code, be directed to the public generally, when frequenting or visiting a particular place, to abstain from a certain act; but this provision does not apply to a proclamation directed not to the public generally frequenting or visiting a particular place, but to a portion of the community.

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s. 296. *Act XLV of 1860, ss. 39, 79—Disturbing a religious assembly—Muhammadan Law—Hanafia and Shafia Schools—Right to say 'amen' loudly during worship—Act VI of 1871, s. 24—Act I of 1872, s. 57 (1)—Muhammadan Ecclesiastical Law—Judicial notice.* A *masjid* was used by the members of a sect of Muhammadans called the Hanifis, according to whose tenets the word "amen" should be spoken in a low tone of voice. While the Hanifis were at prayers, R, a Muhammadan of another sect, entered the *masjid*, and in the course of the prayers, according to the tenets of his sect, called out "amen" in a loud tone of voice. For this act he was convicted of voluntarily disturbing an assembly engaged in religious worship, an offence punishable under s. 296 of the Penal Code. The Full Bench (MAHMOOD, J., *dissenting*) ordered the case to be re-tried, and that, in re-trying it, the Magistrate should have regard to the following questions, namely, (1) Was there an assembly lawfully engaged in the performance of religious worship? (2) Was such assembly, in fact, disturbed by the accused? (3) Was such disturbance caused by acts and conduct on the part of the accused by which he intended to cause such disturbance, or which acts and conduct, at the time of such acts and conduct, he knew or believed to be likely to cause such disturbance? *Held* by MAHMOOD, J., that the discussion occasioned by the act of the accused having, presumably, taken place during the interval when the prayers were not going on, the assembly was not at that time "engaged in the performance of religious worship," and was not "disturbed" within the meaning of s. 296 of the Penal Code; that, in reference to the terms of s. 39 of the Code, the accused did not disturb the assembly "voluntarily"; that he was justified by the Muhammadan ecclesiastical law in entering the mosque and joining the congregation in saying the word "amen" loudly if he thought fit, and his conduct fell within the purview of s. 79 of the Penal Code, and was therefore not an offence under s. 296. *Beatty v. Gillbanks* referred to. Also *per* MAHMOOD, J., that, having regard to the guarantee given by the Legislature in s. 24 of Act VI of 1871 (Bengal Civil Courts Act), that the Muhammadan law shall be administered in all questions regarding "any religious usage or institution," the Court was bound by s. 57 (1) of Act I of 1872 (Evidence Act) to take judicial notice of the Muhammadan ecclesiastical law, and the rules of that law need not be proved by specific evidence.

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s. 300, Exception 1. See MURDER 1, 2.

ss. 302; 304. *Grave and sudden provocation.* See MURDER 1, 2.

s. 325. See CRIMINAL PROCEDURE CODE, s. 35. OFFENCE.

s. 353. *Act XLV of 1860, s. 99—Warrant of arrest in execution of a decree only initialised by proper officer—Civil Procedure Code, ss. 2, 251—Right of private defence.* A warrant issued for the arrest of a debtor under the provisions of s. 251 of the Civil Procedure Code, was initialised by the Munsarim of the Court, sealed with the seal of the Court, and delivered to the proper officer for execution. The debtor forcibly resisted the officer, and was tried and convicted, under s. 353 of the Penal Code, of assaulting a public servant in the execution of his duty as such. In revision, it was contended, with reference to the requirements of s. 251 of the Civil Procedure Code, that the warrant of arrest, having been initialised only, was ~~bad~~ and the officer could not legally execute it, and consequently no offence under s. 353 of the Penal Code had been committed. *Held*, that this contention could not be allowed, and, although it was proper that the person signing a warrant should write his name in full, it could not be said that because the signature was confined to the initials of the name, it was not the duty of the officer to execute the warrant. *Held* also, with reference to s. 99 of the Penal Code, that the act of the accused did not cease to be an offence on the ground that it was done in the exercise of the right of private defence.

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ss. 403; 410. See s. 411.

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Act—(continued.)

XLV of 1860—(concluded.)

s. 411. Animal "*nullius inquit*"—Bull set at large in accordance with Hindu religious usage—Appropriation of bull—Act XLV of 1860, ss. 403, 410. A person was convicted and sentenced under s. 411 of the Indian Penal Code for dishonestly receiving a bull knowing the same to have been criminally misappropriated. It was found that, at the time of the alleged misappropriation, the bull had been set at large by some Hindu, in accordance with Hindu religious usage, at the time of performing funeral ceremonies. Held, that the bull was not, at the time of the alleged misappropriation, "property" within the meaning of the Indian Penal Code, inasmuch as not only was it not the subject of ownership by any person, but the original owner had surrendered all his rights as its proprietor; that it was therefore "*nullius inquit*," and incapable of larceny, being committed in respect of it; and that the conviction must be set aside.

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s. 417. See ATTEMPT TO CHEAT.

ss. 459, 460. Sections 459 and 460 of the Penal Code provide for a compound offence, the governing incident of which is that either a "lurking house-trespass" or "house-breaking" must have been completed, in order to make a person who accompanies that offence either by causing grievous hurt or attempt to cause death or grievous hurt responsible under those sections. The sections must be construed strictly, and they are not applicable where the principal act done by the accused person amounts to no more than a mere attempt to commit lurking house-trespass or house-breaking.

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s. 464, cl. 3. See SS. 24, 25.

s. 471. Act XLV of 1860, ss. 24, 25—*Fraudulently using as genuine a forged document*—"Dishonestly"—"Fraudulently." In a trial upon a charge, under s. 471 of the Penal Code, of fraudulently or dishonestly using as genuine documents known to be forged, it was found that four forged receipts for the payment of rent used by the prisoner, had been fabricated in lieu of genuine receipts which had been lost. Held that, with reference to the definitions of the terms "dishonestly" and "fraudulently" in ss. 24 and 25 of the Penal Code, the prisoner, upon the facts as found, had not committed the offence punishable under s. 471.

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s. 471. Act XLV of 1860, ss. 24, 25—*Fraudulently using as genuine a forged document*—"Dishonestly"—"Fraudulently." The creditors of a Police-constable applied to the District Superintendent of Police that Rs. 2 might be deducted monthly from the debtor's pay until the debt was satisfied. Upon an order being passed directing that the deduction asked for should be made, the debtor produced a receipt purporting to be a receipt for Rs. 18, the whole amount due. It subsequently appeared that the receipt was one for Rs. 8, which had been altered by adding the figure "1," so as to make it appear that the receipt was for Rs. 18. Held that the real intent in the prisoner's mind being to induce his superior officer to refrain from the illegal act of stopping a portion of his salary, the Court in a criminal case ought not to speculate as to some other intent over and above this that might have presented itself to him; that it did not necessarily follow that he contemplated setting up the altered receipt to defeat his creditor's claim; and that therefore he ought not to have been convicted of an offence under s. 471 of the Penal Code.

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s. 499. *Defamation—Communication of defamatory matter to complainant only*—"Making"—"Publishing." Held by the Full Bench (DUTHOIT, J., dissenting) that the action of a person who sent to a public officer by post in a closed cover a notice under s. 424 of the Civil Procedure Code, containing imputations on the character of the recipient, but which was not communicated by the accused to any third person, was not such a making or publishing of the matter complained of as to constitute an offence within the terms of s. 499 of the Penal Code.

QUEEN-EMPRESS v. TAKI HUSAIN ... VII 205

s. 511. See ATTEMPT TO CHEAT.

IX of 1861, s. 5. See MUHAMMADAN LAW 1.

XX of 1863, ss. 14, 15, 18. See SUIT 1.

XI of 1863, s. 6. See SMALL CAUSE COURT SUIT 1.

XVI of 1868, ss. 13, 15, 16. See JURISDICTION 6.

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V of 1870—

- ss. 6, 12, 28. See COURT-FEES 1.
- s. 7, art. ix. See MORTGAGE 7.
- s. 10. *Dismissal of suit under cl. ii.* See CIVIL PROCEDURE CODE, s. 13.
- s. 17. See COURT-FEES 2.
- sch. II, No. 11. See CIVIL PROCEDURE CODE, ss. 322 B, 322 D.
- Statute, Construction of.* See MORTGAGE 7.

X of 1870—

- s. 15. *Reference by Collector to District Court—Land claimed by Collector on behalf of Government or Municipality.*—The scope and object of the Land Acquisition Act (X of 1870) is to provide a speedy method for deciding the amount of the compensation payable by the Collector, when such amount is disputed, and the person or persons to whom it is payable. Section 15 of the Land Acquisition Act contemplates a reference when the question of the title to the land arises between the claimants who appear in response to the notice issued under s. 9, and who set up conflicting claims one against another as to the land required, which the District Judge as between such persons can determine. The Collector has no power to make a reference to the District Judge under s. 15 in cases in which he claims the land in question on behalf of Government or the Municipality, and denies the title of other claimants and the District Judge has no jurisdiction to entertain or determine such reference.

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XIV of 1870. *Regulation XXXIV of 1803, ss. 9, 10.* See MORTGAGE 15.

VI of 1871—

- ss. 19, 20. See JURISDICTION 6.
- s. 20. See MORTGAGE 7.
- s. 24. See ACT XLV of 1860, s. 296: CONDITION RESTRAINING ALIENATION: MISSING PERSON: PRE-EMPTION 10.

VIII of 1871—

- s. 17 (4). *Lease—Lease from year to year—Act III of 1877, s. 49.* In a suit for possession of a piece of land, and for rent of the same, the plaintiff produced in support of his claim two *sarkhats* or *kabuliyats* purporting to be executed in his favour by the defendants, and dated respectively in January 1875, and June 1876. These documents were not registered. The first after reciting that the executant had taken the land from the plaintiff, on a specified yearly rent, and promised to pay the same yearly, proceeded as follows:—"If the owner of the land wishes to have it vacated, he shall give me fifteen days' notice, and I will vacate without making objection: if I delay in vacating the land the owner can realize, by recourse to law, rent from me at the rate of Rs. 8 per annum." The second *sarkhat*, after reciting that the executants had taken the land from the plaintiff on a yearly rent specified, for six years, and promised to pay the same year by year, proceeded thus:—"And if the said Shaikh wishes to have the land vacated within the said term he shall first give us fifteen days' notice and we will vacate it without objection." The lower Courts held that the *sarkhats* were not admissible in evidence as they required registration under s. 17 (4) of the Registration Act (VIII of 1871), being leases of immoveable property from year to year or reserving a yearly rent. *Held*, that the two *sarkhats* cited no rights except those of tenants-at-will, inasmuch as the clause common to both to the effect that at any time, at the will of the lessor, the lessees were to give up the land at fifteen days' notice, governed all the previous clauses, and the defendants could be asked to quit at any time before the lapse of the term at fifteen days' notice. *Held*, therefore, that the leases did not fall under s. 17 (4) of Act VIII of 1871; that their registration was not compulsory; and that they could not be excluded from evidence under s. 49 of Act III of 1877, which governed the question of admissibility, while Act VIII of 1871 governed the question whether registration was or was not compulsory.

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- ss. 28, 35. See REGISTRATION.

IX of 1871—

Schedule II—

No. 65. See NO. 132.

No. 132. *Limitation—Periods respectively applicable to personal demands and to claims charged on immoveable property.* That there is a personal liability upon an instrument charging a debt upon immoveable property does not carry with it

Act—(continued.)**IX of 1871—(continued.)**

the effect that the period of limitation fixed for personal demands by Act IX of 1871 is extended, by reason of this demand being thereby brought within the meaning of art. 132 of sch. II of that Act, which applies to claims "for money charged upon immoveable property." A mortgage of lands sought, after the lapse of more than six years from the date when the mortgage-money was payable, to enforce two distinct remedies, the one against the property mortgaged, and the other against the mortgagor personally, on the contract to repay the mortgage-money. *Held* that art. 132 abovementioned applied only to suits to raise money charged on immoveable property out of that property: and that the twelve years' bar did not apply to the personal remedy, as to which the shorter period prescribed in art. 65 of the same schedule applied.

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XXIII of 1871—

s. 12. *Assignment of pension before passing of Act.* On the 12th February 1865, A, who was in receipt of a *zilahki* pension from Government, assigned by deed a portion thereof to his wife, in lieu of her dower. After his death, disputes arose between the wife and the heirs of A in regard to a portion of the amount thus settled on her; and she instituted a suit, on a certificate granted by the Collector under s. 6 of the Pensions Act (XXIII of 1871), in which she prayed for a declaration of her proprietary right in respect of the said money and of her power to transfer the same. *Held* that the assignment of the 12th February 1865, having been made before the passing of the Pensions Act, was not invalidated by s. 12 of that Act, which had no retrospective operation. The former judgment of the Court in this appeal reversed.

IMTIAZ BEGAM v. LIAKAT-UN-NISSA BEGAM VII 886

I of 1872—

s. 3. "*Fact.*" See ACT I OF 1872, s. 32 (1).

s. 8, Explanations 1, 2. See ACT I OF 1872, s. 32 (1).

s. 9. See ACT I OF 1872, s. 32 (1).

ss. 26, 30. See CONFESSION.

s. 32 (1). *Statement as to cause of death—Cause of death signified in answer to question—Admissibility of evidence as to signs—Act I of 1872, s. 3, s. 8, Explanations 1, 2, s. 9—"Fact"—"Conduct"—"Verbal" statement.* In a trial upon a charge of murder, it appeared that the deceased shortly before her death was questioned by various persons as to the circumstances in which the injuries had been inflicted on her; that she was at that time unable to speak, but was conscious and able to make signs. Evidence was offered by the prosecution, and admitted by the Sessions Judge, to prove the questions put to the deceased and the signs made by her in answer to such questions. *Held* by the Full Bench (MAHMOOD, J., *dissenting*) that the questions and the signs taken together might properly be regarded as "verbal statements" made by a person as to the cause of her death within the meaning of s. 32 of the Evidence Act, and were therefore admissible in evidence under that section. *Per* STRAIGHT, J., that statements by the witnesses as to their impressions of what the signs meant were inadmissible and should be eliminated; but that assuming that the questions put to the deceased were responded to by her in such a manner as to leave no doubt in the mind of the Court as to her meaning, it was not straining the construction to hold that the circumstances were covered by s. 32. *Per* MAHMOOD, J., that the expression "verbal statements" in s. 32 should be confined to statements made by means of a word or words, and that the signs made by the deceased, not being verbal statements in this sense, were not admissible in evidence under that section. *Per* PETHERAM, C. J., that the signs could not be proved as "conduct" within the meaning of s. 8 of the Evidence Act, inasmuch as taken alone, and without reference to the questions leading to them, there was nothing to connect them with the cause of death, and so to make them relevant; while the questions could not be proved either under *Explanation 2* of s. 8 or under s. 9, inasmuch as the condition precedent to their admissibility under either of these provisions was the relevancy of the conduct which they were alleged to affect or of the facts which they were intended to explain. The "conduct" made relevant by s. 8 is conduct which is directly and immediately influenced by a fact in issue or relevant fact, and it does not include actions resulting from some intermediate cause, such as questions or suggestions by other persons. *Per* MAHMOOD, J., that the word "conduct" as used in s. 8 does not mean only such conduct as is directly and immediately influenced by a fact in issue

Act—(continued.)

I of 1872—(continued.)

or relevant fact; that the signs made by the deceased were the conduct of "a person an offence against whom was the subject of any proceeding" and were relevant as such under s. 8, and that the questions put to her were admissible in evidence either under *Explanation 2* of the same section, or under s. 9, by way of an explanation of the meaning of the signs.

QUEEN-EMPRESS v. ABDULLAH ... VII 385

s. 33. See CRIMINAL PROCEDURE CODE, s. 512.

s. 57 (1). See ACT XLV OF 1860, s. 296.

ss. 63 (c), 114, Ill. (g). *Secondary evidence—Copy of a copy—Surt for redemption of mortgage—Burden of proof—Withholding evidence*. A deed executed in 1812 became the subject of litigation resulting, on the 17th May 1813, in a decree the effect of which was to create a usufructuary mortgage of rights and interests in two villages. In 1871, the purchaser of a portion of the mortgagor's rights, alleging that the mortgage-debt had been liquidated from the usufruct, sued to recover possession of the property. The mortgagees resisted the claim for possession, on the grounds that, prior to the execution of the deed in 1812, the mortgagor's ancestor had granted to their own ancestor a *gawanda-dari* right, under which a fixed *jama* of Rs. 121 was payable by them in respect of the lands in the village; that what was mortgaged was not the lands, but only the right to receive the fixed *jama*; and that, therefore, the fact that the mortgage-money had been liquidated from the *jama* did not entitle the plaintiff to oust them from possession. It appeared that the alleged *gawanda-pattar*, the original mortgage-deed, and the decree of the 17th May 1813, were at one time in the defendants' possession, but the defendants alleged that all three documents were destroyed by fire in 1872. The plaintiff sought to support his case by putting in a copy on plain paper purporting to have been transcribed from a certified copy of the decree of the 17th May 1813. *Held*, with reference to the provisions of s. 63 of the Evidence Act (I of 1872), that, there being no evidence proving that the copy produced by the plaintiff had been compared with the original decree, the copy was not admissible in evidence, inasmuch as it could not be regarded either as primary or as secondary evidence of the contents of the original decree. *Held* also, that the destruction or loss of the three documents alleged by the defendants to have been destroyed not being proved, their non-production placed them under the recognized prohibitions of the law of evidence, and subjected them to the presumption recognized by Ill. (g), s. 114 of the Evidence Act, that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. *Held* also, that inasmuch as the plaintiff was no party to the alleged *gawanda-pattar*, nor to the mortgage of 1812, nor to the litigation which resulted in the decree of the 17th May 1813, and could not therefore be taken to be in a position to produce these documents or to prove their contents by secondary evidence; and inasmuch as the circumstances established a *prima facie* case in his favour the burden of proof in regard to the existence of the alleged *gawanda-dari* tenure lay upon the defendants, who, whilst in a position which would involve their being in possession of the documents abovementioned and whilst admitting such possession up to the year 1872, had failed to prove either their destruction or their contents by secondary evidence such as could be relied on. *Rajah Kishen Dutt Ram Panday v. Narendar Bahadoor Singh* referred to.

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ss. 107, 108. *Missing person*. See HINDU LAW 3.

s. 108. See MISSING PERSON.

ss. 114 (b); 133. *Accomplice—Evidence—Corroboration*. See ACCOMPLICE 3.

ss. 115, 116. See ACT XVIII OF 1873, s. 9.

s. 157. See CRIMINAL PROCEDURE CODE, s. 512.

IX of 1872—

s. 2. See ACT XVIII OF 1873, s. 9: CONTRACT.

s. 10. See CONTRACT.

s. 11. See MAJORITY 1 AND 2.

s. 23. See ACT XVIII OF 1873, s. 9. CONTRACT.

s. 28. See CONTRACT.

ss. 42, 45. See DEBT.

ss. 69, 70. *Payment of Government revenue by person wrongfully in possession of land*. B, who was in wrongful possession of land which by right belonged to K, collected rents and paid the Government revenue. K eventually established her

Act—(continued.)

IX of 1872—(continued.)

title to the property, obtained possession, and recovered the rents from the tenants, and B was obliged to refund the same. Subsequently B sued K to recover the sum which he had paid on account of revenue. *Held* that the claim did not fall within the provisions of ss. 69 and 70 of the Contract Act, and the fact that the plaintiff had been a loser by his wrongful act, or that the defendant had been benefited by the payment he made, would give him no right of action against her. *Tiluck Chand v. Soudamini Dasi* referred to.

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ss. 134; 137; 139; 141. See **SURETY**.

s. 265. See **JURISDICTION 13**.

XV of 1873, s. 38. See **PUBLIC HIGHWAY**.

XVIII of 1873—

See **SIR LAND 1**.

s. 9. See **LANDHOLDER AND TENANT 2**.

s. 9. *Sale of occupancy rights with zamindar's consent—Acceptance of rent by zamindar from vendees—Act IX of 1872, ss. 2, 23—Estoppel—Act I of 1872, ss. 115, 116.* Under a deed dated in 1879, the occupancy-tenants of land in a village sold their occupancy-rights, and the zamindars instituted a suit for a declaration that the sale deed was invalid under s. 9 of Act XVIII of 1873 (the N.-W. P. Rent Act in force in 1879), and for ejectment of the vendees who had obtained possession of the land. It was found that the zamindars had consented to the sale to the vendees, and received from them arrears of rent due on the holding by the vendors, and had recognized them as tenants. *Held* by **OLDFIELD, J.**, that sales of occupancy-rights were not void under s. 9 of Act XVIII of 1873, when made with the consent of the landlord; that the sale which the zamindars had consented to was valid; and that, under any circumstances, they were estopped by their conduct from bringing a suit to set aside the sale. *Umrao Begam v. The Land Mortgage Bank of India* referred to. *Per MAHMOOD, J.*—That the sale-deed was invalid with reference to the provisions of ss. 2 and 23 of the Contract Act, inasmuch as its object was the transfer of occupancy-rights, which was prohibited by s. 9 of Act XVIII of 1873. *Umrao Begam v. The Land Mortgage Bank of India*, distinguished. Also *per MAHMOOD, J.*—That s. 115 of the Evidence Act implies that no declaration, act, or omission will amount to an estoppel, unless it has caused the person whom it concerns to alter his position, and to do this he must both believe in the facts stated or suggested by it, and must act upon such belief; that in the present case it could not be said that the vendee was misled by the fact that the zamindars were consenting parties to the sale-deed; that he could not plead ignorance that the deed was unlawful and void; that it had not been shown that he acted upon the zamindars' agreement to take no action, so as to alter his position with reference to the land; and that, under these circumstances, the zamindars were not estopped from maintaining that the sale-deed was invalid. Also *per MAHMOOD, J.*—That the zamindars having accepted the vendees as tenants and taken from them, a tenancy was thereby constituted under the Rent Law; that the vendees were therefore not trespassers; and that therefore the question as to ejectment did not fall within the jurisdiction of the Civil Court.

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s. 9. *Sale of occupancy-rights with zamindar's consent—Acceptance of rent by zamindar from vendees—Act IX of 1872, ss. 2, 23—Estoppel—Act I of 1872, ss. 115, 116.* Under a deed dated in 1879 the occupancy tenants of land in a village sold their occupancy-rights, and the zamindars thereupon instituted a suit for a declaration that the sale-deed was invalid under s. 9 of Act XVIII of 1873 (the N.-W.P. Rent Act in force in 1879), and for ejectment of the vendees, who had obtained possession of the land. It was found that the zamindars had consented to the sale to the vendees, and received from them arrears of rent due on the holding by the vendors, and had recognized them as tenants. *Held* by the Full Bench that the sale-deed was invalid with reference to the provisions of ss. 2 and 23 of the Contract Act, inasmuch as its object was the transfer of occupancy-rights, which was prohibited by s. 9 of Act XVIII of 1873. *Held* also, that s. 115 of the Evidence Act implies that no declaration, act, or omission will amount to an estoppel, unless it has caused the person whom it concerns to alter his position, and to do this he must both believe in the facts stated or suggested by it and must act upon such belief; that in the present case it could not be said that the vendees were misled by the fact that the zamindars were consenting parties to the sale-deed; that they could not plead ignorance that the deed was unlawful

Act—(continued.)

XVIII of 1873—(continued.)

- and void ; that it had not been shown that they acted upon the zamindars' agreement to take no-action, so as to alter their position with reference to the land ; and that, under these circumstances, the zamindars were not estopped from maintaining that the sale-deed was invalid. *Held* also that the zamindars having accepted the vendees as tenants and taken rent from them, a tenancy was thereby constituted under the Rent Law ; that the vendees were therefore not trespassers ; and that therefore the question as to ejectment did not fall within the jurisdiction of the Civil Court. The judgment of OLDFIELD, J., reversed and that of MAHMOOD, J., affirmed.

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XIX of 1873—

s. 3 (4). "*Rent*"—*Services*. See RENT-FREE GRANT.

ss. 43. See MORTGAGE 2.

ss. 56; 62, 64. See CIVIL PROCEDURE CODE, s. 13.

ss. 79-89. See RENT-FREE GRANT.

s. 91. See WAJIB-UL-ARZ.

s. 113. *Civil and Revenue Courts—Question of proprietary right decided by Revenue Court under Act XIX of 1873 (N.-W. P. Land Revenue Act), s. 113—Omission by Revenue Court to frame decree—Decision of Revenue Court not open to attack by suit in Civil Court—Act XIX of 1873, s. 113.* A Revenue Court acting under the provisions of ss. 112 and 113 of the N.-W. P. Land Revenue Act (XIX of 1873) recorded a proceeding declaring the nature and extent of the respective rights of the parties before the Court, and prescribing the mode in which partition should be effected. No decree was framed in accordance with this proceeding. *Held*, that the proceeding of the Revenue Court was a decision by a Court of competent jurisdiction, and could not be interfered with by a suit in the Civil Court disputing its correctness.

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ss. 159, 165. See MORTGAGE 2.

ss. 194, 195. *Act VIII of 1879, s. 20—Court of Wards—Disqualified proprietor—Release of property from superintendence of Court.* M, a female proprietor, brought a suit to recover possession of certain lands, which were in the hands of the Collector, as manager of the Court of Wards, on the allegations that she had placed the property in the hands of the Court some years previously because she was not at that time in a position to manage it herself, but that she was now capable of managing it and desired to get it back. The suit was dismissed, and the plaintiff appealed on the ground, *inter alia*, that inasmuch as she was not a "disqualified proprietor" within the meaning of Act XIX of 1873 (N.-W.P. Land Revenue Act), the Court of Wards had no jurisdiction to take the property, and that its possession was merely the result of an arrangement to which she was a consenting party, and which she now desired to terminate. *Held* that, with reference to the provisions of Act XIX of 1873 and Act VIII of 1879 (N.-W. P. Land Revenue Acts), the suit as brought was not maintainable, inasmuch as there was no evidence that the plaintiff had obtained the previous sanction of the Local Government to the release of the property from the superintendence of the Court of Wards as required by s. 20 of the latter Act. *Held* also, that the plaintiff could not be allowed in appeal entirely to change the nature of the grounds upon which she alleged herself to be entitled to claim relief, and that hence she could not now raise the plea that the Court of Wards, in taking the property under its management, had acted without jurisdiction. The expression "Local Government" in ss. 194 and 195 of Act XIX of 1873 and s. 20 of Act VIII of 1879 means the Lieutenant-Governor of the North-Western Provinces.

MASUMA BIBI v. THE COLLECTOR OF BALLIA VII 687

s. 241. See JURISDICTION 10.

s. 241 (a). See JURISDICTION 11.

s. 241 (g). See CIVIL PROCEDURE CODE, s. 13.

s. 241 (h). See JURISDICTION 4: RENT-FREE GRANT.

IX of 1875—

See MAJORITY 2.

s. 2 (c). See MAJORITY 1.

Act—(continued.)**I of 1877—**

- s. 21. *Agreement to refer to arbitration—Refusal to refer—Suit in respect of matter agreed to be referred—Pleadings.* One of the parties to a contract to refer a controversy to arbitration brought a suit for part of the subject-matter referred. The defendants pleaded the bar of s. 21 of the Specific Relief Act, but did not allege in their answer to the plaint that the plaintiff refused to perform his contract. *Held*, that the mere act of filing the suit on the part of the plaintiff was not tantamount to a refusal to perform his contract, in the sense of s. 21 of the Specific Relief Act. The contract, the existence of which would bar a suit under the circumstances contemplated by s. 21 of the Specific Relief Act, must be an operative contract, and not a contract broken up by the conduct of all the parties to it.

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- s. 42. See LANDHOLDER AND TENANT 5 : SALE IN EXECUTION OF DECREE : SUIT 1.

- s. 42. *Civil Procedure Code*, s. 578. See HINDU LAW 2.

- s. 42. *Hindu widow—Mortgage by Hindu widow in possession of property in lieu of maintenance—Declaratory Decree.* The name of the widow of a member of a joint Hindu family was allowed by the other members to be recorded in her husband's place in respect of his rights and interests in the family property by way of compliment to her, and they consented that, in lieu of maintenance, she should receive the profits of the property during her lifetime. The widow executed a deed of mortgage of the property, which did not specifically state the amount of the estate mortgaged, and also a bond, upon which the obligee obtained a decree, in execution whereof he attached part of the property recorded in the name of the obligor. The members of the family brought a suit in which they prayed for a declaration that the mortgage executed by the widow was invalid, and that the property was not liable for the amount due thereunder, or to attachment in execution of the decree obtained upon the bond. *Held*, that if the widow's possession were only a possession by the plaintiffs' consent entitling her merely to receive the profits for her maintenance, the plaintiffs might eject her from the property, and that before they could obtain a declaration under s. 42 of the Specific Relief Act, they must seek their relief by ejectment, that being the substantial and real relief appropriate to the cause of action. On the other hand, if the widow had an estate in possession, given to her in exchange for her maintenance, she had an interest which she was competent to alienate. *Held* also, that inasmuch as the deed of mortgage contained no description of the amount of the estate mortgaged by the widow, and, upon its face, mortgaged her share of the property only, it could have no operation beyond her share, and the Court would not be justified in granting a declaration under s. 42 of the Specific Relief Act, merely because the plaintiffs apprehended some possible future claim based upon the allegation that the transfer comprised the entire estate.

BHOLAI v. KALI VIII 70

- s. 42. *Suit to set aside a decree on the ground of fraud.* Subsequent to a decree for partition of an ancestral estate, the creditors of one of the parties thereto who, from the time of the suit, had borrowed money from them on the security of his rights and interests in the estate, brought a suit against their debtor and obtained a decree for the moneys due to them. They then sued all the parties to the partition for a declaration that the decree then passed was, so far as it affected their (the plaintiffs') interests, fraudulent and collusive and of no effect. *Held* that the suit was not maintainable.

RAM SARUP v. RUKMIN KUAR VII 884

III of 1877—

- ss. 17 (d) ; 18 (c). See LEASE 2.

- ss. 17, 49. *Effect of a registered instrument confirming a prior one of the same purport not registered.* An instrument purporting to assign a right in immovables of more than the value of Rs. 100 (s. 17 sub-sec. b of Act III of 1877) being unregistered was ineffectual to affect the title of the purchaser. Some years after, the parties executed a deed of conveyance, making the same assignment, confirming the former instrument, and setting it forth in a schedule. The latter instrument was registered. In a suit in which the ownership of the property was contested,—*held* that the fact of the prior deed not having affected the property, being unregistered, was no reason why the deed afterwards registered should not be admitted as evidence of title. In this there had been nothing contravening the object of the Registration Act.

ALEXANDER MITCHELL v. MATHURA DAS VIII 6

Act—(continued.)

III of 1877—(continued.)

s. 49. See ACT VIII OF 1871, s. 17 (4).

s. 50. See CIVIL PROCEDURE CODE, s. 295: MORTGAGE 4.

s. 50. *Mortgage—First and second mortgages—Registered and unregistered documents—Fraudulent transfer—Act IV of 1882, s. 53.* Apart from any question of equitable estoppel, such as described by Lord Cairns in the *Agra Bank v. Barry*, where one person takes a possessory mortgage of property with full knowledge and notice that another is already in possession of such property under an earlier instrument of a similar kind, he cannot be said to be acting in good faith, and the principle of s. 53 of the Transfer of Property Act (IV of 1882) is applicable to such a transaction. In such a condition of circumstances, *quoad* the prior title, though created by an unregistered instrument, the status of the second mortgagee under his registered document is affected by his own *mala fides*; and as, on the one hand, the first mortgagee might avoid it on the ground that it was executed in fraud of him, so, on the other, the second mortgagee cannot, on the strength of his own fraud, pray in aid the provisions of the Registration Law to give preference to an instrument which records a transaction that, in its inception, being fraudulent, was a *nudum pactum*. Such document would not be a "document" in the sense of s. 50 of the Registration Act, which term as therein used means a document legally enforceable. *Rahmat-ulla v. Sarint-ulla* referred to. In a suit for possession of immoveable property by virtue of a registered instrument of mortgage executed in 1883, against a defendant in possession of the same property under an unregistered mortgage-deed of 1881 (both deeds being instruments the registration of which was not compulsory), it was found as a fact that at the time of the execution and registration of his mortgage-deed the plaintiff was aware that the defendant was in possession under his mortgage. *Held* that, under these circumstances, the fact that the plaintiff's deed was registered did not entitle him to dispossess the defendant by virtue of the provisions of s. 50 of the Registration Act (III of 1877).

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s. 50. *Registered and unregistered documents—Mortgagee under registered deed competing with holder of decree on prior unregistered mortgage-deed.* The words in s. 50 of the Registration Act (III of 1877) "not being a decree or order, whether such unregistered document be of the same nature as the registered document or not," mean that, if a decree has been obtained to bring property to sale under a hypothecation-bond, or under a money bond, and under that decree the property has been attached, that decree cannot be ousted by a subsequent registered instrument. The section cannot in any way make a decree effect a transfer of more than the interest which the judgment-debtor possessed. *Held*, that a mortgage-deed registered under Act III of 1877 was entitled to priority over a decree obtained subsequently to the registration of such deed upon a prior unregistered deed of mortgage. *Kanhaiya Lal v. Bansidhar, Shahar Ram v. Shib Lal, and Madar v. Subbarayalu* referred to.

THE HIMALAYA BANK, LIMITED v. THE SIMLA BANK, LIMITED ...

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s. 50. *Registered and unregistered documents—Mortgagee under registered deed not entitled to priority over holder of subsequent decree on prior unregistered deed.* The mortgagee under an unregistered hypothecation bond, of which the registration was optional, obtained a decree thereon, and, in execution of such decree, attached the hypothecated property. *Held*, with reference to the terms of s. 50 of the Registration Act (III of 1877), that the bond, having merged in the decree, was entitled to take effect against a registered bond relating to the same property, and which was executed subsequently to the unregistered bond, but prior to the decree. *Kanhaiya Lal v. Bansidhar and Shahu Ram v. Shib Lal* distinguished.

BAIJNATH v. LACHMAN DAS ...

... VII 888

XV of 1877—

s. f. See APPEAL 4.

s. 5. See PRE-EMPTION 2.

s. 10. See TRUST.

s. 14. "*Prosecuting*" — "*Good faith*" — "*Other cause of a like nature*" — *Limitation Act. Construction of.* In October 1881, an account was struck between K and M and a sum of Rs. 1,457 was agreed between them to be the correct balance then due by the latter to the former. Of this amount a sum of Rs. 885 was paid. In March 1885, K sued M for the balance of Rs. 600 then due on the account stated. The plaintiff claimed the benefit of s. 14 of the Limitation Act (XV of 1877) as suspending the running of limitation during the pendency of a

Act—(continued.)

XV of 1877—(continued.)

former suit which he had prosecuted against the defendant in 1884 and 1885, and which had been dismissed on the merits. That was a suit for the redemption of certain zamindari property on which the defendant held a mortgage, and the plaintiff claimed in that suit that the amount of the balance due by the defendant on the account stated should be deducted from the mortgage-money under an oral agreement entered into by the parties in October 1881. *Held*, that the plaintiff could not be said to have formerly prosecuted his remedy in respect of the items now claimed in a Court which, for want of jurisdiction, or other cause of a like nature, was unable to entertain it; that the provisions of s. 14 of the Limitation Act therefore were not applicable; and that the suit was barred by limitation. *Per STRAIGHT, OFFG. C. J.*—The former suit was not founded upon the same cause of action as the present, inasmuch as it was founded upon the alleged oral agreement and not upon the account stated. *Per MAHMOOD, J.*—The Courts of British India in applying Acts of Limitation are not bound by the rule established by a balance of authority in England, that statutes of this description must be construed strictly. On the contrary, such Acts, where their language is ambiguous or indistinct, should receive a liberal interpretation, and be treated as "statutes of repose" and not as of a penal character or as imposing burdens. *Roddam v. Morley, Syed Ali Saib v. Sri Raja Sanyasiraz Peddabaliyra Simhula Bahadur, Empress v. Kola Lalang, Bell v. Morrison, Shah Keramat Hossein v. Gulab Koonwur, and Muhammad Bahadoor Khan v. The Collector of Bareilly* referred to.

MANGU LAL v. KANDHAI LAL

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s. 19. See EXECUTION OF DECREE 7.

s. 22. See SET-OFF 1.

Schedule II—

No. 10. See PRE-EMPTION 15.

No. 32. *Landholder and tenant—Suit for the removal of trees.* See JURISDICTION 9.

Nos. 52; 53. See SET-OFF 1.

No. 62. See NO. 97: TRUST.

No. 83. See SET-OFF 1.

No. 89. See TRUST.

No. 97. *Suit for money paid by a pre-emptor under a decree for pre-emption which has become void—Act XV of 1877, sch. II, Nos. 62, 120—Suit for money had and received for plaintiff's use—Suit for money paid upon an existing consideration 'which afterwards fails.'* Pending an appeal from a decree for pre-emption in respect of certain property conditional upon payment of Rs. 1,595 the pre-emptor decree-holder, in August 1880, applied for possession of the property in execution of the decree, alleging payment of the Rs. 1,595 to the judgment-debtors out of Court, and filing a receipt given by them for the money. This application was ultimately struck off. In April 1881, judgment was given in the appeal, increasing the amount to be paid by the decree-holder to Rs. 1,994, which was to be deposited in Court within a certain time. The decree-holder did not deposit the balance thus directed to be paid, and the decree for possession of the property accordingly became void. In 1882, the decree-holder assigned to K his right to recover from the judgment-debtors the sum of Rs. 1,595, which he had paid to them in August 1880. In December 1883, K sued the judgment-debtors for recovery of the Rs. 1,595 with interest. *Held*, that No. 62 of the Limitation Act did not govern the suit, but that No. 97, and, if not, No. 120, would apply, and the suit was therefore not barred by limitation.

KOJI RAM v. ISHAR DAS

VIII 278

No. 118. *Limitation—Suit to obtain a declaration that an alleged adoption is invalid or never took place—Suit for possession of immoveable property—Act XV of 1877, sch. II, No. 141.* Article 118 of the Limitation Act applies only to suits where the relief claimed is purely for a declaration that an alleged adoption is invalid or never in fact took place. Such a suit is distinct from a suit for possession of property, and the latter kind of suit cannot be held to be barred as a suit brought under art. 118, merely by reason of its raising a question of the validity of an adoption, but is separately provided for by art. 141. It is discretionary in a Court to grant relief by a declaration of a right, and consequently the fact that a person has not sued for a declaration should not be a bar to a suit for possession of property on any ground of limitation prescribed for the former. In a suit by a person who had objected to an attachment of immoveable

Act—(continued.)

XV, of 1877—(continued.)

Schedule II—(continued.)

property in execution of a decree, and whose objection had been disallowed, to set aside the order disallowing the objection, for removal of the attachment, and for possession of the property, the defendants, at whose instance the attachment had been made, set up a title based on the adoption of the judgment-debtor by the widow of the person whom the plaintiff claimed to succeed by right of inheritance. *Held*, that the limitation applicable to the suit was art. 141 and not art. 118 of the Limitation Act (XV of 1877) the suit being not to obtain any declaration that the alleged adoption was invalid, but for recovery of possession of immoveable property, for which there was a special limitation.

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No. 120. See NO. 97. **PRE-EMPTION 6 AND 15 : TRUST.**

No. 132. *Suit for money charged on rents and profits—Suit for money charged on immoveable property.* K borrowed from C a sum of Rs. 571, and at the same time executed a bond, whereby he mortgaged usufructually to his creditor his "entire right and share" in a particular estate, in lieu of the above-mentioned sum; and it was agreed that C might realize the debt from the rents and profits of two years, and that, as soon as it had been realized, his possession should cease. *Held* that the money borrowed by K was "money charged upon immoveable property," it being charged upon rents and profits in *alieno solo* which, in English law, would be classed as "incorporeal hereditaments," but which in the law of India are included in immoveable property; and that therefore the limitation applicable to a suit for the recovery of the money was that provided in No. 132, sch. II of Act XV of 1877 (Limitation Act). *Dulli v. Bahadur and Pestonji Bezonji v. Abdool Rahiman* dissented from; *Maharana Futtehsangji Jaswantsangji v. Desai Kulhanraji Hakoomutrai* referred to. *Lallubhai v. Naran* followed.

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No. 134. See **MORTGAGE 6.**

No. 141. See NO. 118.

No. 144. See **ADVERSE POSSESSION.**

No. 148. See **MORTGAGE 6.**

No. 156. See **PRE-EMPTION 2.**

No. 158. See **ARBITRATION 1.**

No. 164. Where a property had been attached in execution of a decree,—*held* that the date on which the property was attached, and not the date of the sale in execution, being the date of executing the first process for enforcing the decree, was the date from which limitation should be computed under art 164, sch. II of Act XV of 1877. *Pachu v. Jaikishen* referred to. A Court which admits an application to set aside a decree *ex parte* after the true period of limitation has expired, acts in the exercise of its jurisdiction, illegally and with material irregularity within the meaning of s. 622 of the Civil Procedure Code, and such action may therefore be made the subject of revision by the High Court under that section. *Amir Hasan Khan v. Sheo Baksh Singh and Magn Ram v. Jiwa Lal* commented on by MAHMOOD, J. *Per* MAHMOOD, J.—The term "jurisdiction" as used by their Lordships of the Privy Council in *Amir Hasan Khan v. Sheo Baksh Singh* must be understood in its broad legal sense signifying the power of administering justice according to the means which the law has provided, and subject to the limitations imposed by the law upon the judicial authority.

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No. 171 B. See **APPEAL 2.**

No. 178. See **EXECUTION OF DECREE 1, 3 AND 13.**

No. 178. *Amendment of decree—Civil Procedure Code, s 206.* See **CIVIL PROCEDURE CODE, s. 622.**

No. 179. See **EXECUTION OF DECREE 1, 2 AND 13.**

No. 179. *Execution of decree—Application for "step in aid of execution"—Application by pleader for execution after decree-holder's death.* Where a decree-holder died without taking out execution of his decree, and, two days after his death, his pleader made an application for execution on his behalf, this being the first application of the kind,—*held* that, inasmuch as the authority of a pleader ceases at the moment of his client's death, the application was invalid, and was not such an application or step in aid of execution of the decree as could save a subsequent application for execution by the decree-holder's heirs from being barred by limitation.

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Act—(continued.)

XV of 1877—(continued.)

Schedule II—(continued.)

No. 179 (2). "*Decree*"—*Order rejecting memorandum of appeal for deficiency of court-fee.* An appeal from a decree dated the 8th July 1879, was rejected by the High Court on the 11th June 1880, in consequence of the failure of the appellants to pay additional court-fees declared by the Court to be leviable. On the 23rd December 1882, an application was filed by the decree-holder for execution of the decree. *Held*, with reference to Act XV of 1877 (Limitation Act), sch. II, No. 179 (2), that the order of the 11th June 1880, rejecting the appeal on the ground of deficient payment of court-fee, was equivalent to a decree, and therefore the application, being made not more than three years from the date of that order, was not barred by limitation.

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No. 179 (2). *Execution of decree—Limitation.* Article 179, cl. (2), of the Limitation Act (XV of 1877) must be construed as intended to apply without any exceptions to decrees from which an appeal has been lodged by any of the parties to the original proceedings, and should certainly be applied to cases where the whole decree was imperilled by the appeal. A suit for pre-emption was decreed against the vendors, the purchaser, and another set of pre-emptors, in March 1882. The last-mentioned defendants alone appealed, and their appeal was dismissed in May 1882. In May 1885, the decree-holders applied for execution of the decree. The application was objected to by the purchaser as barred by limitation, having been filed more than three years from the passing of the decree, and it was contended that art. 179, cl. (2), did not apply to the case, inasmuch as the purchaser did not appeal from the original decree. *Held*, that art. 179, cl. (2), of the Limitation Act was applicable, and that the application, being made within three years from the date of the Appellate Court's decree, was not barred by limitation. *Hur Proshad Roy v. Enayet Hossein and Sangram Singh v. Bujharat Singh* distinguished. *Mullick Ahmed Zumma v. Mahomed Syed and Ram Lal v. Jagannath* relied on.

NUR-UL-HASAN v. MUHAMMAD HASAN

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No. 179 (4). See CIVIL PROCEDURE CODE, s. 583.

No. 179 (4). *Execution of decree—Application withdrawn by decree-holder—Limitation—Civil Procedure Code*, ss. 374, 647. The holder of a decree for money dated the 7th June 1879 applied on the 20th July 1880, for execution thereof, but it appeared that in certain particulars the decree required correction, and it was therefore ordered, at the request of the pleader for the decree-holder, that the application should be dismissed and the decree returned to him for amendment. The next application for execution of the decree was made by the decree-holder on the 19th February 1883. *Held* that the application of the 20th July 1880, having been put in and afterwards taken back by the decree-holder, the proceeding became to all intents and purposes as though no application had been made; that therefore it could have no effect as an application made in accordance with law for execution within the meaning of art. 179, sch. II, of the Limitation Act; that applying the rule contained in s. 374 of the Civil Procedure Code, in accordance with s. 647, to the application for execution of the 19th February 1883, the question of limitation must be determined as if the first application had never been filed; and that the application now in question was consequently barred by limitation. *Ramanadan Chetti v. Periatambi Shervai* dissented from. *Pirjade v. Pirjade* referred to.

KIFAYAT ALI v. RAM SINGH

... VII 359

No. 179 (4). *Execution of decree—Limitation—Transmission of decree for execution—Application for execution of attached decree—"Step in aid of execution"—Civil Procedure Code*, ss. 223, 228, 273. A decree was passed on the 20th February 1878, by the Munsif of M. In November 1878, it was, in accordance with the provisions of s. 223 of the Civil Procedure Code, transferred to the Munsif of J. On the 21st January 1879, an application for execution of the decree was made to the Munsif of J, who thereupon issued an order for the attachment of some immoveable property belonging to the judgment-debtor and also for the attachment of three decrees standing in his Court in favour of the judgment-debtor against other persons. On the 18th March 1882, the decree-holder applied to the Munsif of J to execute one of these decrees in his behalf, and he further asked that whatever might be realized in such execution should go to the account of the decree which had been transferred and which was being executed. *Held* that the application of the 18th March 1882, was perfectly legal, and such a proceeding as could keep alive the decree of the 20th February 1878, and that

Act—(continued.)

XV of 1877—(concluded.)

• Schedule II—(concluded.)

- a subsequent application for execution dated the 12th April 1883, was therefore not barred by limitation. An application to execute an attached decree is a "step in aid of execution" of the original decree, within the meaning of art. 179, sch. II, of the Limitation Act, inasmuch as its object is to obtain money in order to pay off the judgment-debtor.

LACHMAN v. THONDI RAM ... VII 362

No. 179 (A). "*Step in aid of execution of decree.*" R, in a suit against S and other persons, obtained a decree on the 24th December 1878, S being exempted from the decree and being awarded costs against the plaintiff. In executing his decree, R, on the 16th June 1880, sought to set off the costs awarded to S against the amount due to himself. On the 6th August 1880, S preferred objections to this course. On the 19th July 1883, S applied for execution of his decree for costs. *Held* that the application was barred by limitation, inasmuch as art. 179 (4) of the Limitation Act requires that the decree-holder should make a direct and independent application for execution on his own account, and it was not sufficient to satisfy the requirements of the law to offer objections under the circumstances under which they were offered in the present case.

SHIB LAL v. RADHA KISHEN ... VII 898

No. 179 (6). See EXECUTION OF DECREE 12.

I of 1879, s. 61. See ACT XLV OF 1860, s. 107.

VIII of 1879, s. 20. See ACT XIX OF 1873, SS. 191, 195.

XVIII of 1879—

- s. 12. *Conviction of pleader of criminal offence—Case reported to the High Court—Argument allowed to show that conviction was illegal.* A District Judge reported to the High Court for orders the case of a pleader who had been convicted of cheating under s. 417 of the Penal Code, and who, in the opinion of the District Judge, was unfit to be allowed to practice. Upon the hearing of the case, counsel was permitted to go behind the conviction in order to show that the acts of the pleader did not amount at law to the offence of cheating.

IN RE DURGA CHARAN ... VII 290

XII of 1881—

s. 2. See LANDHOLDER AND TENANT. 2.

s. 3 (2). "*Rent—Services.*" See RENT-FREE GRANT.

s. 7. See EX-PROPRIETARY TENANT 1 AND 2: SIR LAND 1 AND 2.

s. 7. *Ex-proprietary tenant—Trees.* See EX-PROPRIETARY TENANT 2.

s. 7. *Meaning of "held."* See SIR LAND 1 AND 2.

- s. 7. *Usufructuary mortgage—Ex-proprietary tenant—Sir-land.* *Held* by the Full Bench (OLDFIELD and BRODHURST, J.J., dissenting) that a person who creates a usufructuary mortgage of zamindari property becomes an ex-proprietary or occupancy tenant of the sir-land under s. 7 of the N.-W.P. Rent Act (XII of 1881). *Per* PETHERAM, C.J.—A usufructuary mortgagee is for the time being the proprietor of the property, inasmuch as a proprietor is the person entitled to exclusive possession at the time; and the intention of the Legislature, as expressed in s. 7 of the Rent Act, is that when a zamindar ceases to be entitled to occupy the sir-land as proprietor, he shall have the right to occupy it as an ex-proprietary tenant under s. 5. *Bhagwan Singh v. Murl Singh* dissented from. *Per* STRAIGHT, J.—The words "lose" and "part with" in s. 7 of the Rent Act were intended to cover all cases in which a proprietor of land has either voluntarily or by operation of law deprived himself, permanently or temporarily, of the power to exercise full proprietary right over his property. *Per* MAHMOOD, J.—The meaning of the words "proprietary right" in s. 7 of the Rent Act is equivalent to that of the term "full ownership," corresponding to *dominium* in the Roman law and fee-simple estate in English law. The right of a usufructuary mortgagee cannot be called proprietorship; and having regard to s. 58 of the Transfer of Property Act, the execution of a usufructuary mortgage does not amount to a transfer of the proprietary right. The word "lose" as used in s. 7 of the Rent Act means the transfer of proprietary rights otherwise than by the will of the owner in consequence of some incident of law. The term "part with" is a general expression, including both absolute and temporary alienation, and a usufructuary mortgage is a "parting with" some of the incidents of ownership and falls within the purview of s. 7, inasmuch as the rights of possession and of the enjoyment of the usufruct are transferred from the mortgagor to the mortgagee, though such a transfer does not amount to

Act—(continued.)**XII of 1881—(continued.)**

a total alienation of proprietorship. *Bhagwan Singh v. Murli Singh* dissented from; *Gopal Pandey v. Parsotam Das, Ganga Din v. Dhurandhar Singh and Gulab Rai v. Indar Singh* referred to. *Per* OLDFIELD, J.—The words “lose or part with his proprietary rights in any mahal” in s. 7 of the Rent Act, mean a loss or parting which divests absolutely of all proprietary rights, leaving no interest of a proprietary kind in the mahal; this does not happen in a usufructuary mortgage, and therefore the latter is not a loss of or parting with proprietary rights within the meaning of s. 7. *Bhagwan Singh v. Murli Singh* approved. *Per* BRODHURST, J.—The word “lose” in s. 7 of the Rent Act means involuntarily lose, as, for instance, by auction-sale, and “part with” means voluntarily and entirely divested of by means, e.g., of gift or private sale. “Proprietary rights” mean the whole of the proprietary rights; and a usufructuary mortgagor of zamindari property cannot be said to have lost or parted with his proprietary rights therein, and therefore does not, under the provisions of s. 7 of the Rent Act, become an ex-proprietor or occupancy-tenant of the sir-land.

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ss. 7, 9. *Sir-land—Sale of sir-land by co-sharer—Validity of transfer—Ex-proprietary tenant—Right of occupancy.* Held by PETHERAM, C.J., and STRAIGHT, OLDFIELD, and BRODHURST, JJ., that the question whether the proprietary rights of a co-sharer in the *sir* of a mahal are distinct and separate from the proprietary rights in the mahal itself, so as to enable the owner of one share to sell and give possession of his *sir* alone as against his co-sharers, must be determined with reference to the tenure and conditions under which land is held in the mahal by the coparceners, to be ascertained in each case. *Per* PETHERAM, C.J., and STRAIGHT and OLDFIELD, JJ.—In zamindari tenures, in which the whole land is held and managed in common, a co-sharer cannot convey his right of occupancy in the *sir* as something distinct from his proprietary rights in the mahal. In pattidari tenures in which the lands are divided and held in severalty, each proprietor managing his own lands, there may be lands which come within the classification of *sir* given in the Rent Act, but they would not seem to be on a different footing from any other land held in severalty by a proprietor. *Per* BRODHURST, J.—So long as a person in the sole proprietor of a mahal, he is not restrained by any law from effecting a sale of his proprietary rights in his *sir-land*, even though he retains possession of the whole of the other lands of the mahal. *Per* MAHMOOD, J.—That the proprietary rights of a joint co-sharer in his *sir-land* from an essential part of his rights in the mahal; that such proprietary rights in the *sir-land* may be sold, but that the purchaser under such a sale could not obtain any such possession as would operate in defeasance of the ex-proprietary right in such *sir-land* conferred by s. 7, and secured by s. 9 of the Rent Act. *Sahib Ram v. Kishen Singh, Hazari Lal v. Ugrah Rai, Gulab Rai v. Indar Singh and Tirmal Singh v. Bhola Singh* referred to.

SITAL PRASAD *v.* AMTUL BIBI ... VII

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s. 8. See LANDHOLDER AND TENANT 6: MORTGAGE 1.

s. 9. See LANDHOLDER AND TENANT 1, 2 AND 6: OCCUPANCY TENANT.

s. 10. See JURISDICTION 7.

s. 30. See JURISDICTION 4: RENT-FREE GRANT.

s. 31. See LANDHOLDER AND TENANT 1.

s. 93 (b). See JURISDICTION 9: OCCUPANCY TENANT.

s. 93 (d). See JURISDICTION 1.

s. 93 (g). See LAMBARDAR AND CO-SHARER 1.

s. 93 (h). “Recorded co-sharer.” Held that a co-sharer of a mahal whose share was recorded in “*shamlat*” with all the other pattidars, but was not specifically defined in the *khevat* in a fractional or separate form, was a “recorded co-sharer” within the meaning of s. 93 (h) of the N.-W.P. Rent Act (XII of 1881).

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s. 93 (h). *Village expenses—Expenses of cultivating sir-land held in partnership by plaintiff and defendant.* A recorded co-sharer of a mahal sued the lambardar for his share of the profits of the mahal for the year 1286 fasli. At the time of the institution of the suit, the profits for 1287 and 1288 also were due, but no claim was then made in respect of them. The suit was struck off on account of the non-appearance of the parties under s. 140 of Act XII of 1881 (N.-W.P. Rent Act), with leave to the plaintiff to bring a fresh suit. Subsequently, the plaintiff brought a suit against the same defendant for his share of the profits of mahal for 1287 and 1288 fasli. Held that the suit was not barred by the provisions of s. 43 of the Civil Procedure Code. Held also, that the Courts below had properly

Act—(continued.)**XII of 1881—(concluded.)**

refused to deduct from the plaintiff's claim as "village expenses," within the meaning of s. 93 (h) of the Rent Act, certain charges on account of the expenses of cultivation of sir²land held in partnership by the plaintiff and the defendant.

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ss. 95 (a). See JURISDICTION 7.

s. 95 (c). See JURISDICTION 4: RENT-FREE GRANT.

s. 95 (l). See EX-PROPRIETARY TENANT 1.

s. 95 (n)^e. See JURISDICTION 3, 5 AND 8.

s. 140. See CIVIL PROCEDURE CODE, s. 43.

s. 149. See OCCUPANCY TENANT.

s. 209. See LAMBARDAR AND CO-SHARER 2.

XXVI of 1881, ss. 35, 43. See MAJORITY 2.

IV of 1882—

§. 2. *Regulation XXXIV of 1803*, ss. 9, 10. See MORTGAGE 15.

ss. 2; 10. See CONDITION RESTRAINING ALIENATION.

ss. 10, 11. See VENDOR AND PURCHASER 1.

s. 41. *Transfer by ostensible owner*. See SIR LAND 1.

s. 48. See SIR LAND 1.

s. 51. See MORTGAGE 14.

s. 53. See ACT III OF 1877, s. 50.

s. 54. See PRE-EMPTION 16.

s. 58. See PRE-EMPTION 8 AND 18.

s. 78. See CIVIL PROCEDURE CODE, s. 13.

ss. 83, 84. See MORTGAGE 14.

s. 85. See CIVIL PROCEDURE CODE, s. 13.

ss. 86, 88. See EXECUTION OF DECREE 9.

ss. 95; 100. See MORTGAGE 6.

s. 100. See PRE-EMPTION 18.

s. 106. See LANDHOLDER AND TENANT 3 AND 4.

s. 111. See LANDHOLDER AND TENANT 4

Mortgage—Foreclosure—Regulation XVII of 1806, s. 8.—*Suit for possession of mortgaged property*. See MORTGAGE 8

V of 1882, ss. 60, 61. See LICENSE.

VIII of 1882—

s. 4. See CRIMINAL PROCEDURE CODE, s. 35.

XV of 1883—

s. 69. *Act XV of 1883*, s. 71—*Municipal rules—Infringement of rules—Prosecutions—N.-W. P. Government Notification No. 865, dated the 3rd November 1869—Rule VI, Fidelity of*. Municipal Boards and Magistrates should see that before prosecutions are instituted under the Municipal rules, care is taken that the requirements of s. 69 of Act XV of 1883 (N.-W. P. and Oudh Municipalities Act) are satisfied. A District Magistrate, who was also Chairman of a Municipal Board, having information that a certain person had evaded the payment of octroi duty, directed his prosecution for breach of Municipal rules. The Magistrate in thus causing proceedings to be taken, acted wholly of his own motion and authority. The accused was tried and convicted under Rule 6, Government, N.-W. P. Notification No. 865, dated the 3rd November 1869, read with s. 45 of Act XV of 1873 (N.-W. P. and Oudh Municipalities Act). This rule provided that any person evading or abetting the evasion of the octroi duties specified in a schedule, should be deemed to have committed an infringement of a bye-law. It purported to have been made under s. 12 of Act VI of 1868 (Municipal Improvements Act, N.-W. P.), which authorized the making of "rules as to the persons by whom, and the manner in which, any assessment of taxes under this Act shall be confirmed, and for the collection of such taxes." *Held*, that assuming the rule to have been legally made under s. 12 of Act VI of 1868, which was not clear, and that it was saved by s. 2 of Act XV of 1873, it would as declared in s. 71 of Act XV of 1883 (N.-W. P. and Oudh Municipalities Act) continue in force until repealed by new rules made under such last-mentioned Act, and be deemed to have been made under that Act, and its operation was therefore subject to the provisions of that Act, and among them to s. 69, which made it a condition precedent to the institution of a prosecution against the petitioner, that there should be a complaint of the Municipal Board or of some person authorized by the Board in that behalf. *Held*, that the position of the Magistrate of the District in connection with s. 65 was neither better nor worse than that of any other member of the Board, and unless he had been duly

Act—(concluded.)

XV of 1883—(concluded.)

authorized by the Board as a Board, he had no more *locus standi* to cause a prosecution to be instituted personally than any other individual member; and the words of s. 69 being mandatory, and the petitioner having from the outset urged this objection to the legality of the proceedings, he was entitled to the benefit of it now, and the conviction was illegal and must be set aside.

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s. 71. See s. 69.

Adjustment of Decree—

Uncertified. See CONTRACT.

Adoption—

Jains—Hindu Law. See JAINS.

Of sister's son. See HINDU LAW 1.

Admission by Co-defendant—

In a suit for possession of immoveable property brought by three Muhammadan brothers, their three sisters were impleaded as defendants under s. 32 of the Civil Procedure Code, and two of the latter subsequently filed a written statement, in which, after stating that they were on good terms with their brothers, the plaintiffs, and that the suit had been instituted with their knowledge and permission, they prayed that the suit might be decreed, subject to the condition that they would, on some future occasion, "settle with their own brothers as to their right and costs." The third sister did not appear to defend the suit. *Held* that the lower Courts were wrong in treating this admission as sufficient to entitle the plaintiffs to a decree for possession, not only of their own share, but also of the shares of their three sisters, it being a fundamental proposition connected with the administration of justice that the plaintiff cannot sue for more than his own right, and that no defendant can, by an admission or consent of this kind, convey the right or delegate the authority to one for more than his own share in property. *Lachman Singh v. Tansakh* referred to.

AZIZULLAH KHAN v. AHMAD ALI KHAN VII 353

Adverse Possession—

Mortgage—Suit by mortgagee for possession of mortgaged property—Pre-emption—Purchaser for value without notice—Act XV of 1877, sch. II, No. 144. Under a registered deed of mortgage dated in May 1869, the mortgagee had a right to immediate possession; but by arrangement between the parties, the mortgagors remained in possession, the right of the mortgagee to obtain possession as against them being, however, kept alive. In October 1869, the mortgagors sold the property, and thereupon, one R brought a suit to enforce the right of pre-emption in respect of the sale and obtained a decree, and got the property and sold it in 1871 to D. In 1883 the mortgagee brought a suit against D to obtain possession under his mortgage. *Held*, with reference to a plea of adverse possession for more than twelve years set up by the defendant, that the position of a person who purchased property by asserting a right of pre-emption was not analogous to that of an auction-purchaser in execution of a decree, but that such person merely took the place of the original purchaser and entered into the same contract of sale with the vendor that the purchaser was making. There was privity between him and the vendor, and he came in under the vendor, and his holding must be taken to be in acknowledgment of all obligations created by his vendor. *Anundoo Moyee Dossee v. Dhonendro Chunder Mookerjee* distinguished. *Held* also, that although it would be material to show that the defendant had in any way by fraud been kept out of knowledge of the mortgage, his not having notice of it would not otherwise affect his liability, inasmuch as the principle on which Courts of Equity in England refuse to interfere against *bona fide* purchasers for a valuable consideration, without notice, when clothed with the legal title, had no applicability in the Courts of British India. *Held*, under these circumstances, that there was no equitable ground why the plaintiff's right under the mortgage, which had priority, should be defeated by the defendant's purchase.

DURGA PRASAD v. SHAMBHU NATH VIII 86

Agreement to refer to Arbitration—

See ACT I OF 1877, s. 21.

Alluvial Land—

See CIVIL PROCEDURE CODE, s. 320.

Alluvion—

Execution of decree—Decree for money—Property not attached—Such property not sold in execution—Submersion of contiguous estate. F owned a share in a village M, which in 1875 was divided into two separate mahals, K and U, and Government revenue was separately assessed on each mahal. In 1876, K was entirely submerged by the Ganges. On the 20th September 1877, F's share was sold in execution of a decree, and the auction-purchaser was put in possession. In the sale-certificate the village M was named, without specific mention of either of the two mahals, and the Government revenue referred to was the amount assessed on U only. Subsequently the river receded, and part of K was again left dry, and it was treated by the revenue authorities as having accreted by alluvion to U in the proprietary possession of the auction-purchaser. *Held* that this view was erroneous, inasmuch as, before the auction-sale of 20th September 1877, the two properties were separate, being separately assessed with revenue, and the incidents of the ownership of one could not affect the ownership of the other, and since there was no such rule of law as would justify the proposition that simply because two mahals are contiguous, and one of them is liable to be submerged, therefore it is nothing more or less than an accretion to the other. *Held* also, that inasmuch as the mahal K being at the time under water, was not attached in execution of the decree against F and was not advertised for sale, and the revenue assessed thereon was not referred to in the sale-proceedings, and the sale-certificate contained no reference to it as the property sold, the sale of the 20th September 1877, did not convey any rights to the auction-purchaser in respect of K. *Mahadeo Dubey v. Bhola Nath Dicit* referred to.

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"Ancestral" Property—

See CIVIL PROCEDURE CODE, s. 320.

Appeal—

See ARBITRATION 1, 2: CIVIL PROCEDURE CODE, s. 44, RULE (a); ss. 66, 103, 107; ss. 311, 312; ss. 322B, 322D; s. 381; ss. 556, 558: EX PARTE DECREE 1: PRACTICE 2 AND 3: REMAND: SUIT 4.

1. *Abatement of. Application for declaration of insolvency—Appeal from order rejecting application—Death of decree-holder respondent—No application by appellant for substitution of deceased's representative—Act XV of 1877, sch. II, No. 171 B—Civil Procedure Code, ss. 344-348, 350, 351, 368, 553, 582, 590.* The decree-holder respondent in an appeal from an order refusing an application by the judgment-debtor for declaration of insolvency under s. 344 of the Civil Procedure Code, died, and the judgment-debtor, appellant, took no steps to have the legal representative of the deceased substituted as respondent in his place. *Held* that art. 171 B, sch. II of the Limitation Act (XV of 1877) applied to the case, and that, as no one had been brought on the record to represent the deceased respondent within the period prescribed, the appeal must abate. *Per* MAHMOOD, J., that whatever the position of the parties might have been in the regular suit, in the insolvency proceedings the judgment-debtor occupied a position analogous to that of a plaintiff, and the decree-holder occupied the position of a defendant. *Narain Das v. Lajja Ram* distinguished.

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2. *Abatement of. Death of plaintiff-respondent—No application for substitution of deceased's representative—Civil Procedure Code, ss. 368, 582—Act XV of 1877, sch. II, art. 171B.* *Held* by the Full Bench (MAHMOOD, J., dissenting), that s. 582 of the Civil Procedure Code does not make the provisions of Ch. XXI relating to the death of a defendant in a suit applicable to the death of a plaintiff-respondent in an appeal, so as to render it obligatory on the defendant appellant to make an application to the Court praying that the legal representatives of the deceased be made parties to the appeal; and that, where there has been no such application, the appeal does not abate. *Per* PETHERAM, C.J.—The words "so far as may be" in the second clause of the first paragraph of s. 582, must be construed as meaning "so far as may be necessary to carry into effect the remedies contemplated by Ch. XXI." *Per* MAHMOOD, J., *contra*, that the object of s. 582 of the Civil Procedure Code is to obviate the necessity of repeating the provisions of Ch. XXI, so as to make them applicable to appeals, and the words "appellant" and "respondent" as used in the section include both plaintiffs and defendants in an appeal; that the whole Code maintains the analogy between the position of a respondent and that of a defendant for the purpose of

Appeal—(continued.)

being impleaded and brought before the Court; that Ch. XXI applies to cases where a plaintiff-respondent has died; and that, in such a case, and where no application has been made, within the period prescribed therefor, praying that the legal representatives of the deceased be made parties in his place, the appeal abates. Also *per* MAHMOOD, J.—The word “defendant” as used in art. 171 B of the Limitation Act (XV of 1877) must be taken to include a respondent, whether plaintiff or defendant in the suit. *Lakshmibai v. Balkrishna, Rajmonee Dabee v. Chunder Kant Sandel, and Bai Javer v. Hathising Kesrising* referred to. *NARAIN DAS v. LAJJA RAM* ... VII 693

Act IX of 1861, s. 5. See MUHAMMADAN LAW 1.

3. *Decree—Judgment—Objections by respondent to decree—Res judicata—Civil Procedure Code, ss. 13, 540, 561, 584.* In a suit to obtain possession of certain property and to set aside a deed called a deed of endowment (*wakf-nama*), on the ground that the defendant had fraudulently obtained its execution, the defendant pleaded (i) that the deed was a valid one, and (ii) that she was in possession of the property in satisfaction of a dower-debt, and her possession could not be disturbed so long as the debt remained unsatisfied. The Court of First Instance held that the deed was invalid, but that the defendant was entitled to remain in possession of the property till her dower-debt was satisfied, and the Court passed a decree which merely dismissed the suit, without embodying the finding as to the deed. On appeal by the plaintiff to the District Judge, the defendant filed objections under s. 561 of the Civil Procedure Code in regard to the first Court's decision that the deed of endowment was invalid. The Judge dismissed the plaintiff's appeal, affirming the finding as to dower, and, refusing to decide the question of the validity of the deed as being unnecessary for disposal of the claim, disallowed the defendant's objections. The defendant appealed to the High Court. *Held* by the Full Bench (OLDFIELD and MAHMOOD, JJ., *dissenting*) that if a decree is, upon the face of it, entirely in favour of a party to a suit, such decree being the thing which by law is made appealable, and nothing else, that party has no right of appeal therefrom. If, in the judgment of which such decree is the formal expression, findings have been recorded upon some issues against that party, and he desires to have formal effect given to them by the decree, so as to allow of his filing objections thereto under s. 561 of the Civil Procedure Code or of appealing therefrom under s. 540, he must take steps under s. 206 to have the decree properly brought into conformity with the judgment, so that there may be matters on the face of it to show that something has been decided against him; but if he fails to take this course, the decree, though in general terms, will stand good as finally deciding the issues raised by the pleadings upon which the ultimate determination of the cause and the decree itself rested. The findings in a judgment upon matters which subsequently turn out to be immaterial to the grounds upon which a suit is finally disposed of, as to the plaintiff's right to any portion of the relief sought by him as declared by the decree, amount to no more than *obiter dicta*, and do not constitute a final decision of the kind contemplated by s. 13 of the Civil Procedure Code. *Held* also that, in the present case, the Judge was right in holding that the question as to the validity or otherwise of the deed of endowment was wholly immaterial. The judgment of STRAIGHT, J., in *Lachman Singh v. Mohan*, approved and followed. *Per* OLDFIELD, J., *contra*, that the decree, to agree with the judgment and fulfil the requirements of s. 206 of the Civil Procedure Code, should contain the material points for determination arising out of the claim and material for the decision thereon; that if this has not been done the defect is a good ground of appeal, notwithstanding that the decree, on its face, may be altogether in favour of the appellant, and notwithstanding that he may not have applied for amendment of the decree under s. 206, or for review of judgment; and that, in the present case, the defect in the decree would afford a good ground of appeal. *Per* MAHMOOD, J., that inasmuch as the provisions of s. 13 of the Civil Procedure Code relate as well as to the trial of issues as to the trial of suits, and in the present case the validity or otherwise of the deed was a matter directly and substantially in issue between the parties, and was adjudicated upon the finding of the first Court upon that issue was not a mere *obiter dictum*, but would be binding upon the defendant as *res judicata*, notwithstanding the fact that the suit against her was dismissed on the ground that she held possession of the property in lieu of dower; that whatever has the force of *res judicata* is necessarily appealable; that the word “from” as used in s. 540 or s. 584, and the expression “objection to the decree” in s. 561, refer not only to matters existing, upon the face of the decree, but also to those which should have existed, but do not exist there; and that the defendant in the present case was aggrieved or injured by the omission in the decree of the first

Appeal—(concluded.)

Court, and was therefore entitled to file objections to it, and for the same reason, to appeal to the High Court, from the decree of the lower Appellate Court. Also *per* MAHMOOD, J., that it was doubtful whether the reliefs contemplated by ss. 206 and 623 were open to the defendant; but that, even conceding that she sought to have sought her remedy under either of those sections, her neglect to do so did not make her incapable of obtaining the same result by the exercise of her right of appeal. *Anusuyabai v. Sakharam Pandurang*; *Man Singh v. Narayan Das*; *Mohan Lal v. Ram Diql Niamat Khan v. Phadu Buldia* and *Pan Koor v. Bhagwant Koor* referred to.

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4. Memorandum of. *Civil Procedure Code*, ss. 2, 54 (c), 582, 622—"Decree"—*Order rejecting plaint*—*Plaint held to include memorandum of appeal*—*Order rejecting appeal*—*Act XV of 1877, s. 4*—*High Court's powers of revision*. An order rejecting a memorandum of appeal as barred by limitation is a "decree" within the meaning of s. 2 of the *Civil Procedure Code*; it is therefore appealable, and not open to revision by the High Court under s. 622 of the Code. *Gajraj Singh v. Bhagwant Singh and Dhanatullah Beg v. Wajid Ali Shah* distinguished.

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Second. See CIVIL PROCEDURE CODE, S. 584.

5. **Second.** *Finding on issue of fact remitted*—*Civil Procedure Code*, ss. 565, 566, 568. Held by the Full Bench (TYRRELL, J., *dissenting*), that the findings upon issues remanded by the High Court in second appeal cannot be challenged upon the evidence as in first appeals, but objections to these findings must be restricted to the limits within which the original pleas in second appeal are confined *Nivath Singh v. Bhikki Singh* referred to. *Per* PETHERAM, C.J., and TYRRELL, J., (STRAIGHT, J., *dissenting*).—Sections 565 and 566 of the *Civil Procedure Code* are, as far as may be incorporated in Ch. XLII of the Code relating to second appeals, and when the evidence for disposing of the real issues in the case has been taken and exists on the record, it is the duty of the High Court, on the hearing of a second appeal, to itself fix and determine such issues on the evidence on the record, and not to put the parties to the expense and delay involved by a remand. *Per* STRAIGHT, J.—Section 587 of the *Civil Procedure Code* does not mean that the provisions of Ch. XLI relating to first appeals are to be applied indiscriminately or in their entirety to second appeals, and implies no warrant for the decision by the High Court of questions of fact in any shape or at any stage of a second appeal. *Ramnarain v. Bhawanidin and Sheoambar Singh v. Lallu Singh* referred to. *Per* TYRRELL, J.—The jurisdiction of Courts of second appeal in respect of questions of fact is restricted inasmuch as the appeal may not be entertained on "grounds" of fact, but, under the circumstances of s. 566 of the Code, no less than under the abnormal circumstances contemplated by the ruling of the Full Bench in *Nivath Singh v. Bhikki Singh*, the High Court may take cognizance of omitted issues of fact, and must determine them if there be evidence upon the record sufficient for that purpose. An issue to be tried in this way will, with all the evidence bearing upon it, be open to consideration from any point of view that may be present to the Court on the evidence and otherwise. In cases where the Court, still acting under s. 566, has been obliged in the absence of evidence on the record, to supplement the defect through the agency of the Court below, its jurisdiction in respect of such evidence does not become limited thereby, or by reason only of the circumstance that the evidence is accompanied by a "finding" of the inferior Court—the term "finding" being used in s. 566 in its restricted sense of an answer to the proposition referred for inquiry, and not of an award or decision of the issue before the Court.

BALKISHEN *v.* JASODA KUAR ... VII 765

Summary rejection of. See CRIMINAL PROCEDURE CODE, S. 421.

To Her Majesty in Council. *Question of fact.* See FAMILY CUSTOM.

Appellate Court—

- Power of.** See CRIMINAL PROCEDURE CODE, SS. 423, 436, 439: SUIT 4.

Apportionment—

See MORTGAGE 10.

Arbitration—

1. **Agreement to refer not providing for disagreement of arbitrators**—**Appointment of umpire by Court**—**Award by umpire and one arbitrator**—**Decree in accordance with award**—**Appeal**—*Civil Procedure Code*, ss. 508, 509, 511, 523—**Application to set**

Arbitration—(continued.)

aside award—Act XV of 1877, sch. II, No. 158. In an agreement to refer certain matters to arbitration, which was filed in Court under s. 523 of the Civil Procedure Code, and on which an order of reference was made by the Court, no provision was made for difference of opinion between the arbitrators, by appointing an umpire or otherwise. The arbitrators being unable to agree upon the matters referred, the Court, on the application of one of them, appointed an umpire and directed that the award should be submitted on a particular date. An award was made by the umpire and one arbitrator, without the concurrence of the other arbitrator, and submitted to the Court, which passed a decree in accordance with its terms. On appeal by the defendant in the case, the District Judge reversed the decree. *Held*, that an appeal would lie to the Judge from the decree of the first Court, where there had been no legal award such as the law contemplated. *Lachman Das v. Brijpal* referred to. *Held*, that in the present case, there had been no legal award such as the law contemplated, inasmuch as the agreement to refer gave the Court no power to appoint an umpire, and required that the award should be made by the arbitrators named by the parties. *Held* that s. 509 and the other sections preceding s. 523 of the Civil Procedure Code, relating to the power of the Court to provide for difference of opinion among the arbitrators, were only made applicable to cases coming under s. 523, so far as their provisions were consistent with the agreement filed under that section. *Held* also, that the defendant was not precluded from appealing to the Judge from the first Court's decree because he had not applied to set aside the award within the ten days allowed by art. 158, sch. II of the Limitation Act, inasmuch as that article applied to applications referred to in s. 522 of the Civil Procedure Code, *i.e.*, applications to set aside an award on any of the grounds mentioned in s. 521, and the defendant did not contest the award on any of those grounds.

MUHAMMAD ABID *v.* MUHAMMAD ASGHAR VIII 64

Agreement to refer to. See ACT I OF 1877, s. 21.

Filing award in Court—Partnership—Agreement to refer disputes to arbitration. See CIVIL PROCEDURE CODE, ss. 525, 526.

Making award after the period allowed by Court—Order fixing time, or enlarging time fixed, requisite—Civil Procedure Code, ss. 508, 514, 522—Decree in accordance with award—Appeal—Objection to validity of award taken for the first time in appeal. See CIVIL PROCEDURE CODE, s. 521.

Making award after the time allowed by Court. See CIVIL PROCEDURE CODE, s. 521.

2. *Powers of arbitrators—Payments by instalments—Appeal—Civil Procedure Code, ss. 518, 522.* The arbitrators to whom the matters in difference in two suits for money were referred to arbitration, made an award for payment to the plaintiff of certain sums by the defendant, and further directed that these sums should be paid by certain instalments. The plaintiff preferred objections to the award, in so far as it directed payment by instalments, and the Court, holding that the arbitrators had no power to make such a direction, modified the award to that extent, under s. 518 of the Civil Procedure Code. On appeal the District Judge, while allowing the power of the arbitrators to direct payment by instalments, reduced the number of instalments which had been fixed. *Held*, that the decree of the first Court not being in accordance with the award, an appeal lay to the Judge, with reference to s. 522 of the Code. *Held* also, that as it was clear that the reference to arbitration gave the arbitrators full powers, not only as to the amount to be paid, but also as to the manner of payment, the lower appellate Court was wrong in reducing the number of instalments which had been fixed. *Per MAHMOOD, J.*—The word "award" used in the last sentence of s. 522 of the Code must be understood to mean an award as given by the arbitrators, and not as amended by the Court under s. 518. The words "in excess of, or not in accordance with the award," used in s. 522, were intended to enable the Court of appeal to check the improper use of the power conferred by s. 518.

JAWAHAR SINGH *v.* MULRAJ VIII 449

3. *Refusal of arbitrators to act—Civil Procedure Code, s. 510.* It is an essential principle of the law of arbitration that the adjudication of disputes by arbitration should be the result of the free consent of the arbitrators to act; and the finality of the award is based entirely upon the principle that the arbitrators are judges chosen by the parties themselves, and that such judges are willing to settle the disputes referred to them. Where certain matters were referred to arbitrators who refused to act, and the Court of First Instance passed an order directing them to proceed and to make an award, and they, on the passing of such order,

Arbitration—(continued.)

- made an award,—*held* that all proceedings taken by the arbitrators in obedience to the order of the Court directing them to arbitrate against their will were null and void.
- SHIBCHARAN v. RATIRAM VII 20
- 4. • *Remand under Civil Procedure Code, s. 566 for trial of issues—Reference by first Court of whole case to arbitration—Refusal of arbitrator to act—Award by remaining arbitrators—Illegality of award—Civil Procedure Code, s. 510.* A Court of First Instance to which issues have been remitted under s. 566 of the Civil Procedure Code by the appellate Court has only jurisdiction to try the issues remitted, and is *functus officio* in other respects, and cannot make a reference of the case to arbitration, which is only within the jurisdiction of the appellate Court. *Gossain Dowlut Geer v. Bissessur Geer* referred to. When a case has been referred to arbitration, the presence of all the arbitrators at all meetings, and, above all, at the last meeting when the final act of arbitration is done, is essential to the validity of the award. Where a case was referred by a Court to the arbitration of three persons, and the parties to the reference agreed to be bound as to the matters in dispute by the decision of a majority of the arbitrators, and one of the arbitrators subsequently refused to act, and withdrew from the arbitration,—*held* that the Court could not pass a decree on the award of the remaining arbitrators, and could only, under s. 510 of the Civil Procedure Code, appoint a new arbitrator or supersede the arbitration and proceed with the suit. *Kazee Syud Nasir Ali v. Mussamut Tinoo Dossia and Rohilchand and Kumaon Bank v. Row* referred to.
- NAND RAM v. FAKIR CHAND VII 523
- 5. • *Setting aside award—Corruption or misconduct of arbitrator—Revocation of submission to arbitration—Civil Procedure Code, s. 508.* An award cannot be set aside by the Court on the mere surmise that the arbitrator has been partial. After the parties to a suit have agreed to refer to arbitration and the order of reference has been made by the Court under s. 508 of the Civil Procedure Code, neither of them can arbitrarily and on no sufficient ground withdraw from the agreement. *Pestonjee Nussurwanjee v. Manockjee & Co.* followed.
- NAINSUKH RAI v. UMADAI VII 273

Attempt to cheat—

Act XLV of 1860, ss. 417, 511. In a prosecution for an attempt to cheat, under ss. 417-511 of the Penal Code, the accused was charged and convicted of having at the central octroi office made false representations as to the contents of certain *kuppas* (skin vessels), the object of which was to obtain a certificate entitling him to obtain a refund of octroi duty. Prior to granting the certificate, the octroi officers examined the contents of the *kuppas*, and found that the representations of the accused regarding them were untrue. In consequence of this discovery no certificate was given to him, and he was charged and convicted as above-mentioned. The procedure necessary for obtaining a refund of octroi duty was that the central office, on satisfying itself that the articles produced were of the nature stated, would grant a certificate, which certificate would have to be indorsed by the outpost clerk when he passed the goods (on which refund was claimed) out of the town, and the owner would have to take back the certificate so indorsed to the central office and present it to be cashed. *Held*, that even assuming the accused to have falsely represented the contents of the *kuppas* as alleged, he had not completed an attempt to cheat, but had only made preparation for cheating, and that the conviction must therefore be set aside.

QUEEN-EMPRESS v. DHUNDI VIII 304

Bond—

See DEBT.

- 1. • *Interest—Covenant for rate of interest after due date of bond.* In a deed of mortgage, dated in July 1870, the mortgagors covenanted, among other things, as follows:—"That, having repaid the principal amount in the course of three years, we shall take back this bond, and we shall continue to pay annually interest on the said amount at the rate of Re. 1-2 per cent. per mensem; that should we in any year fail to pay the amount of interest, it shall, at the close of the year, be consolidated with the principal amount, and we shall pay compound interest at Re. 1-2 per cent. per mensem.....that, in the event of non-payment of the principal and interest on the expiration of the appointed time, the "mortgagee" shall be at liberty to recover from us the whole amount due to him with interest by means of a law suit." *Held* that the terms of the bond amounted to

Bond—(continued.)

a covenant to pay interest at the stipulated rate after the period of three years, so long as the principal remained due; that, the bond containing an express covenant for the payment of interest at that rate, the interest was not affected by the considerations of the reasonableness or otherwise of the rate; and that the mortgagee was therefore entitled to interest up to the date of the decree at the rate of Re. 1-2 per mensem. *Baldeo Panday v. Gokal Rai* referred to.

CHHAB NATH v. KAMTA PRASAD ... VII 333

2. *Interest—Penalty.* The lender of money, for the use of which interest is to be paid, may, at the time of making the loan, protect himself against breach of the borrower's contract to pay the interest when due, either by a stipulation that, in case of such breach, he shall be entitled to recover compound interest, or by a stipulation that, in such a case, the rate of interest shall be increased. But a condition that, upon failure by the borrower to pay the interest when due, both compound interest and an increased rate shall be payable, amounts to a penalty, inasmuch as the two stipulations together cannot be regarded as a fair agreement with reference to the loss sustained by the lender. In a bond dated in February 1877, for a sum of money payable in June 1882, it was provided that interest should be paid at the rate of Rs. 9 per cent. per annum on the Puranmashi of every Jaith, and that, if the interest were not duly paid, the rate should be increased to Rs. 15 per cent. per annum, and compound interest should be payable. There was no provision for payment of interest from the time when the principal became due. In December 1884, the obligee brought a suit on the bond against the obligor, claiming interest from the date of the bond to the date of the institution of the suit at Rs. 15 per annum, and compound interest for the same period at the same rate. *Held*, that the stipulations contained in the bond must be regarded as penal, and it was therefore the Court's duty to limit the penalty to what was the real amount of damage sustained by the plaintiff in consequence of the defendant's breach of the contract to pay the interest at the due date. *Held* that, for this purpose, the proper course was to reduce the interest to Rs. 9 per cent. per annum, reckoned at compound interest, with yearly rests, to the due date of the bond; and that, inasmuch as the plaintiff was to blame for not having enforced his remedy at an earlier date, he should only recover simple interest at Rs. 9 per cent., from the due date of payment, upon the entire sum which was due when the bond became due, *i.e.* the principal added to the compound interest calculated at Rs. 9 per cent. The same obligee held another bond executed by the same obligors in June 1879, for a sum of money payable in June 1882, with interest at Rs. 9 per cent. per annum. There was a provision in the bond that if the principal and interest were not paid on the due date, the obligee should be entitled to recover the principal with interest at the rate of Rs. 24 per cent. per annum from the date of the bond. In December 1884, the obligee brought a suit on the bond against the obligor claiming interest on the principal amount from its date to the date of the institution of the suit at the rate of Rs. 24 per cent. per annum. *Held*, that the increased rate of interest might fairly be considered as representing the damages sustained by the lender by reason of the borrower's failure to pay interest at the specified time, and should therefore be paid down to the due date of the bond; and that, as the plaintiff failed to enforce payment for a long time, the interest, from the due date, might fairly revert to the old rate of Rs. 9 per cent. per annum, and the amount should be calculated from that date, on that basis, on the whole amount of principal and interest then due on the bond.

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3. *Mortgage—Words creating simple mortgage—Interest after due date—Measure of damages.* A suit was brought in 1884, upon a hypothecation-bond executed in April 1875, in which the obligors agreed to repay the amount borrowed with interest, at Re. 1-8 per cent. per mensem, in June of the same year. There was no provision as to payment of interest after due date. The bond specified certain property as belonging to the obligors and contained the following provision:—“Our rights and property in the aforesaid taluka Rajapur shall remain pledged and hypothecated for this debt.” Interest was claimed in the suit at the rate of Re. 1-8 per cent. per mensem as well for the period after as for the period before the due date of the bond. *Held*, that the terms of the bond by which the property was hypothecated were sufficiently clear and explicit to constitute a legal hypothecation of the shares and interests of which it recited at the opening that the obligors were owners. *Held*, that although cases might arise in which a jury or a judge might refuse to give a plaintiff any interest, *i.e.*, damages, *post diem*, at all, the circumstances would have to be of a very exceptional character, as, for

Bond—(concluded.)

- **Example**, where the interest contracted to be paid before due date was exorbitant and extortionate. *Cooke v. Fowler* referred to. *Held*, that in determining the amount of damages the question whether the plaintiff has unnecessarily delayed bringing his suit, and so allowed his claim to mount up to a sum far in excess of the principal money originally advanced, may be taken into consideration as a reason for not making the original rate of interest the basis on which to assess such damages. *Juala Prasad v. Khuman Singh* referred to. The principle upon which the obligee of the bond may recover interest after due date does not rest upon any implied contract by the obligor to pay such interest, but proceeds upon the breach of contract which has taken place by reason of the non-payment on due date, and the reasonable amount to which the obligee is entitled for such breach. The decision of the question by what standard the damages should be measured must depend in each case upon its special circumstances.

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Burden of Proof—

See ACT I OF 1872, SS. 63 (c), 114, (g) : FRAUDULENT TRANSFER : LAMBARDAR AND CO-SHARER 2 : LIMITATION.

Joint Hindu family—Alienation by father—Suit by sons to set aside alienation—Duty of sons to pay father's debts. See HINDU LAW 8.

Limitation—Suit for redemption. See MORTGAGE 6.

Vendor and purchaser—Non-payment of purchase-money. See VENDOR AND PURCHASER 3.

Cause of Action—

See DECLARATORY DECREE 1 AND 2.

Charge—

See PRE-EMPTION 18.

Alteration of. See MAGISTRATE.

Lambardar and co-sharer—Payment by lambardar of arrears of revenue due by co-sharer. See LAMBARDAR AND CO-SHARER 1.

Sessions Court—Addition of charge triable by any Magistrate. See SESSIONS COURT.

Charges—

Alternative. See ACT XLV OF 1860, s. 193.

Cheque—

See MAJORITY 2.

Children—

Custody of. See MUHAMMADAN LAW 1.

Civil and Revenue Courts—

See JURISDICTION 1, 2, 3, 4, 5, 7, 8, 9, 10 AND 11.

Civil Procedure Code—

s. 2. See APPEAL 4.

s. 2. "*Decree.*" See CIVIL PROCEDURE CODE, s. 381.

s. 2. "*Signed.*" See ACT XLV OF 1860, s. 353.

s. 11. See JURISDICTION 13.

s. 13. See APPEAL 3.

s. 13. *Civil Procedure Code, s. 45—Res judicata—Matter directly and substantially in issue—Meaning of "suit" in s. 13.* S sued K for four bonds, alleging that the same had been satisfied. K had formerly sued S on two of these bonds. S had alleged in defence of that suit that those two bonds, as also the other two, had been satisfied. It was decided in that suit that not one of the bonds had been satisfied. *Held* by PETHERAM, C.J., and OLDFIELD, BRODHURST, and DUTHOIT, JJ., that, the only issue in the former suit which had to be decided being whether the bonds on which that suit was brought had been satisfied or not, the second suit was, under s. 13 of the Civil Procedure Code, *res judicata* only in respect of those bonds, and not in respect of the other two bonds. The Court which tried the former suit had not jurisdiction to try the subsequent suit. *Per* MAHMOOD, J.—This being so, if the word "suit" in s. 13 were taken literally, it might with some plausibility be contended that there was no *res judicata* in respect of any of the bonds. The word "suit," however must be understood to mean such a matter as might have formed the subject of a separate suit independently of the special provisions of the Civil Procedure Code, such as s. 45,

Civil Procedure Code—(continued.)

which enables the plaintiff to unite several causes of action in one and the same suit. Adopting this interpretation, it was clear that the two bonds which were the subject of the former suit could not be allowed to form the subject of litigation again. As to the other two bonds, which were not the subject-matter of the former suit, they did not, in the former suit, constitute a matter "directly and substantially in issue," within the meaning of s. 13; and even if they were "directly and substantially in issue," the decision in the former suit would not support the plea of *res judicata*, because the Court which tried that suit was not a Court of jurisdiction competent to try the subsequent suit in which the plea was raised.

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- s. 13. *Dismissal of suit under s. 10, cl. ii, Act VII of 1870—Dismissal of suit for misjoinder—Dismissal of suit "in its present form."* The purchaser of certain immoveable property in execution of a decree sued for possession of the same. The suit was dismissed "in its present form" (*ba haisiyat maujuda*) upon two grounds, first, with reference to s. 10 of the Court Fees Act (VII of 1870), that the suit was under-valued and the plaintiff had failed to pay, within the time fixed, additional court-fees required by the Court, and secondly, for misjoinder. The purchaser subsequently brought a second suit. *Held* that the dismissal of the former suit was not, under the circumstances, a decision within the meaning of s. 13 of the Civil Procedure Code such as could bar the second suit by way of *res judicata*. *Per* MAHMOOD, J.—The object of s. 10, and indeed of the whole of the Court Fees Act, is to lay down rules for the collection of one form of taxation, and the rule that statutes which impose pecuniary burdens or encroach upon, or qualify the rights of, the subject, must be strictly construed, applies with special force to such provisions of the Act as provide a penalty, whatever its nature may be. Section 10, is simply a penal clause to enforce the collection of the court-fees, and dismissal of a suit under its provisions cannot operate as *res judicata*. Also *per* MAHMOOD, J.—The condition in s. 13 of the Civil Procedure Code, that the former suit must have been "heard and finally decided" means that a former judgment proceeding wholly on a technical defect or irregularity, and not upon the merits, is not a bar to a subsequent suit for the same cause of action. It is not every decree or judgment which will operate as *res judicata*, and every dismissal of a suit does not necessarily bar a fresh action. It is necessary also to show that there was a decision finally granting or withholding the relief sought. *Ramnath Roy Chowdhry v. Bhagbut Mohaputler, Shokhee Bewah v. Mehdee Mundul, Dullabh Jogi v. Narayan Lakhu, Rungrav Rajji v. Sidhi Mahomed Ebrahim, Fateh Singh v. Lachmi Kooer, Roghoomath Mundul v. Juggut Bundhoo Bose and Sankappa Chetti v. Rani Kulandaperi Nachiyar* referred to. Also *per* MAHMOOD, J.—The words *ba haisiyat maujuda* must be taken as amounting to a permission to the plaintiff to bring a fresh suit, within the meaning of s. 373 of the Civil Procedure Code, and could only mean that the Judge using them in his decree had no intention to decide the case finally, so as to bar the adjudication upon the merits of the rights of the parties in a future litigation between them. The procedure provided by Ch. XXII of the Code is not the only manner in which a plaintiff can come into Court for the second time to ask for adjudication upon the merits of his rights, which were not adjudicated upon on the former occasion owing to some technical defect which proved fatal to the former suit. *Ganesh Rai v. Kalka Prasad* dissented from. *Watson v. The Collector of Rajshahye* and *Salig Ram v. Turbhawan* referred to.

MUHAMMAD SALIM v. NABIAN BIBI VIII

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- s. 13. *Meaning of "between parties under whom they or any of them claim"—Muhammadian Law—Alienation by widow—Rights of other heirs—Minor—Mother—Guardian—Mortgage—First and second mortgagees—Suit by first mortgagee for sale of mortgaged property—Second mortgagee not made a party—Act IV of 1882, ss. 78, 85—Res judicata.* Upon the death of G, a Muhammadan, his estate was divisible into eight shares, two of which devolved upon his son A, one upon each of his five daughters, and one upon his widow B. The name of B only was recorded in the revenue registers in respect of the zamindari property left by G. In 1876, A and B gave to X a deed of simple mortgage of 2½ biswas out of a 5 biswas share of a village included in the said property. In 1878, A and B gave to S a deed of simple mortgage of the 5 biswas, which were described in the deed as the widow's "own" property. In 1882, X obtained a decree upon his mortgage for the sale of the mortgaged property, and it was put up for sale and purchased by X himself in January 1884. In February and November 1884 the daughters of G obtained *ex parte* decrees against A and B in suits brought by

Civil Procedure Code—(continued.)

- them to recover their shares by inheritance in the 5 biswas. In 1885, S brought a suit upon his mortgage of 1878, claiming the amount due thereon and the sale of the whole 5 biswas. To this suit he made defendants A and B, G's daughters, and X, alleging that the decrees of February and November 1884, were fraudulently and collusively obtained; and as to the auction-sale of January 1884, that the 2½ biswas were sold subject to his mortgage, he not having been made a party to the suit brought by X upon the deed of 1876, and therefore not being bound by any of the proceedings taken therein or consequent thereto. It was contended that B's position as head of the family entitled her to deal with the property so as to bind all the members of the family, though using her name only, and it was suggested that, at the time of the mortgage of 1878, some of the daughters were minors. On behalf of the daughters it was contended (*inter alia*) that the decrees obtained by them against A and B in February 1884, were conclusive, by way of *res judicata*, against the plaintiff, who, as mortgagee from A and B, claimed under a title derived from them. *Held*, that there being no evidence to show that the decrees of February and November 1884, were fraudulently and collusively obtained, the Court of First Instance was right in exempting the shares of the daughters from the lien sought to be enforced by the plaintiff; and that, inasmuch as the deed of 1876 was prior in date to the plaintiff's deed of 1878, and there was no allegation of fraud or collusion in regard to it, the decree and sale in enforcement of the former deed would defeat the rights of the plaintiff under the latter. *Khub Chand v. Kallan Das and Ali Hasan v. Dhirja* referred to. *Per* MAHMOOD, J.—According to the Muhammadan Law the surviving widow, though held in respect by the members of the family, would not be entitled to deal with the property so as to bind them, and the entry of her name in the revenue registers in the place of her deceased husband would probably be a mere mark of respect and sympathy. Her position in respect of her husband's estate is ordinarily nothing more or less than that of any other heir, and even where her children are minors, she cannot exercise any power of disposition with reference to their property, because although she may, under certain limitations, act as guardian of their persons till they reach the age of discretion, she cannot exercise control or act as their guardian in respect of their property without special appointment by the ruling authority, in default of other relations who are entitled to such guardianship. Even therefore if some of the daughters in the present case were minors at the time of the plaintiff's mortgage, their shares could not be affected thereby. They could only be so affected if circumstances existed which would furnish grounds for applying against them the rule of estoppel contained in s. 115 of the Evidence Act, or the doctrine of equity formulated in s. 41 of the Transfer of Property Act, but here no such circumstances existed. Also *per* MAHMOOD, J.—The decree of February and November 1884, did not operate as *res judicata* against the plaintiff, inasmuch as a mortgagee cannot be bound by a decision relating to the mortgaged property in a suit instituted after his mortgage, and to which he was not a party. After a mortgage has been duly created, the mortgagor, in whom the equity of redemption is vested, no longer possesses any such estate as would entitle him to represent the rights and interests of the mortgage in a subsequent litigation, so as to render the result of such litigation binding upon and conclusive against such mortgagee. The plaintiff in the present suit could not be treated as a party claiming under his mortgagors, within the meaning of s. 13 of the Civil Procedure Code, and that section must be interpreted as if, after the words "under whom they or any of them claim," the words "by a title arising subsequently to the commencement of the former suit," had been inserted. *Dooma Sahoo v. Joonaratn Loll and Bonomalee Nag v. Koy-lash Chunder Dey* referred to. *Outram v. Morewood, Boykuntath Chatterjee v. Amceeroonissa Khatoon, Kalama Natchiar v. Srimut Raja Mootoo Vijaya Raganadha and Ram Coomar Sein v. Prosunno Coomar Sein* distinguished. The principles of the rule of *res judicata*, as part of the law of civil procedure properly so called, and those of the rule of estoppel, as part of the law of evidence, explained and distinguished.
- SITA RAM v. AMIR BEGAM... .. VIII
- s. 13. *Res judicata*. Two-thirds of a village were sold by T, P, and B. B was the widow of S, her name being recorded in respect of the property formerly recorded in his name, and what she sold was his one-third share in the village, the other one-third being sold by T and P. The vendors having refused to give possession of the property, the purchasers sued them for possession of it and joined as defendants to the suit C, D, and M, to whom belonged the remaining one-third share in the village. These latter persons contended, *inter alia*, that the family was a joint one and that B was not competent

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to alienate her deceased husband's share in the village. The Court decided that the family was joint. After B's death, her daughter K, whose name had been recorded in place of her mother's, made a usufructuary mortgage of another village in which her deceased father had formerly owned a share. A suit was brought by certain persons who had purchased the right in the same village of the representatives in interest of C, D and M, against K, her mortgagee, and their vendors, to set aside the mortgage and recover the interest which they had purchased. They contended that the family was joint, and that the question whether it was joint or divided was *res judicata* by reason of the decision in the former litigation. *Held*, that the question whether the family was joint or divided had not, in the former suit, been determined among the defendants *inter se*, but simply as against the plaintiff, and could only be *res judicata* against him or parties claiming under the same title; and the decree in that suit was therefore not binding against K in the hands of the present plaintiffs, who were not the assignees of the plaintiff in the former suit, but of persons who were arrayed in it as defendants along with B, K's mother, and on the same side. *Shadal Khan v. Amin-ullah Khan* referred to by STRAIGHT, J., and distinguished by TYRRELL, J. *Narain Kuar v. Durjan Kuar* referred to by STRAIGHT, J.

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- s. 13. *Res judicata*—Act XIX of 1873, ss. 56, 62, 64, 241 (g). *Held*, that an order by a Settlement Officer directing that certain persons should be recorded as the sub-proprietors of certain land, as they claimed to be, and not as lessors, as certain other persons asserted that they were, did not operate as *res judicata* in a suit by the latter persons against the former for a declaration that the former were not sub-proprietors of the land, but lessees thereof, the Settlement Officer not being competent, under Act XIX of 1873 (N.-W.P. Land Revenue Act), to try such a question of right.

TOTA RAM v. HAR KISHAN ... VII 224

- s. 13. *Set-off*. See SET-OFF 2.
 ss. 15; 25. See JURISDICTION 6.
 ss. 16; 20. See JURISDICTION 12.
 s. 30. See MOSQUE.

- s. 43. Act XII of 1881 (N.-W. P. Rent Act), s. 140—*Case struck off with liberty to plaintiff to bring a fresh suit—Omission to sue for part of claim in case struck off—Fresh suit for omitted claim not barred*. A recorded co-sharer of a mahal sued the lambardar for his share of the profits of the mahal for the year 1286 fasli. At the time of the institution of the suit the profits for 1287 and 1288 fasli also were due, but no claim was then made in respect of them. The suit was struck off on account of the non-appearance of the parties under s. 140 of Act XII of 1881 (N.-W. P. Rent Act), with leave to the plaintiff to bring a fresh suit. Subsequently, the plaintiff brought a suit against the same defendant for his share of the profits of the mahal for 1287 and 1288 fasli. *Held* that the suit was not barred by the provisions of s. 43 of the Civil Procedure Code. *Held* also that the Courts below had properly refused to deduct from the plaintiff's claim as "village expenses," within the meaning of s. 93 (h) of the Rent Act, certain charges on account of the expenses of cultivation of sir-land held in partnership by the plaintiff and the defendant.

MULCHAND v. BHIKARI DAS ... VII 624

- ss. 43, 44. See COURT-FEES 2.

- s. 44, Rule (a)—"Decree"—*Order rejecting application under Civil Procedure Code, s. 44, Rule (a) and returning plaintiff—Appeal—Civil Procedure Code, s. 2*. No appeal lies under any of the provisions of s. 588 of the Civil Procedure Code from an order under s. 44, Rule (a), rejecting an application for leave to join another cause of action with a suit for the recovery of immoveable property. In a plaint filed in the Court of a Subordinate Judge the plaintiff claimed to recover possession of a house, together with some grain which was stored in it. The plaintiff applied to the Subordinate Judge for leave under s. 44, Rule (a) of the Civil Procedure Code, to join the claim for grain with the claim for possession of the house. The Subordinate Judge refused leave, and returned the plaint, with directions that the plaintiff should institute two suits for recovery of the house and the grain, respectively, in the Court of the Munsif. *Held*, that the Subordinate Judge's order was substantially an order rejecting the plaint, on the ground that the plaintiff had joined a cause of action with a suit for recovery of immoveable property; that, although this might have been a misapplication of s. 44, Rule (a) of the Code, its effect was to reject the plaint; that such an order

Civil Procedure Code—(continued.)

was a decree, with reference to the definition in s. 2, and was appealable as such to the District Judge; and that therefore a second appeal lay in the case to the High Court, and that Court was not competent to interfere in revision under s. 622.

BANDHAN SINGH *v.* SOLHU ... VIII 191

*s. 43. See CIVIL PROCEDURE CODE, s. 13.

s. 53. *Practice—Rejection, etc., of plaint at a date subsequent to first hearing. Held* (OLDFIELD, J., *dissenting*) that, under s. 53 of the Civil Procedure Code, a plaint can be rejected, returned for amendment, or amended by the Court of First Instance only at or before the first hearing of the suit, and not after the first hearing thereof. *Modhe v. Dongre* dissented from. *Soorjmulku Koer's Case, Burjore v. Bhagana and Fazul-un-nissa Begam v. Mulo* distinguished by MAHMOOD, J. *Per* MAHMOOD, J.—The plaint may, for causes other than those mentioned in s. 53, be amended by the Court after the first hearing.

DAMODAR DAS *v.* GOKAL CHAND ... VII 79

ss. 54, 55, 584. See COURT-FEES 1.

s. 54 (c). See APPEAL 4.

s. 57 (a). See JURISDICTION 6.

ss. 64, 100, 108, 157. See EX PARTE DECREE 2.

ss. 66, 103, 107. *Dismissal of suit for non-appearance plaintiff ordered to appear under s. 66—Rejection of application to set aside dismissal—Civil Procedure Code, ss. 540, 588 (8).* A plaintiff who had been ordered, under s. 66 of the Civil Procedure Code, to appear in person in Court upon a day specified, failed to appear, and under s. 107, read with s. 102, his suit was dismissed. He then applied to the Court under s. 103, for an order to set the dismissal aside, but his application was rejected. He thereupon preferred an appeal from the decree dismissing the suit under the provisions of s. 540. *Held*, that the plaintiff was not entitled to appeal from the decree dismissing the suit, and that his only remedy was by way of an appeal under s. 588 (8) of the Code from the order rejecting the application to set the dismissal aside. *Lal Singh v. Kunjan* referred to.

KRISHNA RAM *v.* GOMIND PRASAD ... VIII 20

ss. 98, 99, 647. See PRACTICE 2.

s. 103. See EX PARTE DECREE 1.

s. 108. See CIVIL PROCEDURE CODE, s. 136: EX PARTE DECREE 1 AND 3.

s. 111. See SET-OFF 1.

s. 111. *Set-off—Res judicata—Court-fee on set-off.* See SET-OFF 2.

ss. 129; 136. See PARDAH-NASHIN 1.

s. 136. *Civil Procedure Code, s. 108—Decree against defendant under s. 136—"Ex parte" decree.* A defendant failing to comply with an order to answer interrogatories, the Court, under s. 136 of the Civil Procedure Code, struck out his defence, and, proceeding *ex parte*, passed a decree against him. *Held*, that the decree could not be treated, in respect of the remedy by appeal, as an *ex parte* decree, and therefore, under the ruling in *Lal Singh v. Kunjan* not appealable, but that an appeal would lie from the decree.

CHUNNI LAL *v.* CHAMMAN LAL ... VII 159

s. 157. See EX PARTE DECREE 3.

s. 191. *Hearing of suit—Power of judge to deal with evidence taken down by his predecessor.* A Subordinate Judge, having taken all the evidence in a suit before him, adjourned the case to a future date for disposal. Upon the date fixed a further adjournment was made. The Subordinate Judge, at this stage of the proceedings, was removed, and a new Subordinate Judge was appointed. *Held*, that the trial, so far as it had gone before the first Subordinate Judge, was abortive and, as a trial, became a nullity. *Held* also, that the duty of the second Subordinate Judge, when the case called on before him, was to fix a date for the entire hearing and trial of the case before himself; that he might, at the request of the pleaders, have fixed the same day upon which the case was called on, and proceeded to try it at once; and that the trial should then have proceeded in the ordinary way, except that the parties would be allowed, under s. 191 of the Civil Procedure Code, to prove their allegations in a different manner. *Jagram Das v. Narain Lal* referred to.

AFZAL-UN-NISSA BEGAM *v.* AL ALI ... VIII 85

s. 191, Chapter XV. *Hearing of suit—Power of Judge to deal with evidence taken down by his predecessor—Civil Procedure Code, s. 198.* A Subordinate Judge, having taken all the evidence in a suit before him, and having completed the hearing of the suit, except for the arguments of counsel on both sides, was removed,

Civil Procedure Code—(continued.)

and the case came on for hearing before his successor. The new Subordinate Judge took up the case from the point at which it had been left by his predecessor, and proceeded to judgment and decree. *Held* that the only power given by the Civil Procedure Code in such cases is to allow the evidence taken at the first trial to be used as evidence at the second trial, and not to allow the two hearings to be linked together and virtually made one; that the Subordinate Judge should have fixed a day for the entire hearing of the suit before himself, and should first have heard the opening statement on behalf of the plaintiff, the evidence produced by both sides, and the arguments on behalf of both, and then finally decided the case which he had himself heard and tried; that he might, in accordance with the provisions of s. 191 of the Civil Procedure Code, have allowed the depositions which had been taken before his predecessor to be put in; and that, in neglecting to take this course, and in deciding the case upon materials which were never before him, his action was illegal, and the judgment and decree were nullities.

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- s. 191. *Hearing of suit—Trial—Death or removal of judge during suit—Procedure to be followed by new judge—Power of new judge to deal with evidence taken by his predecessor.* The trial of a suit before a Subordinate Judge was completed except for argument and judgment, and a date was fixed for hearing argument. At this point a new Subordinate Judge was appointed, and he passed an order directing a further adjournment and fixing a particular date for disposal of the case. After some further adjournments, the Subordinate Judge delivered judgment, having heard argument on both sides upon the evidence taken by his predecessor. The District Judge having on appeal upheld the Subordinate Judge's decision, a second appeal was preferred to the High Court, and an objection was raised on the appellant's behalf that the proceedings taken before the Subordinate Judge were void, and he could not be said to have tried the case, inasmuch as no evidence was taken before him, and his judgment was based solely on evidence recorded by his predecessor. No objection of this kind was taken in either of the Courts below. *Held* by the Full Bench that with reference to the grounds of appeal, and under the circumstances of the case, the officer who passed the decree in the Court of First Instance had jurisdiction to deal with and determine the suit in the mode in which he did. *Jagram Das v. Narain Lal and Afzul-un-nissa Begam v. Al Ali* discussed. *Per* STRAIGHT, OFFG. C.J., that, as no objection was raised before the Subordinate Judge to his taking up and dealing with the case in the mode in which he did, but the evidence was discussed and criticized on both sides, there had been a waiver on the part of the appellant in reference to the action of the Subordinate Judge of which he now sought to complain. *Per* OLDFIELD, J., that where a Judge takes up a trial begun by another, although the law permits him to deal with the evidence taken by his predecessor as if he himself had taken it down, he must deal with it judicially, and try the cause as though it had come before him in the first instance, and there must be a hearing of the entire case before himself; and in every case it has to be seen whether, as a matter of fact, there has been a real trial and hearing of the entire case by the Judge, and if the evidence previously taken was not judicially dealt with, counsel heard upon it, and the entire case fully heard and tried, there has been no trial in the legal sense of the work, and the proceedings must be set aside. *Jagram Das v. Narain Lal and Afzul-un-nissa Begam v. Al Ali* followed. *Per* MAHMOOD, J., that although it is true that "a trial must be one, and must be held before one Court only," the identity of the Court is not altered by a new Judge being appointed to preside in such Court; that when a trial goes on for more than one day, each day constitutes a separate hearing, and that such hearings cannot be treated as a trial heard on the original date; that the Civil Procedure Code does authorize a Judge to take up a case which has been partly heard before his predecessor, and to continue it from the point at which his predecessor left off; that where the Judge who has partly heard a case dies or is removed, the trial, so far as it has gone before him, is neither abortive nor becomes a nullity; that the new Judge is not required to fix a day for the entire hearing of the suit before himself, nor is there anything to prevent him from taking up a trial which has been partly heard by his predecessor, and to proceed with it as if it had been commenced before himself; that the Code does not recognize such procedure as amounting to separate trials; that the Judge who succeeds another, after a trial which has partly proceeded before his predecessor, is not bound to fix a new day for commencing the trial *de novo*, nor should the trial proceed before the new Judge as if the day were the first on which the case had ever come on for hearing; that the evidence recorded by the preceding Judge, by the mere fact of being upon

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The record, is *ipso facto* evidence in the cause and could, under s. 191 of the Code, be treated by the succeeding Judge "as if he himself had taken it down or caused it to be made;" that when the case comes on for hearing before the new Judge, there is no necessity for putting in the depositions of witnesses which, though taken by his predecessor, are already upon the record; that such depositions must be dealt with as materials of evidence before the new Judge; that a judgment and decree upon such evidence are neither illegal nor absolute nullities, there being no want of jurisdiction; that when such judgment and decree are passed, the Court of first appeal is prohibited by s. 561 of the Code to order a trial *de novo*, but is bound by s. 565 of the Code to decide the appeal upon the evidence on the record: that where further issues are directed to be tried, or additional evidence is to be taken, the Court of appeal is bound to act according to the provisions of ss. 566, 568 and 569 of the Code, but cannot order a new trial: that even when there has been an irregularity on the part of the first Court in receiving or rejecting evidence, the provisions of s. 578 of the Civil Procedure Code and s. 167 of the Evidence Act prohibit the reversal of a decree and the remand of a case for new trial, unless the irregularity affects the merits of the case or the jurisdiction of the Court. *Jagam Das v. Narain Lal and Afzal-un-nissa Begam v. Al Ali* dissented from. *Per* TYRRELL, J., that, in reference to the Full Bench, the only matters which can legally be attended to are the cases referred, and it is not competent for the Full Bench to review or pronounce judicial opinions upon the Court's judgment in cases which have been finally decided and not made the subject of reference. *Jagam Das v. Narain Lal and Afzal-un-nissa Begam v. Al Ali* followed and explained.

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s. 198. See CHAPTER XV, s. 191.

s. 206. See EXECUTION OF DECREE I. HIGH COURT'S POWERS OF REVISION

s. 206. Act XV of 1877, sch. II, No. 178. See s. 622.

s. 206. Amendment of decree—Execution of decree—Objection to validity of amendment. See DECREE.

s. 206. *Civil Procedure Code, s. 622—Order amending decree—High Court's powers of revision.* A District Judge, by an order passed under s. 206 of the Civil Procedure Code, altered a decree passed by his predecessor in the terms, "I dismiss the appeal," to read "I accept the appeal," on the ground that his predecessor had obviously meant to say that he accepted the appeal, and that the decree as it stood failed to give effect to the judgment. *Per* OLDFIELD, J.—That the order passed by the Judge under s. 206 could not be made the subject of revision by the High Court under s. 622 of the Civil Procedure Code, because there was an appeal from the amended decree, which became the decree in the suit and superseded the original decree. *Per* MAHMOOD, J.—That an order passed under s. 206 of the Civil Procedure Code constituted an adjudication separate from that concluded by a decree under the Code passed after the parties had been heard and evidence taken, and that the order in the present case was therefore a separate adjudication, and was not appealable under s. 588. Also that, in saying that by "dismissed," his predecessor meant "decreed" the Judge had altered the decree in a manner not warranted by the terms of s. 206, that he had therefore exercised his jurisdiction "illegally and with material irregularity," within the meaning of s. 622 of the Code, and that the Court was consequently competent to revise his order. *Raghunath Das v. Raj Kumar* referred to.

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s. 206. *Civil Procedure Code, s. 622—Order amending decree—High Court's powers of revision.* *Per* OLDFIELD, J.—When an original decree is amended under s. 206 of the Civil Procedure Code, it as amended is the decree in the suit; and an appeal therefore lies from it under the provisions of s. 540, when the validity of the amendment can be questioned. The matter of amending a decree under s. 206 does not by itself constitute a "case" within the meaning of s. 622 of the Civil Procedure Code, but forms part of the proceedings in the suit in which the decree is made. *Held*, therefore, *per* OLDFIELD, J., that, where an original decree, which was appealable, was amended by the Court of First Instance, under s. 206 of the Civil Procedure Code, the High Court had no power to revise such amendment under s. 622 of the Code. *Per* MAHMOOD, J.—An order passed under s. 206 amending a decree is a separate adjudication, and is not merely a part of the original decree, and cannot alter its date, and such an order is not appealable under s. 588 of the Code. Such an order, therefore, can be revised by the High Court, under s. 622.

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- ss. 206, 209. *Amendment of decree—Judgment awarding interest for period prior to suit—Decree directing interest to be paid from date of suit.* The judgment in an appeal adjudged interest to be paid for the period prior to the institution of the suit only. The decree contained an order for payment of interest from the date of the suit onwards. *Held* that no variance with the judgment within the meaning of s. 206 of the Civil Procedure Code, was involved in the additional order contained in the decree.

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- ss. 213, 215. See JURISDICTION 13.

- s. 223. See ACT XV OF 1877, SCH. II, NO. 179 (4).

- s. 228. See ACT XV OF 1877, SCH. II, NO. 179 (4): EXECUTION OF DECREE 19.

- s. 230. See EXECUTION OF DECREE 11.

- s. 230. *Execution of decree—Twelve years' old decrees—Statutes, Construction of—General words—Retrospective effect.* The holder of a decree bearing date the 15th June 1872, applied for execution thereof on the 9th February 1885, the previous application being dated the 27th November 1883. *Held* that the application for execution was not barred by s. 230 of the Civil Procedure Code. *Musharraff Begam v. Ghulab Ali* followed. *Goluck Chandra Mytee v. Harapriah Debi, Bhawan Das v. Daulat Ram and Sreenath Gooch v. Yusoff Khan* referred to. *Tufail Ahmad v. Sadhu Saran Singh* discussed and dissented from by MAHMOOD, J. *Per MAHMOOD, J.*—The rule of construction being that a limited meaning can only be given to general words in a statute where the statute itself justifies such limitation, the words "any decree" in the proviso to s. 230 of the Civil Procedure Code must not be construed as confined to such decrees as would be barred on the date of the Code coming into force, inasmuch as no reason for so restricting the meaning of those words can be found in the Code or is suggested by the legislative policy upon which clauses such as the proviso in question are based. This policy is to prevent a sudden disturbance of existing rights in consequence of new legislation; but it is beyond its object and scope to revive rights or remedies which have already expired before the new Act comes into operation, and although the Legislature may revive such rights or remedies, it can only do so by express words to that effect.

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- s. 230. *Meaning of "granted."* Under s. 230 of the Civil Procedure Code, after a decree is twelve years old, there is a prohibition against its being executed more than once, i.e., an application for execution should not be granted if a previous application has been allowed under the provisions of that section. The mere filing of a petition with the result that the application contained in it is subsequently struck off, is not "granting" an application within the meaning of s. 230 of the Code, and ss. 245, 248, and 249 show that there is a broad distinction between admitting an application for the purpose of issuing notice to the other side and of hearing the objections that may be urged, and a decision of the Court as provided in s. 249. In 1865 a decree was passed for a sum of money payable by yearly instalments for a period of sixteen years. Down to March 1877, various amounts were paid on account of the decree. In that month an application was made for execution of the decree, the result being an arrangement for liquidation of the amount then due, which was confirmed by the Court. A second application for execution was made on the 9th March 1881, the decree then being more than twelve years old. All that was done with reference to this application was that notice to appear was issued to the judgment-debtor's representatives, and subsequently a petition was filed notifying that an arrangement had been effected, under which a certain sum had been paid by one of the said representatives in satisfaction of the claim against him, and that the other had agreed to pay the balance by yearly instalments. Upon this, the application for execution was struck off. On the 5th March 1883, another application for execution was made, notice to appear was issued, and after this notice a petition was put in intimating that an arrangement had been come to, and praying that execution might be postponed, whereupon the application was struck off. Again, on the 31st March 1884, the decree-holder applied once more for execution of the decree. *Held* that neither the previous application of the 9th March 1881, nor that of the 5th March 1883, could properly be said to have been "granted" within the meaning of s. 230 of the Civil Procedure Code, and under these circumstances, the decree, though twelve years old and upwards, was not barred by that section and the application for execution should be allowed.

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s. 230. *Twelve years' old decree—Execution of decree—Meaning of "granted."* A decree passed in April 1872, was kept alive by various applications for execution up to 1883. In February and December of that year two such applications were made, but the proceedings on both occasions terminated in the applications being struck off without any money being realized under the decree. In November 1884, the decree-holder again applied for execution, the application being the first made after the decree had become twelve years old, and being made within three years from the passing of the Civil Procedure Code, 1882. *Held* that the application must be entertained in accordance with the ruling of the Full Bench in *Musharraf Begam v. Ghalib Ali. Tufail Ahmad v. Sadho Saran Singh* dissented from. *Sokhu Ram v. Ram Din* referred to. *Per* MAHMOOD, J., that the previous execution proceedings, initiated by the applications of February and December 1883, having terminated in those applications being struck off, it could not be said that the applications were "granted" within the meaning of s. 230 of the Civil Procedure Code. *Paraga Kuar v. Bhagwan Das* referred to.

c. RAMADHAR v. RAM DAYAL... VIII 536

s. 232. See EXECUTION OF DECREE 4.

s. 239. See EXECUTION OF DECREE 19.

s. 243. See s. 244 (c).

s. 244. See CIVIL PROCEDURE CODE, s. 583. EXECUTION OF DECREE 4, 5 AND 17: HIGH COURT'S POWERS OF REVISION 4.

s. 241. *Civil Procedure Code, ss. 278-283—Question for Court executing decree—Separate suit—"Representative" of judgment-debtor.* The decree-holder under a decree for enforcement of lien against the zamindari rights and interests of K, applied for execution by attachment and sale of certain shares, one of which was recorded in the *khwat* in the name of K, and two others in the name of B, his brother's widow. The shares having been attached, the judgment-debtor died, and J, his brother, and L, his son, were substituted as his representatives. In execution of the decree, only the share which had stood recorded in the name of the deceased judgment-debtor, and which was in possession of J and L as his representatives, was sold; and the decree-holder then applied for sale of the other shares which had been attached. To this B objected under s. 281 of the Civil Procedure Code, claiming to be the owner of the shares in question. Before the hearing of her objection she died, and L applied to have his name brought upon the record in her place for the purpose of supporting the objections. An order having been passed disallowing the objections which had been filed by B, L appealed to the High Court. A preliminary objection was taken on behalf of the decree-holder to the hearing of the appeal, on the ground that as the first Court's order related to L's claim, as the heir of B, to have the shares entered in her name released from attachment, it must be regarded as passed under s. 281 of the Civil Procedure Code, and as conclusive, subject to L's bringing a suit to establish his right. On the other side it was contended that L, being the representative of the deceased judgment-debtor K, the first Court's order must be regarded as passed under s. 244 of the Code, and the appeal would therefore lie. *Held* that the preliminary objection must prevail, and the first Court's order must be regarded as passed under s. 281 and not under s. 244 of the Code, inasmuch as L's claim, which was rejected by it, was nothing more than to come in as B's representative for the purpose of supporting her objections; and it was in right of a third person, whose interest he asserted to have passed to him, that he prayed admission to the proceedings, and this character was wholly distinct from that he filled as the legal representative of his deceased father. Because L happened for the purpose of the execution-proceedings, to be his father's legal representative, and to be liable to satisfy the decree to the extent of any assets which might have come to his hands, it did not follow that any rights claimed by him through a third person must be dealt with, and could only be dealt with, between him and the decree-holder in the execution-proceedings. *Wahed Ali v. Jumae, Ram Ghulam v. Hazaru Kuar, Sitaram v. Bhagwan Das, Shankar Dial v. Amir Haidar, Nath Mal Das v. Tajammul Husain and Kanai Lal Khan v. Sashibhuson Biswas* referred to.

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s. 244. *Decree for possession of immoveable property—Execution of decree—Reversal of decree on appeal—Mesne profits—Civil Procedure Code, s. 583.* G obtained a decree against R for possession of a house, and in execution thereof obtained possession. On appeal, the decree was set aside by the High Court, whose decree did not direct that the appellant should be restored to possession and was silent as to mesne profits. *Held*, that, with reference to s. 583 of the

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Civil Procedure Code, R was entitled to recover possession of the property in execution of the High Court's decree, but that, with reference to the decision of the Full Bench of the Court in *Ram Ghulam v. Dwarka Rai*, he could not, in execution of that decree, recover mesne profits.

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- s. 244. *Mesne profits—Decree for possession of immovable property—Reversal of decree on appeal—Appellate decree silent as to mesne profits—Suit for recovery of mesne profits.* The plaintiff in a suit for possession of immovable property obtained a decree for possession thereof, and in execution of the decree obtained possession of the property. This decree was subsequently reversed on appeal by the defendant. The decree of the Appellate Court was silent in respect of the mesne profits which the plaintiff had received while in possession. The defendant instituted a suit to recover those profits. *Held, per PETHERAM, C.J., and OLDFIELD, BRODHURST and DUTHOIT, J.J.,* that the suit was not barred by s. 244 of the Civil Procedure Code, the question raised by such suit, although it might have arisen out of the decree of the Appellate Court, not "relating to the execution, discharge or satisfaction of the decree," within the meaning of that section (because, at that time, no such question had arisen or was in existence), and therefore not one in respect of which a separate suit is barred by that section. *Partab Singh v. Bem Ram* distinguished by OLDFIELD, J. *Per MAHMOOD, J.*—That the suit was not barred by s. 244, the mesne profits sought to be recovered not having been realized in execution of the decree reversed on appeal. *Per DUTHOIT, J.*—The words in cl (c) of s. 244, "any other questions arising, etc." should be read as "any other questions directly arising"; otherwise the most remote inquiries would be possible in the execution department.

RAM GHULAM v. DWARKA RAI ... VII 170

- s. 244. *Question for Court executing decree—Party to suit—Representative.* Where certain property having been attached in execution of a decree, the representative of the judgment-debtor objected that the property had been acquired by himself and not inherited from the judgment-debtor, and was therefore not liable in execution,—*held* that the question was one which must be decided in the execution department under s. 244 of the Civil Procedure Code. *Ram Ghulam v. Hazaru Koer* referred to.

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- s. 244. *Question for Court executing decree—Plaintiff suing in a character separate from that in which decree was passed against him—Separate suit not barred.* A judgment-debtor, upon the attachment of certain land in execution of decrees passed against him personally by the Revenue Court, instituted a suit for a declaration and establishment of his right to such land, not as his own property but as, *wakf*, of which he was *mutaulah* or trustee. *Held* that inasmuch as the plaintiff was not suing his own right, but in his capacity as custodian, trustee, or manager of the *wakf* property, and he must therefore be taken to fill a character separate from that in which the decrees were passed against him by the Revenue Court, his suit was not barred by the provisions of s. 244 of the Civil Procedure Code. *Madho Prakash Singh v. Murlu Manohar and Shankar Dutt v. Anu Haidar* referred to.

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- s. 244. *Question for Court executing decree—Separate suit—Civil Procedure Code ss. 266, 316.* The provisions of s. 244 (c) of the Civil Procedure Code prohibit not only a suit between parties and their representatives, but also a suit by a party or his representatives against a purchaser at a sale in execution of the decree, the object of which is to determine a question which properly arises between the parties or their representatives, and relates to the execution, discharge, or satisfaction of the decree. A judgment-debtor, whose occupancy-tenure had been sold in execution of a decree for money, sued the purchaser for recovery of the property, on the ground that the sale of occupancy-rights in execution of decree was illegal and void, being in contravention of the provisions of s. 9 of Act XII of 1981 (N.W. P. Rent Act). *Held* by the Full Bench that the question involved in the suit was one of the nature referred to in s. 244 (c) of the Civil Procedure Code as determinable only by order of the Court executing the decree, and that the suit was therefore not maintainable. *Narain v. Purat* referred to.

BASTI RAM v. FATTU ... VII 146

- s. 244. *Questions for Court executing decree—Party to suit—Representative.* Where certain property was attached in execution of a decree passed upon a bond against the legal representatives of the obligor, and the judgment-debtors objected to the

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attachment on the ground that the property was not part of the obligor's estate and liable to be taken in execution of the decree, but was property which they could claim in their own right,—held that the matter in dispute was one between the parties to the suit in which the decree was passed, and relating to the execution, discharge or satisfaction of the decree within the meaning of s. 244 of the Civil Procedure Code, and was therefore to be determined in the execution department and not by regular suit. *Chowdry Wahed Ali v. Mussamut Sumaee, Shankar Dial v. Amur Haidar, and Nath Mal Das v. Tajammul Husain* referred to. *Per MAHMOOD, J.*—That the turning-point upon which the application of the rule contained in s. 244 of the Civil Procedure Code barring adjudication in a regular suit depends, is whether the judgment-debtor in raising objections to execution of decree against any property, pleads what may analogically be called a *jus tertii*, or a right which, although he represents it, belongs to a title totally separate from that which he personally holds in such property. *Kanai Lal Khan v. Sashi Bhuson Biswas* dissented from.

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s. 244 (c) See CONTRACT.

s. 244 (c). *Execution of decree—Civil Procedure Code, ss. 243, 245—Order in stay of execution a matter "relating to execution" of decree—Order appealable—Order restoring judgment-debtor to possession after execution—Order illegal.* The provisions of s. 244 of the Civil Procedure Code govern equally the procedure of the Court which passed the decree when executing such decree and the Court to which the decree is sent for execution. *Cooke v. Hiseeba Beebee* referred to. All orders staying execution of decrees, whether passed by the Court which passed the decree, or by the Court to which it is sent for execution, are "questions arising between the parties to the suit in which the decree was passed, and relating to the execution" thereof within the meaning of s. 244 (c) of the Civil Procedure Code, and, as such, appealable, irrespective of the provisions of s. 508. *Kristomohiny Dossee v. Bama Churn Nag Chowdry and Luckmeeper Singh v. Sita Nath Doss* followed. The widest meaning should be attached to cl. (c) of s. 244 of the Civil Procedure Code, so as to enable the Court of First Instance and the Court of appeal to adjudicate upon all kinds of questions arising between the parties to a decree and relating to its execution. There is no provision in the law which empowers the Court passing a decree to set aside the proceedings under which the decree-holder has already been placed in possession in execution of his decree. The provisions of s. 243 of the Civil Procedure Code have no reference to a case in which execution has already been carried out, and the decree-holder placed in possession of the property decreed to him.

GHAZIDIN v. FAKIR BAKHSI ... VII 73

ss. 244, 278, 283, 311. See SALE IN EXECUTION OF DECREE.

s. 251. See ACT XLV OF 1860, s. 358.

s. 253. *Execution of decree against surety.* See EXECUTION OF DECREE 24

s. 258. See CONTRACT: EXECUTION OF DECREE 7 AND 12.

s. 266. See s. 244.

s. 273. See ACT XV OF 1877, SCH. II, NO. 179 (4).

s. 274. See EXECUTION OF DECREE 5 AND 10.

s. 276. See EXECUTION OF DECREE 15.

s. 278. See EXECUTION OF DECREE 5 AND 21.

ss. 278-283. See s. 244.

s. 288. See SUIT 3.

s. 290. See EXECUTION OF DECREE 23.

s. 295. See EXECUTION OF DECREE 15.

s. 295. *Execution of decree—Attachment of property—Payment into Court of money due under decree—Assets realized by sale or otherwise.* G and C held decrees against B and took out execution of them, and the judgment-debtor's property was attached, but no sale took place. The judgment-debtor paid into Court the sum of Rs. 1,200 on account of G's decree. Held that G was entitled to the sum of Rs. 1,200 paid into Court by the judgment-debtor, and A could not be regarded as assets realized by sale or otherwise in execution of a decree, so as to be rateably divisible between the decree-holders under s. 295 of the Civil Procedure Code, inasmuch as it could not be said that there was a realization from the property of the judgment-debtor.

GOPAL DAI v. CHUNNI LAL ... VIII 67

s. 295. *Suit for refund of proceeds of execution-sale—Small Cause Court suit—Mortgage—First and second mortgages—Act III of 1877, s. 50.* S and L held mortgage bonds executed in their favour by the same person. S's bond was

Civil Procedure Code—(continued.)

dated the 16th June 1882, and was registered, the registration being compulsory. L's bond was of prior date, the 30th December 1880, and was not registered, the registration being optional. Both instituted suits on their bonds against the obligor and obtained decrees for sale of the property, the decrees being passed on the same day. The property was attached in execution of both decrees on the 14th August 1882. The sale-proceeds were divided by the Court executing the decrees equally between the parties by an order dated the 1st May 1883, notwithstanding that S claimed the whole on the ground that he was an incumbrancer under a decree passed on a registered instrument, and therefore entitled to priority. S, being dissatisfied with this order, brought a suit to recover from L the moiety of the sale-proceeds paid to him. *Held* that the suit being one to compel the defendant to refund assets of an execution-sale which he was not entitled to receive, and to set aside the order of the Court executing the decree, which directed the payment of the assets to him, was expressly allowed to be brought under the provisions of the penultimate paragraph of s. 295 of the Civil Procedure Code, and could not be regarded as a suit of the nature cognizable in a Court of Small Causes. *Held* also that the registered bond of the plaintiff took effect as regards the property comprised in it against the defendant's unregistered bond under s. 50 of the Registration Act (III of 1877), which gave priority to the incumbrance created by the former bond over the incumbrance created by the latter, and this priority was not effected by the subsequent decrees obtained on the bonds, which only gave effect to the respective rights under the bonds. The meaning of s. 295 of the Civil Procedure Code is that when immoveable property is sold in execution of decrees ordering its sale for the discharge of incumbrances, the sale-proceeds are to be applied in satisfaction of incumbrances according to their priority.

SHAHI RAM v. SHIB LAL VII 378

s. 311. See EXECUTION OF DECREE 23.

ss. 311, 312. See EXECUTION OF DECREE 17, 21 AND 22.

ss. 311, 312. *Execution of decree—Sale in execution—Order disallowing objections to sale—Order confirming sale—Appeal—Civil Procedure Code, ss. 313, 314, 588 (16).* *Per* PETHERAM, C.J., and OLDFIELD, BRODHURST, and DUTHOIT, JJ.—An order passed under the first clause of s. 312 of the Civil Procedure Code, after an objection made under the provisions of s. 311 has been disallowed, is appealable under art. (16) of s. 588. *Per* MAHMOOD, J.—An application made under s. 311 can be disposed of only under s. 312, and if the Court rejects the objection to the sale, the order must be regarded as an order "refusing to set aside a sale of immoveable property" under the 1st paragraph of s. 312, and therefore appealable as falling under the purview of art. (16) of s. 588. *Lalman v. Rassa Lal and Rajan Kuar v. Lalla Prasad* dissented from by MAHMOOD, J.

TOTA RAM v. KHUB CHAND VII 253

ss. 313, 314. See CIVIL PROCEDURE CODE, SS. 311, 312.

s. 316. See s. 244.

s. 320. See EXECUTION OF DECREE 6.

s. 320. *Rules prescribed by Local Government—Notification No. 671 of 1880, dated the 30th August 1880—"Ancestral" property—Alluvial land—"Ancestral" riparian property—Alluvial land held on same title as riparian land.* *Held* that the ownership of alluvial land which had accreted to a riparian village must rest upon the same title as that upon which the original village was held, and that as the riparian village was ancestral, the accreted property must be ancestral also. RAM PRASAD RAI v. RADHA PRASAD SINGH VII 402

ss. 322B, 322D. *Dispute as to extent of judgment-debtor's liability to claim—Appeal from order disposing of dispute—Nature of appeal—Act VII of 1870, sch. II, No. 11.* An appeal from the decision of a dispute under s. 322B of the Civil Procedure Code falls directly within the exception of art. 11, sch. II, of the Court Fees Act (VII of 1870), and the memorandum of appeal should therefore be presented as to a decree in a suit upon an *ad valorem* stamp. *Srinivasa Ayyangar v. Prida Tamb Nayahar* dissented from. AHMAD KHAN v. MADHO DAS VII 565

s. 351 (a). *Insolvent judgment-debtor—Accidental false statement in application.* Before rejecting an application by a judgment-debtor for a declaration of insolvency with reference to the provisions of s. 351 (a) of the Civil Procedure Code, it is necessary that the Court should be satisfied that the applicant has wilfully made false statements: unintentional inaccuracies are not sufficient grounds for rejection.

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- s. 351 (b). *Insolvent judgment-debtor*—"Property"—*Fraudulent intent*. Section 351 (b) of the Civil Procedure Code contemplates a case of active concealment, transfer, or removal of substantive property since the institution of the suit in which was passed the decree in execution of which the judgment-debtor was arrested or imprisoned, with intent to deprive the creditor or creditors of available assets for division; and it does not cover an omission by the judgment-debtor, in his application for a declaration of insolvency, of a statement as to his right to demand partition of ancestral estate in which he is a sharer, especially where there is no evidence of any intent to defraud.
SUKRIT NARAIN LAL v. RAGHUNATH SAHAI ... VII 446
- s. 368. See APPEAL 2.
 s. 373. See SUIT 4.
 s. 374. See ACT XV OF 1877, SCH. II, NO. 179 (4).
 s. 381. *Civil Procedure Code*, s. 2—*Appeal*. The definition of "decree" in s. 2 of the Civil Procedure Code means that where the proceeding of the Court finally disposes of the suit, so long as it remains upon the record, it is a "decree." *Held* by the Full Bench that an order passed under s. 381 of the Civil Procedure Code, dismissing a suit for failure by the plaintiff to furnish security for costs as ordered, was the decree in the suit, and appealable as such, and consequently was not open to revision by the High Court under s. 622 of the Code.
WILLIAMS v. BROWN ... VIII 108
- s. 407 (c). *Suit in formâ pauperis*—*Rejection of application*—"Right to sue"—*Limitation*. Where an application for leave to sue as a pauper was rejected with reference to s. 407 (c) of the Civil Procedure Code on the ground that the claim was barred by limitation, and therefore the applicant had no right to sue,—*held* by the Full Bench that the Court had acted within its powers, and that its jurisdiction not having been exercised illegally or with material irregularity, the High Court had no power of interference in revision under s. 622 of the Civil Procedure Code. *Amir Hassan Khan v. Sheo Baksh Singh* referred to. The terms of s. 407 (c) of the Code must not be read as limiting the Court's discretion to merely ascertaining whether the "right to sue" arose within its jurisdiction, but have a more extended meaning, namely, that an applicant must make out that he has a good subsisting cause of action, capable of enforcement in Court, and calling for an answer, and not barred by the law of limitation or any other law. *Per MAHMOOD, J.*—The word "case" as used in s. 622 of the Civil Procedure Code should be understood in its broadest and most ordinary sense, including all adjudications which might constitute the subject of appeal or revision, subject to the rules governing the exercise of the appellate and revisional jurisdictions respectively; and it comprehends adjudications under s. 407, which fall under the same general category of adjudications as the rejection of an ordinary plaint under s. 53 or s. 54. *Phul Singh v. Jagai Nath, Bhulneshri Dat v. Bidiadhas, and Sital Sahu v. Bachu Ram* referred to. Also *per MAHMOOD, J.*—The provisions of s. 407 must be interpreted strictly, inasmuch as they operate in derogation of the right possessed by every litigant to seek the aid of the Courts of Justice; and an exercise of jurisdiction under that section, when such exercise of jurisdiction is open to the objection of illegality or material irregularity, would form a proper subject of revision by the High Court. *Har Prasad v. Jafar Ali and Koka Rangarajayaka Ammal v. Koka Venkatachellapati Nayudu* referred to.
CHATTARPAL SINGH v. RAJA RAM ... VII 661
- s. 443. See MAJORITY 2.
 ss. 492, 494. *Temporary injunction*—*Stay of sale in execution of decree*—*Practice*—*Notice to opposite party*. Where a Court made an order granting a temporary injunction under s. 492 of the Civil Procedure Code, without directing notice of the application for injunction to be issued to the other side, and its order directing stay of sale of property in execution was passed *ex parte*, without the other side being given an opportunity to show cause, *held* that the order was irregular. Where ancestral property was attached in execution of a decree, and a son of the judgment-debtor instituted a suit to establish his right to the property and made an application for a temporary injunction directing stay of sale pending the decision of the suit, *held* that inasmuch as what was advertised to be sold was the rights and interests of the plaintiff's father in the property, and it could not be said that the property was being "wrongfully sold in execution of a decree" and the application on the face of it disclosed no sufficient ground to warrant an order under s. 492 of the Civil Procedure Code being made as prayed, the temporary injunction ought not to have been granted.
AMOLAK RAM v. SAHIB SINGH ... VII 550

Civil Procedure Code—(continued.)

- s. 508. See ARBITRATION 5.
 s. 508. See S. 521; ARBITRATION 1.
 ss. 509; 511. See ARBITRATION 1.
 s. 510. See ARBITRATION 3 AND 4.
 s. 514. See S. 521.
 s. 518. *Civil Procedure Code, s. 522—Appeal.* See ARBITRATION 2.
 s. 521. *Arbitration—Making award after the time allowed by Court.* Under s. 521 of the Civil Procedure Code, the rule that no award shall be valid unless "made" within the period fixed by the Court, is equivalent to a rule that the award must be "delivered" within that period. Upon a reference to the arbitration of three persons, the Court ordered that the award made by them should be filed on the 19th September 1885. The award was not filed on that date, but was signed by two of the arbitrators on that date, and by the third arbitrator on the 20th September, on which day it was filed. It had been agreed that the opinion of the majority should carry the decision. *Held* that the award was not "made within the period fixed by the Court" within the meaning of s. 521 of the Civil Procedure Code.

BEHARI DAS v. KHALIAN DAS VIII 543

- s. 521. *Arbitration—Making award after the time allowed by Court—Order fixing time, or enlarging time fixed, for the delivery of award requisite—Civil Procedure Code, ss. 508, 514, 522—Decree in accordance with award—Appeal—Objection to validity of award taken for the first time in appeal.* The law contained in ss. 508 and 514 of the Civil Procedure Code requires that there shall be an express order of the Court fixing the time for delivery of the award or for extending or enlarging such time; and the mere fact that the Court has passed a decree in accordance with the award cannot be taken as affording a presumption that an extension of time was given. An award which is invalid under s. 521 of the Civil Procedure Code, because not made within the period allowed by the Court, is not an award upon which the Court can make a decree, and a decree passed in accordance with such an award is not a decree in accordance with an award from which no appeal lies with reference to the ruling of the Full Bench in *Lachman Das v. Brijpal*. Where objection to the validity of the award on the ground that it was made beyond the time allowed was not taken by the defendant in the first Court, *held* that he was not thereby estopped from raising the objection for the first time in appeal, inasmuch as it was not shown that in the first Court he was aware of the defect, or had done anything to imply consent to extension of the time.

CHUHA MAL v. HARI RAM... .. VIII 548

- s. 522. *Appeal.* See ARBITRATION 2.
 s. 522. *Decree in accordance with award—Appeal.* See S. 521.
 s. 523. See ARBITRATION 1.
 ss. 525, 526. *Filing award in Court—Partnership—Agreement to refer disputes to arbitration.* The three parties to a deed of partnership agreed that in case of any dispute or difference, the matter should be referred to the arbitration of persons chosen by each party to such dispute, and that in case any such party should refuse or fail to nominate an arbitrator, then the arbitrator named by the other party should nominate another arbitrator, and the two should nominate a third person as umpire. Certain differences having arisen among the three partners, two of them called upon the executors of the third to nominate an arbitrator under the terms of the deed, but they refused to do so. The first mentioned partners then nominated an arbitrator, who in his turn nominated another, and these having appointed an umpire, made an award. One of the partners at whose instance the matter in dispute had been referred to arbitration presented an application under s. 525 of the Civil Procedure Code praying that the award might be filed in Court. This application was opposed by the executors of the third partner, who appeared and lodged verified petitions disclosing grounds of objection within the meaning of s. 520 or s. 521 of the Code. *Held* that the word "parties" as used in s. 525 should not be confined to persons who are actually before the arbitrators; that if persons by an agreement have undertaken between themselves that, in the event of a certain state of things happening, a particular procedure shall be followed which, under one state of circumstances, may be adopted *in invitum*, they should, for the purposes of s. 525, be regarded as parties to that arbitration; and that there was sufficient reason to show that the defendants in the present case were *prima facie* bound by the arbitration, so as to bring them within the terms of s. 525 as parties thereto, who should be called on to show cause why the award should not be filed. *Willcox v. Storkey and Re Newton and Hetherington* referred to. *Held* also that ss. 525 and 526 of the Code, read together, mean that the party coming forward to oppose the filing of

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- the award, must show cause, that is, must establish by argument, or proof, or both, reasonable grounds to warrant the Court in arriving at the conclusion that the award is open to any of the objections mentioned in s. 520 or s. 521, and it is not sufficient, when it is sought to make the award a rule of Court, for the defeated party to come and merely say upon a verified petition that this or that ground referred to in ss. 520 and 521 existed against the filing. *See Ram Chowdhry v. Denobundhoo Chowdhry* and *Ichanoyee Chowdhranee v. Prosunno Nath Chowdhry* dissented from. *Dutto Singh v. Dosad Bahadur Singh*, *Dandekar v. Dandekars* and *Chowdhry Murtaza Hossein v. Bech-un-nissa* referred to.
- JONES v. LEDGARD ... VIII 340
- s. 539. See MOSQUE. SUIT 1.
- s. 540. See EX PARTE DECREE 1.
- ss. 540, 561, 584. See APPEAL 3.
- ss. 540, 588 (8). See CIVIL PROCEDURE CODE, SS. 66, 103, 107.
- s. 545. See s. 244 (c).
- ss. 545, 546. *Execution of decree against surety*. See EXECUTION OF DECREE 21.
- s. 549. See PRACTICE 3.
- s. 549. An appeal, although it may have been rejected by the Appellate Court, under s. 549 of the Code of Civil Procedure, upon failure by the appellant to furnish security demanded under that section, may be restored, on sufficient grounds, at the Court's discretion. The High Court having apparently treated an appeal as though, after rejection of it under the above section, a petition tendering security to the amount demanded, and asking restoration of the appeal, was not entertainable and could not be considered, *held* by the Judicial Committee that restoration was within the Court's discretion and that there were grounds for it, upon the appellant's giving approved security within such time as the Court might fix.
- BALWANT SINGH v. DAULAT SINGH ... VIII 316
- s. 549. Section 549 of the Civil Procedure Code was never intended by the Legislature to derogate from the right of appeal given by the law to every person who is defeated in a suit in the Court of First Instance, and an application should not be granted under that section of which the only ground is a statement that the appellant is not pecuniarily in a position to pay the costs of the appeal, if it should be dismissed. *Maneckji Limji Mancherji v. Goolbai* followed. *Ross v. Jaques*, *Seshayyengar v. Jannularadin*, and *Jogendro Deb Roykut v. Fumindro Deb Roykut* referred to.
- LAKHMI CHAND v. GATTO BAI ... VII 542
- ss. 556, 558. *Non-attendance of appellant at hearing of appeal—Dismissal of appeal on the merits—Application for re-admission*. In an appeal before an appellate Court, the appellant did not attend in person or by pleader, and the Court instead of dismissing the appeal for default, tried and dismissed it upon the merits. Subsequently, the appellant applied to the Court, under s. 558 of the Civil Procedure Code, to re-admit the appeal, explaining her absence when the appeal was called on for hearing. The Court rejected the application, on the ground that the appeal had been decided on the merits and reasons had been recorded for its dismissal which there were no apparent grounds for setting aside. *Held* that the Court should have dismissed the appeal for default, and it was illegal to try it on the merits, and the judgment was consequently a nullity, the existence of which was no bar to the re-admission of the appeal.
- ZAINAR BEGAM v. MANAWAR HUSAIN KHAN ... VIII 277
- s. 560. See EX PARTE DECREE 1.
- s. 561. *Objections by respondent—Withdrawal of appeal*. Where an appeal was dismissed upon the application of the appellant himself made before the hearing—*held* that the respondents, who had filed objections to the decree of the Court of First Instance under s. 561 of the Civil Procedure Code, had no claim to have their objections heard, notwithstanding the dismissal of the appeal. *Comnar Puresh Naram Roy v. Watson and Co.* and *Dhondi Jagannath v. The Collector of Salt Revenue* referred to.
- MAKTAB BEG v. HASAN ALI ... VIII 551
- ss. 562, 564. See PRE-EMPTION 15.
- ss. 562, 564, 566. See REMAND.
- ss. 562; 565, 566. See RES JUDICATA.
- ss. 565, 566; 568. See APPEAL 5.
- s. 578. See JURISDICTION 6.
- s. 578. *Act I of 1877, s. 42*. See HINDU LAW 2.

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- s. 582. See APPEAL 2 AND 4 : SUIT 4.
- s. 583. See CIVIL PROCEDURE CODE, s. 244.
- s. 583. *Execution of decree—Decree enforcing the right of pre-emption—Non-payment of purchase-money decreed by appellate Court—Restitution of purchase-money paid under lower Court's decree—Application for restitution—Revival of application.* A decree for pre-emption was passed conditionally upon payment by the decree-holder of Rs. 1,139, and in July 1880, the plaintiff paid this amount into Court, and it was drawn out by the defendant in August 1881. Meanwhile, in July 1881, the High Court in second appeal raised the amount to be paid by the plaintiff to Rs. 2,400, but the plaintiff allowed the time limited for payment of the excess difference to elapse without paying it and the decree for pre-emption thereupon became dead. In May 1883, the plaintiff applied in the execution department for the refund of the deposit which had been drawn and retained by the defendant. This application was granted, and the defendant ordered to refund, and this order was confirmed on appeal in January 1885, and by the High Court in second appeal in May 1885. Meanwhile the first Court had suspended execution of the order pending the result of the appeal, and in December 1884 removed the application temporarily from the "pending" list. In February 1885, the plaintiff applied for restitution of the amount deposited, asking for attachment and sale of property belonging to the defendant. This application was dismissed as barred by limitation. *Held* that this application was only a revival of the application of May 1883, which was within time. *Held* also that the plaintiff was, in the sense of s. 583 of the Civil Procedure Code, "a party entitled to a benefit by way of restitution under the decree" of the High Court of July 1881; that it was a necessary incident of that decree that he was entitled to restitution of the sum which he had paid as the sufficient price under the decree of the Lower Appellate Court; that he was competent under s. 583 to move the local Court to execute the appellate decree in this respect in his favour "according to the rules prescribed for the execution of decrees in suits"; that he did this in May 1883, by an application made according to law in the proper Court in the sense of art. 179 of the Limitation Act; and that his present application to the same effect being within three years from that application was within time.
- NAND RAM v. SITA RAM VIII 545
- s. 583. *Reversal of decree—Repayment of money realized—Restitution—Interest—Question for Court executing decree—Fresh suit—Civil Procedure Code, s. 244.* In a suit for redemption of a mortgage, a decree was passed for possession by redemption, on the plaintiff paying the sum of Rs. 43,625-7-0, the amount of the mortgage-debt. Prior to the institution of the suit, the defendant had taken proceedings in the Judge's Court to foreclose the mortgage, and the plaintiff paid the above-mentioned sum into that Court for the defendant, who took it. The plaintiff appealed to the High Court from the decree directing him to pay Rs. 43,625-7-0 as the mortgage-debt, and obtained a decree by which the decree of the first Court was modified, and the amount payable on redemption was reduced to Rs. 22,155. The plaintiff then took out execution of the decree to recover from the defendant the difference between the two sums with interest. *Held* that the effect of the Appellate Court's decree was to direct restitution of any sum paid under the first Court's decree which was disallowed by the Appellate Court's decree, and that the question was clearly one for determination by the Court executing the decree and not by separate suit, being expressly provided for by s. 583 of the Civil Procedure Code. *Held* also that the decree-holder was entitled to restitution of the amount with interest. *Roger v. The Comptoir d'Escompte de Paris* referred to. *Ram Ghulam v. Dwarka Rai* distinguished by MAHMOOD, J.
- JASWANT SINGH v. DIP SINGH VII, 432
- s. 584. See COURT-FEES 1 : EX PARTE DECREE 1 : REMAND.
- s. 584. *Second appeal—Grounds impugning findings of fact.* *Held* by the Full Bench (PETHERAM, C.J., dissenting) that, under s. 584 (c) of the Civil Procedure Code, it is competent for the High Court to entertain pleas in second appeals which impeach the findings of fact recorded by the Lower Appellate Court, on the ground that such findings are conjectural, that they ignore the evidence, and that the Court has given no reasons for the conclusions at which it arrived. Where a Lower Appellate Court has drawn strained or unreasonable conclusions from the evidence, or has discredited or disbelieved witnesses or documentary proof upon capricious or unsustainable grounds, or has stated no intelligible reasons for arriving at its findings of fact, the High Court may take notice of all

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such matters in second appeal. *Futtehna Begam v. Mohamed Ausur, Assanullah v. Hafiz Mahomed Ali and Lal Mahomed Bepari v. Shola Bewa* referred to. *Per PETHERAM, C. J.*—The High Court is not at liberty in second appeal to look into the evidence in the cause for the purpose of ascertaining whether the lower Courts have found the facts correctly, inasmuch as no question of fact is included in the grounds of appeal allowed by s. 584 of the Civil Procedure Code, and it would seem that the intention of the Legislature was that in small causes the findings of the lower Courts on questions of fact should be absolutely final. By "Specified law" in cl. (a) of s. 584 is meant the statute law, and by "usage having the force of law" the common or customary law of the country or community, and the clause is confined to cases in which the Lower Appellate Courts have either misconstrued a statute or written document, or have come to a wrong conclusion as to what is the customary law of the country or community with reference to questions at issue between the parties. Clause (b) can only refer to mistakes in law, and does not extend the operation of cl. (a). The term "procedure" in cl. (c) means the practice followed by the Courts in the trial of cases, and cannot be construed as including the mental process by which a Court comes to a conclusion upon a question of fact. *Per MAHMOOD, J.*—That the Legislature, by framing s. 574 of the Civil Procedure Code, intended to guard against such failure of justice as might arise from the defective or arbitrary exercise of the extensive powers possessed by the Court of first appeal in cases which, with reference to their nature, would be proper subjects of second appeal; and a judgment of a Court of first appeal which falls short of due compliance with the various clauses of s. 574, is essentially defective, and may properly be made the subject of complaint in second appeal under s. 584. *Ramnaram v. Bhawanidin, and Sheoambar Singh v. Lallu Singh* referred to. The word "procedure" in cl. (c) of s. 584 must be understood in its most generic sense, including all the rules contained in the Civil Procedure Code, or any other law, regulating the investigation of cases by the Civil Courts. When the Court of first appeal, after having entered into the merits of the case, has considered the evidence and adjudicated upon the merits in the manner required by s. 574, the mere circumstance that the conclusions at which the Court has arrived are erroneous or opposed to the weight of evidence, will not justify interference in second appeal, even though such conclusions proceeded upon an improper conception of the exact effect and bearing of the case upon the merits. On the other hand, when the Court of first appeal, while adjudicating with due compliance with the provisions of s. 574, arrives at conclusions upon the merits ignoring any steps essential for justifying those conclusions, or where such conclusions are based upon evidence inadmissible by law, or proceed upon an erroneous view of the legal effect of any material part of the evidence, or are arrived at under a misconception either of the rules of evidence or of any other law, such conclusions, though they purport to be distinct findings of fact, would lay the judgment of the Lower Appellate Court open to second appeal under cl. (c) of s. 584, so long as the error was substantial enough to have possibly affected the justice of the case upon the merits.

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s. 588 (16). See CIVIL PROCEDURE CODE, SS. 311, 312.

s. 588 (28). See REMAND : RES JUDICATA.

s. 590. See REMAND.

s. 610. *Privy Council decree—Execution for costs—Rate of exchange—Meaning of "for the time being."* Under the last paragraph of s. 610 of the Civil Procedure Code, the amount payable must be estimated at the rate of exchange "for the time being fixed by the Secretary of State for India in Council," and the words "for the time being" mean the year in which the amount is realized or paid or execution taken out, and not the year in which the decree was passed. The decree-holders, under a decree passed by Her Majesty in Council, having taken out execution for a sum of £119-11 under s. 610 of the Civil Procedure Code—held that, the rate of exchange being fixed yearly by the Secretary of State for India in Council, the rate of exchange on the date of the application for execution was the proper rate of exchange the decree-holders were entitled to.

PARAM SUKH v. RAM DAYAL ... VIII 650

s. 617. *High Court, Reference to—Final decree or order.* A Munsif, being of opinion that he had no jurisdiction to entertain a particular suit, made an order returning the plaint for presentation to the proper Court. An appeal was preferred under s. 588 of the Civil Procedure Code to the District Judge, who,

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entertaining doubts upon the question of jurisdiction, referred the matter to the High Court, under s. 617. *Held* that, inasmuch as the order of the Munsif was not a final decree in the suit, and any order of the Judge in appeal disposing of the plea of jurisdiction would not amount to a "final" decree within the meaning of s. 617 of the Civil Procedure Code, the High Court had not jurisdiction to entertain the reference.

RAMPHUL v. DURGA VII

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- s. 622. See APPEAL 4: CIVIL PROCEDURE CODE, s. 206. EXECUTION OF DECREE 6: HIGH COURT'S POWERS OF REVISION 1.

s. 622. *High Court's powers of revision.* In a suit to enforce the right of pre-emption in respect of a usufructuary mortgage of immovable property, the plaintiffs alleged that the consideration-money was less than that stated in the mortgage-deed. The Court of First Instance gave the plaintiffs a decree for possession of the property, on payment of an amount less than that mentioned in the deed, and this decree was affirmed on appeal. The mortgagees appealed to the High Court on the following grounds.—(i) Because it was for the respondents to prove that any portion of the consideration was not paid. (ii) Because the lower Court has not considered the evidence of the appellants. (iii) Because the finding of the lower Court is based on conjecture." *Held*, on the question whether on such grounds, not being grounds on which a second appeal is allowed by Ch. 42 of the Civil Procedure Code, the appeal should not proceed rather under Ch. 46, s. 622 of that Code, that the appeal should not proceed under s. 622 of the Civil Procedure Code, in consequence of the decision of the Privy Council in *Amir Hassan Khan v. Sheo Baksh Singh* that only questions relating to the jurisdiction of the Court could be entertained under that section.

MAGNI RAM v. JIWA LAL VII

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s. 622. *High Court's powers of revision—"Jurisdiction"—"Illegality"—"Material irregularity."* A suit was instituted in the Court of a Munsif to recover from the defendants a sum of Rs. 49, being the amount due under a bond and which the plaintiff alleged had been recovered on her account by one of the defendants from the obligor. The Munsif, being of opinion that the determination of the plaintiff's right to the bond involved the question of her heirship to the estate of a certain deceased person, and that consequently the case before him raised a question affecting the title to property exceeding Rs. 1,000 in value, held that he had no jurisdiction to entertain the suit, and accordingly returned the plaint for presentation to the proper Court under s. 57 of the Civil Procedure Code. *Held*, by the Full Bench that the Munsif had acted upon an erroneous view, as the only subject-matter of the suit was the Rs. 49; that he had consequently failed to exercise a jurisdiction vested in him, and the High Court was therefore competent to revise his order under s. 622 of the Civil Procedure Code. The result of *Amir Hassan v. Sheo Baksh Singh* and *Magni Ram v. Jiwa Lal* is that the questions to which s. 622 of the Civil Procedure Code applies are questions of jurisdiction only. The meaning of the decision of the Privy Council in the former case is that, if the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it, either of fact or law, and that the High Court has no jurisdiction under s. 622 to inquire into the correctness of its view of the law, or the soundness of its findings as to facts; but that, when no appeal is provided, its decision on questions of both kinds is final. *Per STRAIGHT and TYRRELL, JJ.*—Clauses (a) and (b) of s. 584, specifying the grounds on which a second appeal lies to the High Court, embody what s. 622 refers to in the word "illegally"; that is to say, to cases where the Court below has, in the exercise of its jurisdiction, come to a decision which is contrary to some specified law or usage having the force of law, or failed to determine some material issue of law or usage. Clause (c) of s. 584 indicates the meaning of the words "material irregularity" in s. 622, i.e., some material irregularity in procedure, "which may possibly have produced error or defect in the decision of the case upon the merits." *Maulvi Muhammad v. Syed Husam* referred to.

BADAMI KUAR v. DINU RAI VIII

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s. 622. *High Court's powers of revision—"Jurisdiction"—Limitation.* A Court which admits an application to set aside a decree *ex parte* after the true period of limitation has expired acts in the exercise of its jurisdiction illegally and with material irregularity within the meaning of s. 622 of the Civil Procedure Code, and such action may therefore be made the subject of revision by the High Court under that section. *Amir Hasan Khan v. Sheo Baksh Singh* and *Magni Ram v.*

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- *Jiwa Lal* commented on by MAHMOOD, J. *Per* MAHMOOD, J.—The term "jurisdiction" as used by their Lordships of the Privy Council in *Amir Hassan Khan v. Sheo Baksh Singh* must be understood in its broad legal sense signifying the power of administering justice according to the means which the law has provided, and subject to the limitations imposed by the law upon the judicial authority.

HAR PRASAD *v.* JAFAR ALI ... VII 345

s. 622. *High Court's powers of revision—Meaning of "jurisdiction"—Amendment of decree—Civil Procedure Code, s. 206—Act XV of 1877, sch. II, No. 178.* In execution of a decree for partition of immoveable property passed in 1872, a dispute arose as to the execution in reference to a portion of the property, and in 1881 it was finally decided that the decree was defective in its description of the property, and therefore incapable of execution. In May 1885, on application by the decree-holder, the Court passed an order amending the decree, the amendment having reference to an arithmetical error. The judgment-debtor applied to the High Court for revision of this order, on the grounds that the amendment of the decree was barred by limitation, and that the decree itself being barred by limitation and finally pronounced to be incapable of execution, the Court had acted beyond its jurisdiction in amending it. *Held* that the application for revision must be rejected. *Per* OLDFIELD, J., that the High Court had no power to entertain the application under s. 622 of the Civil Procedure Code, with reference to the decision of the Privy Council in *Amir Hassan Khan v. Sheo Baksh Singh* and of the Full Bench in *Badami Kuar v. Dinu Rai*, and further that upon the facts stated the Court ought not to interfere. *Per* MAHMOOD, J., that the Court was not precluded from entertaining the application for revision under s. 622 of the Civil Procedure Code. *Amir Hassan Khan v. Sheo Baksh Singh, Badami Kuar v. Dinu Rai, Raghunath Das v. Raj Kumar, Surtia v. Ganga, Magu Ram v. Jiwa Lal, Har Prasad v. Jafar Ali* referred to. *Bhagwant Singh v. Jageshwar Singh and Abu Said Khan v. Hamid un-nissa* dissented from. The meaning of the term "jurisdiction" used in s. 622 of the Civil Procedure Code must not be confined to the territorial or pecuniary limits of the powers of a Court, or to the nature of the class to which the case belongs. It implies, in addition to questions of these kinds, the presence or absence of a positive authority or power conferred by the law upon tribunals in cases which satisfy the other conditions referred to. In framing the section, the Legislature gave to the High Court power to interfere with the action of subordinate tribunals in cases where there is no remedy, either by appeal or otherwise, and where those tribunals have either exceeded or wrongly declined to exercise the authority, the power and the jurisdiction which the law confers upon them, or, under the pretence of exercising such authority, power and jurisdiction, have acted against a positive prohibition of the law. *Combe v. Edwards and Crepps v. Durden* referred to. *Held* also *per* MAHMOOD, J., that in the present case the Court below had jurisdiction to entertain the application under s. 206 of the Code; that it did so entertain it; and that in making the amendment its action could not be regarded as beyond the limits of its legal power and authority, so as to render it open to the objection of the exercise of jurisdiction "illegally or with material irregularity," within the meaning of s. 622. *Lucas v. Stephen, Oomanund Roy v. Maharajah Suttish Chunder Roy, Zahoor Hossein v. Syedur and Goluck Chunder Mussant v. Ganga Narain Mussant* referred to. Under a proper interpretation of the preamble and s. 4 of the Limitation Act (XV of 1877), the rule of limitation is confined to the litigants, and is inapplicable to acts which the Court may or has to perform *suo motu*. Section 206 of the Civil Procedure Code empowers a Court of its own motion to amend its decree, and the mere fact that one of the parties has made an application asking the Court to exercise that power will not render the action of the Court subject to the rule of limitation. *Roberts v. Harrison, Vuthal Janardan v. Rakmi, and Kiyasa Gowdan v. Ramasami Ayyar* referred to.

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- s. 647. See ACT XV OF 1877, SCH. II, NO. 179 (4).
- sch. IV, Form No. 113. See JURISDICTION 13.
- sch. IV, Form No. 141. See EXECUTION OF DECREE 15.

Commitment—

See CRIMINAL PROCEDURE CODE, SS. 423, 436, 439.

"Complaint"—

See CRIMINAL PROCEDURE CODE, S. 195.

Condition restraining Alienation—

Transfer of property—Inheritance—Act IV of 1882, ss. 2, 10—Act VI of 1871, s. 24.

In a suit for possession of certain shares in certain villages, a compromise was effected between the plaintiffs and B the defendant. The terms of the compromise were embodied in a deed, the terms of which were (*inter alia*) as follows :—"The said B will hold possession as a proprietor, generation by generation, without the power of transferring in any shape..... The following shares recorded in B's name shall not be transferred or sold in auction in payment of any debt payable by the said B, and in the event of their being transferred or sold, such transfer will be invalid, and the plaintiffs will then be entitled to set aside that transfer, and to obtain possession." B obtained possession of the shares allotted to him by the compromise. Subsequently certain creditors of B attached the shares referred to in the deed in execution of a decree obtained against the heirs of B for money lent to B on a bond, which he had executed while in possession of the shares, and in which he made a simple mortgage of them. The representatives of the plaintiffs in the suit in which the compromise was made objected to the attachment. *Held* by OLDFIELD, J., that the deed of compromise passed an absolute estate to B and his heirs to which the law annexed a power of transfer, and that, in reference to s. 10 of the Transfer of Property Act, the stipulation against alienation on B's part, or against sale by auction in execution of decrees against him, was void. *Per* MAHMOOD, J.—That the rule contained in s. 10 of the Transfer of Property Act was not binding upon the Court in this case, inasmuch as the question was one of succession or inheritance, to be governed by s. 24 of the Bengal Civil Courts Act; that it was for those objecting to the attachment to show that, under the Hindu law, the rights of B in the property ceased to exist at his death, or that his estate devolved upon them free of his debts; that, the Hindu law being silent on this subject, the principles of justice, equity, and good conscience must be applied, to which, so far as transfer was concerned, effect was given by s. 10 of the Transfer of Property Act; that the restrictions imposed by the deed of compromise upon B's powers of alienating the absolute estate which it conferred upon him were opposed to the policy of the law and could not be recognized; and that B must be held to have an absolute estate which would devolve upon his heirs and which could be sold in execution of decrees for his debts. The *Tagore Case* referred to.

BHAIRO v. PARMESHI DAYAL

VII 516

Conditional Decree—

"Finality" of. See PRE-EMPTION 2.

Confession—

Act I of 1872 (Evidence Act), ss. 26, 30. The word "confession" as used in the sections of the Evidence Act relating to confessions must not be construed as including a mere inculpatory admission which falls short of being an admission of guilt.

QUEEN-EMPRESS v. JAGRUP

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Consideration—

See CONTRACT: FRAUDULENT TRANSFER.

Failure of. See VENDOR AND PURCHASER 2.

Contract—

See DEBT: MAJORITY 1 AND 2.

Consideration—Uncertified adjustment of decree—Civil Procedure Code, ss. 244 (c), 258—Act IX of 1872, ss. 2, 10, 23, 28. The consideration for a mortgage consisted partly of the amount of two decrees held by the mortgagee against the mortgagor. The mortgagee having sued to enforce the mortgage, the mortgagor pleaded failure of consideration as a bar to the enforcement of the mortgage. This plea was based on the allegation that the mortgagee had not certified the adjustment of the decrees as provided by s. 258 of the Civil Procedure Code, and they were still in force under the terms of that section. *Per* DUTHOIT, J., that the failure of the mortgagee to certify the adjustment of the decrees did not constitute a failure of consideration, because he did not covenant to certify such adjustment, and it was not, in fact, necessary for him to do so; because he could not seek execution of the decrees on the ground that, though unsatisfied, they were still in force under s. 258 of the Civil Procedure Code, without becoming liable to penalties; and because if the mortgagor considered the entering up of the adjustment of the decrees to be imperative, he had his remedy by application to the Court in the terms of s. 258. *Per* MAHMOOD, J., that the adjustment of a decree out of Court, if never certified to the Court, is, under s. 258, ineffectual

Contract—(continued.)

only so far as the execution of the decree is concerned, that there is nothing in the Contract Act to make such an adjustment invalid as the consideration for an agreement; that an agreement founded on such consideration may be enforced without defeating the objects of s. 258; and that consequently there was, in respect of the amount of the decrees, valid consideration for the mortgage. *Gyanamani Dasi v. Pran Kishori Dasi, Meer Mahomed Kazem Jowharry v. Khetoo Bebee, Guni Khan v. Kwonjo Behary Sein, Davlata v. Ganesh Shastri, Shadi v. Ganga Sahai, and Sita Ram v. Mahipal* followed. *Patankar v. Devji* and *Pandurang Ramchandra Chowghule v. Narayan* dissented from.

RAMGHULAM v. JANKI RAI ... VII 194

Superseding decree. See EXECUTION OF DECREE 7.

Co-sharers—

See PRE-EMPTION 19 AND 20.

Costs—

See DECLARATORY DECREE 1: EXECUTION OF DECREE 8.

Security for. See PRACTICE, 3.

Suit to recover, by way of damages. See VENDOR AND PURCHASER 1.

Court-fees—

1. *Act VII of 1870, ss. 6, 12, 28—Order requiring additional court-fee on claim, passed subsequent to decree—Decree prepared so as to give effect to subsequent order—Civil Procedure Code, ss. 54, 55, 584.* A Judge, after disposing of an appeal on the 1st March 1883, again took it up, and on the 21st March 1883, directed the appellant to pay additional court-fees on her memorandum of appeal. On the 2nd May 1883, the appellant paid the additional court-fees under protest, and a decree was then prepared, bearing date the 1st March 1883, but it referred to and carried into effect the subsequent order of the 21st March and the 2nd May. *Per MAHMOOD, J.*, that as soon as the Judge had passed the decree of the 1st March 1883, he ceased to have any power over it, and was not competent to introduce new matters not dealt with by the judgment; that the order of the 21st March and the deposit of the 2nd May, whether right or wrong, were not proceedings to which effect could be given in the antecedent decree of the 1st March 1883; and that the decree was *ultra vires* to that extent, and was therefore liable to correction in second appeal under s. 584 of the Civil Procedure Code. The powers conferred by ss. 54 (a) and (c) and 55, read with s. 582 of the Civil Procedure Code, or by s. 12 of the Court Fees Act (VII of 1870) read with cl. (ii) of s. 10, are intended to be exercised before the disposal of the case, and not after it has been decided finally so far as the Court is concerned. The powers conferred by s. 28 of the Court Fees Act cannot be exercised by an order passed after the decision of the case to which the question of the payment of court-fees relates, and even assuming that they can be so exercised, such an order, though it may be subject to such rules as to appeal or revision as the law may provide, cannot be given effect to by making insertions in an antecedent decree. *Per OLDFIELD, J.*—That the Court had power to make the order it did, inasmuch as the collection of court-fees was no part of a Judge's functions in the trial of a suit which could be said to have ceased with its determination; and the provisions of the Court-Fees Act fixed no time within which the presiding Judge could exercise his power of ordering documents to be stamped, and seemed, on the other hand, to contemplate the exercise of that power at any time subsequent to the receipt, filing or use of a document, and to make the validity of the document and the proceedings relative thereto dependent on the document being properly stamped.

MAHADEI v. RAM KISHEN DAS ... VII 528

2. *Suit for profits in respect of several years—Distinct causes of action—Distinct subjects—Act VII of 1870 (Court Fees Act), s. 17—Civil Procedure Code, s. 48.* 44. In an appeal in a suit for recovery of profits under s. 53 (h) of the N.-W.P. Rent Act, in respect of several years, the proper court-fee leviable on the memorandum of appeal is one calculated on the aggregate amount of the profits claimed, and not one calculated separately on the amount of profits claimed for each year.

MUHAMMAD MALIK KHAN v. NIRBAI BIBI ... VII 761

Court of Wards—

See ACT XIX OF 1873, ss. 194, 195.

Criminal Breach of Trust —

Master and servant—*Servant entrusted with moneys for payment to tradesman of account settled with master for a specific sum—Gratuity of tradesman to servant—Right of master to benefit of gratuity*—Act XLV of 1860, ss. 405, 409. Where a master entrusts his servant with money for the payment of an *open* account, i.e., an account of which the items have never been checked or settled, and the tradesman makes the servant a present, and the transaction amounts to a taxation of the bill and a reduction of the price by the servant, the latter obtains the reduction for his master's benefit, the money in his hands always remains the master's property, and, if he appropriates it, he commits criminal breach of trust. But where the master himself has *settled* the account with the tradesman for a specific sum and sends the servant with the money, and the servant, after making the payment, accepts a present from the tradesman, in that case the servant does not commit criminal breach of trust, inasmuch as the money is given to him by a person whom he believes to have a right to give it, though it may be that, according to the strict equitable doctrines of the Court of Chancery, he is bound to account to the master for the money. *Hay's Case* [*In re Canadian Oil Works Corporation*] referred to.

QUEEN-EMPRESS v. IMDAD KHAN VIII 120

Criminal Procedure Code—

- s. 17. See S. 437.
 s. 28. See SESSIONS COURT.
 s. 35. *Conviction of rioting and causing grievous hurt—Offences distinct—Separate sentences not illegal—Criminal Procedure Code, s. 235—Act VIII of 1882, s. 4—Act XLV of 1860, ss. 147, 325.* The offences of rioting, of voluntarily causing hurt, and of voluntarily causing grievous hurt, each of the two latter offences being committed against a different person, are all distinct offences within the meaning of s. 35 of the Criminal Procedure Code. Under the first paragraph of s. 235 of the Criminal Procedure Code, a person accused of rioting and of voluntarily causing grievous hurt may be charged with and tried for each offence at one trial, and under s. 35, a separate sentence may be passed in respect of each. *Queen-Empress v. Ram Partab* dissented from.

QUEEN EMPRESS v. DUNGAR SINGH VII 29

- s. 39. See MAGISTRATE.
 s. 55. See ACT XLV OF 1860, SS. 224, 225.
 ss. 110, 117, 118. See ACT XLV OF 1860, SS. 224, 225.
 ss. 134; 143; 144. See ACT XLV OF 1860, S. 291.
 s. 195. See ACT XLV OF 1860, SS. 182; 211.
 s. 195. "*Sanction*"—"*Complaint*"—*Criminal Procedure Code, s. 476.* On the 2nd August 1884, a Munsif, who was of opinion that in the course of a suit which had been tried before him, certain persons had committed offences under ss. 193, 463, and 471 of the Penal Code, and that the prosecution of these persons was desirable, made an order which he described as passed under s. 643 of the Civil Procedure Code, and in which he directed that the accused should be sent to the Magistrate, and that the Magistrate should inquire into the matter. In May 1885, upon an application by one of the accused to the District Court to "revoke the sanction for prosecution granted by the Munsif," it was contended that the "sanction" had expired on the 2nd February 1885, and had ceased to have effect. *Held* by the Full Bench that the Munsif's order, whether it was or was not a sanction, was a sufficient "complaint" within the meaning of s. 195 of the Criminal Procedure Code, and that the limitation period prescribed by that section was not applicable to the case. *Per* PETHERAM, C.J., and STRAIGHT, J.—That, considering that s. 643 of the Civil Procedure Code was closely similar to s. 476 of the Criminal Procedure Code, the Munsif's order might be taken as having been passed under the latter section. Also *Per* PETHERAM, C.J., and STRAIGHT, J.—The words in s. 195 of the Criminal Procedure Code, "except with the previous sanction or on the complaint of the public servant concerned" must be read in connection with s. 476, which was enacted with the object of avoiding the inconvenience which might be caused if a Munsif, or a Subordinate Judge, or a Judge, were obliged to appear before a Magistrate and make a complaint on oath, like an ordinary complainant, in order to lay the foundation for a prosecution. The language of s. 476 indicates that where a *Court* is acting under in s. 195, a complaint in the strict sense of the Code is not required and that the procedure therein laid down constitutes the "complaint" mentioned in s. 195.

ISHRI PRASAD v. SHAM LAL VII 871

Criminal Procedure Code—(continued.)

s. 216. *Witness for defence—Refusal by Magistrate to summon witness under Criminal Procedure Code, s. 216—Witness summoned by Sessions Court—Criminal Procedure Code, ss. 291, 540.* Upon the committal of certain persons for trial before the Sessions Court for offences under the Penal Code, each of the prisoners, under s. 211 of the Criminal Procedure Code, gave in a written list of the persons whom he wished to be summoned to give evidence at the trial. On each of these lists the name of a particular person was entered, who objected under s. 216 to being summoned, on the ground that the summons was desired for vexatious purposes only, and that there were no reasonable grounds for believing that any evidence he could give would be material. Upon this objection, the committing Magistrate passed an order requiring the prisoners to satisfy him that there were reasonable grounds for believing that the objector's evidence was material, and, having heard arguments on both sides, passed an order refusing to issue the summons. The only ground stated by the Magistrate for this order was that he thought the reasons assigned for the application to have the objector summoned were insufficient. Subsequent to the order, and before the trial in the Sessions Court had begun, the Sessions Judge, upon an application filed on behalf of the prisoners, passed an order directing that the objector should be summoned to give evidence. The order assigned no reasons, and was passed in the absence of the objector or of any person representing him, and without notice to show cause being issued to him. The objector applied to the High Court for revision of the order on the ground that the Sessions Judge had no jurisdiction to make it. *Held* that when a Magistrate refuses, under s. 216 of the Criminal Procedure Code, to summon a witness included in the list of the accused, he must record his reasons for such refusal, and such reasons must show that the evidence of such witness is not material; that the ground stated by the Magistrate, *viz.*, that the reasons assigned for the application to have the objector summoned were insufficient, did not show that the evidence was not material; that the Sessions Judge had jurisdiction to make the order complained of; and that, even if he had not, it would not under the circumstances be desirable to interfere with his order in revision. *Per* STRAIGHT, J., that s. 540 is not the only provision of the Criminal Procedure Code which confers on a Sessions Judge powers of the kind exercised by him in this case. Under s. 291, though the summoning of witnesses by an accused through the medium of the Sessions Judge is not a matter of right, yet the Judge has an inherent power, if he thinks proper to exercise it, to sanction the summoning of other witnesses than those named in the list delivered to the committing Magistrate.

IN RE RAJAH OF KANTIT VIII 668

s. 226. See SESSIONS COURT.

s. 233. See S. 234.

s. 234. *Criminal Procedure Code, ss. 233, 234—Joinder of charges—Offences of the same kind committed in respect of the same person.* Where a postmaster was accused of having, on three different occasions within a year, dishonestly misappropriated moneys paid to him by different persons for money orders, *held* that, the offences of which such person was accused being the dishonest misappropriations by a public servant of public moneys, (for as soon as they were paid they ceased to be the property of the remitters), such offences were "of the same kind," within the meaning of s. 234 of the Criminal Procedure Code, and such person might, therefore, under that section, be charged with and tried at one trial for all three offences. *Empress v. Murari* observed on.

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s. 235. See S. 35; MAGISTRATE: OFFENCE.

ss. 236, 237. *Sessions Court—Addition of charge triable by any Magistrate—Power of Sessions Judge to add charge and try it.* See SESSIONS COURT.

s. 288. *Trial before Court of Session—Evidence given before committing Magistrate used at trial to contradict witnesses.* Section 288 of the Criminal Procedure Code was never intended to be used so as to enable a Court trying a cause to take a witness's deposition bodily, from the committing Magistrate's record, and to treat it as evidence before the Court itself. *Queen v. Amanulla* referred to. A Judge is bound to put to the witnesses whom he proposes to contradict by their statements made before the committing Magistrate, the whole or such portions of their depositions as he intends to rely upon in his decision, so as to afford them an opportunity of explaining their meaning, or denying that they had made any such statements, and so forth. In a case in which the Sessions Court had neglected to apply the above rules, STRAIGHT, J., quashed the conviction.

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Criminal Procedure Code—(continued.)

- s. 291. See s. 216.
- s. 338. *Tender of pardon to accomplice who has pleaded guilty—Accomplice—Evidence—Corroboration.* A Court of Session, under s. 338 of the Criminal Procedure Code, tendered a pardon to an accused person charged jointly with two others for the same offence, who had pleaded guilty. The tender was accepted and such person was examined as a witness against the other accused. *Held* that the tender of pardon was not improperly made, and the evidence of the approver was admissible. *Per* DUTHOIT, J.—The word "supposed" in s. 338 must be taken merely as intended to exclude the case of a man who has actually been convicted of the crime, and not the case of a man, who, although admitted to be a party to the crime, is unconvicted.
- QUEEN-EMPRESS v. KALLU ... VII 160
- s. 367. See s. 421.
- s. 369. See REVIEW OF JUDGMENT.
- s. 421. *Appeal, Summary rejection of—Judgment of criminal appellate Court—Criminal Procedure Code, ss. 367, 424, 439—High Court's powers of revision—Delay in applying for exercise.* The powers conferred by s. 421 of the Criminal Procedure Code should be exercised sparingly and with great caution, and reasons, however concise, should be given for rejecting an appeal under that section. Where a Sessions Judge rejected an appeal summarily under s. 421 of the Code, by an order consisting merely of the words "appeal rejected," and an application for revision of such order was made to the High Court nearly nine months thereafter, on the ground that the Judge was wrong in rejecting the appeal without assigning his reasons for so doing—*held* that this objection, if taken within a reasonable time, would have been valid, but as the application for revision was made with very great delay, the Court should not interfere.
- QUEEN-EMPRESS v. RAM NARAIN ... VIII 514
- s. 423. *Powers of appellate Court to alter finding of Court of First Instance.* Where the Court of Session had tried, convicted, and sentenced an accused person under s. 409 of the Penal Code, and the High Court was of opinion that the conviction was not sustainable under that section, the Court refused to alter the finding, under s. 423 of the Criminal Procedure Code, to a conviction for some other offence for which the accused had not been charged or tried.
- QUEEN-EMPRESS v. IMDAD KHAN ... VIII 120
- ss. 423, 436, 439. *Appellate Court, Powers of—Commitment.* The appellate Court referred to in s. 423 of the Criminal Procedure Code can, in an appeal from a conviction, only order an accused person to be committed for trial when it considers that the accused is triable exclusively by the Court of Session. The meaning of the words in s. 423 (b) of the Criminal Procedure Code, "or order him to be tried by a Court of competent jurisdiction subordinate to such Appellate Court, or committed for trial," is as follows:—If in an appeal from a conviction, the appellate Court finds that the accused person, who was triable only by a Magistrate of the first class or by a Court of Session, has, by an oversight or under a misapprehension, been tried, convicted and sentenced by a Magistrate of the second class, the Appellate Court may in that case reverse the finding and sentence, and order the accused to be retried by a Magistrate of the first class or by the Court of Session; and, in like manner, when the appellant, who was triable solely by the Court of Session has been tried, convicted and sentenced by a Magistrate of the first class, the Sessions Judge, in disposing of the appeal, is empowered to reverse the finding and sentence, and to order that the accused be committed for trial.
- QUEEN-EMPRESS v. SUKHA ... VIII 14
- s. 424. See s. 421.
- ss. 435, 437. *Power of District Magistrate to direct further inquiry by Magistrate of the first class—"Inferior Magistrate."* Where a District Magistrate called for the record of a case in which a Magistrate of the first class had discharged certain accused persons, and directed another Magistrate of the first class to make further inquiry into the case, *held*, following *Nobin Kristo Mookerjee v. Russick Lall Laha* and *Queen-Emress v. Nawab Jan*, that the District Magistrate's order was *ultra vires* and illegal.
- JHINGURI v. BACHU ... VII 134
- s. 437. "Inferior"—"Subordinate"—*First class Magistrate "subordinate" to Magistrate of District—Criminal Procedure Code, ss. 17, 435.* A Magistrate of the first class is within the meaning of s. 437 of the Criminal Procedure Code,

Criminal Procedure Code—(concluded.)

- "subordinate" to the Magistrate of the District, who is therefore competent to call for the record of the former, and to deal with it under s. 437.

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- s. 439. *High Court's powers of revision—Delay in applying for exercise.* See s. 421.

- s. 439. *High Court's powers of revision—Revision of case in which term of imprisonment has been served.* The High Court is competent, in the exercise of its powers of revision under s. 439 of the Criminal Procedure Code, to interfere with a conviction, even though, in consequence of the expiry of the sentence, it may not be possible to interfere with the latter.

QUEEN-EMPRESS v. SINHA ... VII 135

- s. 476. See s. 195.

- s. 494. See PROSECUTION.

- s. 512. *Act I of 1872, ss. 33, 157—Witness, threatening—Duty of Magistrate.* In 1874 five out of six persons who were named as having committed a murder were arrested, and after inquiry before a Magistrate were tried before the Court of Session and convicted. At the time of the inquiry before the Magistrate the sixth accused person absconded, as was recorded by the Magistrate. In their examination before that officer the witnesses deposed to the absconder having been one of the participators in the crime charged against the prisoners then under trial. In the Sessions Court the Judge did not record that the sixth accused person had absconded, and the evidence was recorded against the prisoners then under trial only. In 1886 the absconder was apprehended and tried before the Court of Session upon the charge of murder. At that time most of the former witnesses were dead, and the Sessions Judge, referring to s. 33 of the Evidence Act admitted in evidence against the prisoner the depositions given in 1874 before both the Magistrate and the Sessions Court. He also admitted the deposition of a surviving witness, which had been given in 1874 before the Sessions Court. This witness now also gave evidence against the prisoner. *Held* that the depositions were not admissible in evidence under s. 33 of the Evidence Act, the prisoner not having been a party to the former proceedings and not having then had an opportunity of cross-examining the witnesses. *Held*, however, that, under the circumstances, the depositions given in 1874 before the committing Magistrate, though not those given in the Court of Session, were admissible in evidence under s. 512 of the Criminal Procedure Code. *Per* STRAIGHT, J., that, under the special circumstances, the deposition taken in 1874 of the surviving witness was admissible under s. 157 of the Evidence Act as corroboration of her evidence given at the trial of the prisoner. In cross-examination before the Court of Session a witness stated that, when she was before the committing Magistrate, that officer, addressing her, said:—"Recollect, or I will send you into custody." *Held* that if the Magistrate did so address the witness, he exceeded his duty.

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- s. 537. See SESSIONS COURT.

- s. 540. See s. 216.

- sch. V, Form XX. See ACT XLV OF 1860, s. 291.

- sch. V, No. XXVIII (4). See ACT XLV OF 1860, s. 193.

Culpable Homicide—

Not amounting to murder. Grave and sudden provocation. See MURDER 1 AND 2.

Daughter's Son—

See HINDU LAW 2 AND 3.

Debt—

- *Bond—Inheritance—Hindu Law—Right of one of several heirs to sue creditor for share of debt—Contract—Obligation—Act XXVII of 1860—Act IX of 1872, ss. 42, 45.* *Held* by the Full Bench (MAHMOOD, J., *dissenting*) that when, upon the death of the obligee of a money-bond, the right to realize the money has devolved in specific shares upon his heirs, each of such heirs cannot maintain a separate suit for recovery of his share of the money due on the bond.

KANPHIYA LAL v. CHANDAR ... VII 313

Declaratory Decree—

See ACT I OF 1877, s. 42: EXECUTION OF DECREE 4: JURISDICTION 3 AND 10
SALE IN EXECUTION OF DECREE.

Declaratory Decree—(continued.)

1. *Abstract right—Cause of action—Costs.* A Hindu brought a suit in which he alleged that the Hindu community had acquired by long established custom an exclusive right to use for religious purposes a ghat situate on the river Ganges, but that the Muhammadans were in the habit of interfering with the exercise of such right by bathing at the ghat. He prayed for a declaration of the right, and for a perpetual injunction to be issued to the Muhammadans generally forbidding them to resort to the ghat. No act of trespass was charged against any of the defendants. The defence was that the Muhammadans were entitled to use the place, and that their use of it did not cause any inconvenience to the plaintiff. *Held* that the suit was not maintainable, since the Court had no power to pass a decree against persons who had never interfered with the property in dispute, or to issue an injunction against the whole Muhammadan world; but that, inasmuch as the defendants had fought the case all along as if the suit were maintainable, and upon a false issue, both sides must pay their own costs.

SHAH MUHAMMAD v. KASHI DAS ... VII 199

2. *Cause of action—Hindu widow—Testamentary declaration.* A sonless Hindu widow, in possession of her deceased husband's estate as such, made a statement before a revenue official, which was recorded by him, to the effect that she wished the property to go after her death to her nephew, and that S, the person entitled to succeed her, had no right to the property. *Held* that such statement as it was intended to operate, and would have operated, as a will in respect of the property, gave S a right to sue for a declaration that it should not have any effect as against him.

KALIAN SINGH v. SANWAL SINGH ... VII 163

Hindu Law—Reversioner. See HINDU LAW 12.

Reversioner—Act I of 1877, s. 42. See HINDU LAW 2.

Decree—

See APPEAL 3 AND 4: CIVIL PROCEDURE CODE, s. 44, RULE (a); s. 381: EXECUTION OF DECREE 1: SUIT 4.

Act XV of 1877, sch. II, No. 178. See CIVIL PROCEDURE CODE, s. 622.

Amendment of. See CIVIL PROCEDURE CODE, ss 206, 209.

Amendment of. Execution of decree—Objection to validity of amendment—Civil Procedure Code, s. 206. The Court in a suit upon a bond gave the plaintiff a decree, making a deduction from the amount claimed of a sum covered by a receipt produced by the defendant as evidence of part-payment and admitted to be genuine by the plaintiff. The decree was for a total amount of Rs. 1,282. Subsequently, on application by the decree-holder and without giving notice to the judgment-debtor, the Court which passed the decree, purporting to act under s. 206 of the Civil Procedure Code, altered the decree and made it for a sum of Rs. 1,460. The decree-holder took out execution, and the judgment-debtor objected that the decree was for Rs. 1,282 and had been improperly altered. The Court executing the decree disallowed the objection, on the ground that it was not such as could be entertained in the execution-department. *Held* that the decree as it originally stood was in accordance with the judgment, and the Court had no power to alter it as it did, and the proceeding was further irregular, in that no notice was given to the opposite party as required by s. 206 of the Code. *Held* also that when a decree-holder executes his decree, a judgment-debtor is competent to object that the decree is not the decree of the Court fit to be executed, and therefore not capable of execution; and that the judgment-debtor, in this case could raise the question whether the decree, which was altered behind his back, was a valid decree and fit to be executed.

ABDUL HAYAT KHAN v. CHUNIA KUAR ... VIII 377

For sale of mortgaged property. See EXECUTION OF DECREE 9.

For sale of mortgaged property and for costs. See EXECUTION OF DECREE 10.

Order amending. See CIVIL PROCEDURE CODE, s. 206.

Payable by instalments. See EXECUTION OF DECREE 11 AND 12.

Uncertified adjustment of. See CONTRACT.

Defamation—

See ACT XLV OF 1860, s. 499.

Justification—Express malice—Evidence of complainant having previously acted as alleged in the libel—Act XLV of 1860 (Penal Code), s. 499. In a prosecution for defamation under s. 500 of the Penal Code, the alleged libel accused the complainant, who was a judicial officer, of (i) having, upon a particular occasion, used abusive language to certain respectable native litigants appearing before him.

Defamation—(continued.)

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in Court, and (ii) having, upon other occasions not specified, treated other respectable natives (not named) "in a similar manner." This latter accusation was contained in a postscript. The complaint filed by the complainant in the Court of the committing Magistrate, and the charge sheet in which the Magistrate committed the defendant for trial, covered the whole of the document complained of, except the postscript. At the trial of the case the defendant pleaded not guilty, and also relied on the first, eighth and ninth Exceptions to s. 499 of the Penal Code. The prosecution gave evidence to prove that, in making the charges contained in the alleged libel, the defendant was actuated by express malice toward the complainant. *Held*, with reference to the terms of s. 499 of the Penal Code, that evidence of particular instances of abusive language applied by the complainant upon former occasions to natives appearing in his Court was admissible, first, as relating to the question what was the reputation which the defendant was said to have injured, and secondly because it must be gathered from the document complained of as a whole whether it showed a malicious intention or not.

LAIDMAN v. HEARSEY

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Disqualified Proprietor—

See ACT XIX OF 1873, SS. 194, 195.

Documents—*Discovery of.* See PARDAH-NASHIN 1.**Dower—**

See FRAUDULENT TRANSFER : MUHAMMADAN LAW 5 AND 6.

Estoppel—

See ACT XVIII OF 1873, S. 9 : PRE-EMPTION 7 AND 12.

Equitable. Extinguishment of charge. An owner of property made a grant therefrom of an annuity, with a proviso that, in case of failure to pay the same, the grantee and her heirs should be entitled to take possession of the property. He subsequently mortgaged the same property, by an instrument which set out that it was his absolutely. After this he paid the annuity till the death of the grantee, whose heir he was. The mortgagees obtained a decree upon their deed, and in execution thereof the property was attached and sold, and the decree-holders obtained possession. The heirs of the mortgagor sued the decree-holders for recovery of possession, and for arrears of the annuity, claiming under the terms of the grant. *Held* that the charge merged and was extinguished, and as the grantor had professed to transfer the property to the mortgagees unincumbered, he was bound to give it over to them free from incumbrance, and it would not lie in his mouth, nor in the mouths of his heirs, to set up the charge against the mortgagees and their vendees.

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European British Subject—*Not domiciled in India.* See MAJORITY 2.**Evidence—**

See DEFAMATION.

Secondary. See ACT I OF 1872, S. 63 (c).**Execution of Decree—**

See ACT XV OF 1877, SCH II, NO. 179, AND NO. 179 (4). ALLUVION : CIVIL PROCEDURE CODE, SS. 230 ; 244 ; 244 (c) ; 295 ; 311, 312 : PRE-EMPTION 2.

1. *Adjudication that execution is barred by limitation—Finality of order—Civil Procedure Code, s. 206—Amendment of decree—Act XV of 1877, sch. II, Nos. 178, 179.* An application to execute a decree passed in April 1880, was made on the 19th February 1884, and rejected on the 26th March 1884, as being beyond time. This order was upheld on appeal in March 1885. While the appeal was pending the decree-holder in May 1884, applied to the Court of First Instance to amend the decree under s. 206 of the Civil Procedure Code, and in December 1884 the application was granted. In April 1885, an application was made for execution of the amended decree, the decree-holder contending that limitation should be calculated from the date of the amendment, and that art. 178 of the Limitation Act (XV of 1877) applied to the case. *Held* that No. 179 and not No. 178 was applicable, that the order rejecting the application of the 19th February 1884, became final on being upheld on appeal ; that the amendment could not revive the decree or furnish a fresh starting-point of limitation ; and that the application was therefore time-barred. *Mungul Pershad v. Gria Kant Lahiri and Ram Kirpal*

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v. *Rup Kuari* referred to. Observations by MAHMOOD, J., on the amendment of decrees and s. 206 of the Civil Procedure Code.

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Amendment of decree—Objection to validity of amendment. See DECREE, AMENDMENT OF.

2. *Application by two of three joint decree-holders for part execution of joint decree—Limitation—Act XV of 1877, sch. II, No. 179—Acquiescence by judgment-debtor in part execution.* A decree for money was passed in 1871 in favour of two persons jointly. In 1883 the decree-holders applied for execution thereof. By previous applications for execution made in 1875, 1877 and 1880, the decree-holders had sought to recover two-thirds of the amount of the decree. Held that inasmuch as the previous executions of the decree by some sharers for their shares, whether strictly allowable or not, were allowed, and no objections at the time were taken, they were good for the purpose of keeping the decree alive, and that the judgment-debtor could not now take exception to them as not being applications to enforce the decree within the meaning of the Limitation Act. *Mungul Pershad Dichit v. Grijit Kant Lahiri* followed.

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3. *Application for refund of excess payment—Accrual of right to apply—Act XV of 1877, sch. II, No. 178.* The judgment-debtors against whom a decree had been executed applied for a refund of money which they alleged had been recovered in execution by the decree-holders in excess of what was actually due under the decree. Upon this application, an account was taken by order of the Court. Held that the limitation applicable to the case was that provided by art. 178, sch. II of the Limitation Act, and that the right to apply for the refund of the excess amount paid in execution accrued at the time when the account was taken and stated on the application of the judgment-debtors in the course of the proceedings in execution.

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4. *Application of transferee of decree for execution disallowed—Suit by transferee for decretal amount—Declaratory decree—Civil Procedure Code, ss. 232, 244.* The transferee of a decree for costs, associating with him the transferor, made an application under s. 232 of the Civil Procedure Code to be allowed to execute the decree. The application was opposed by the judgment-debtor, and was rejected, and the Court referred the transferee to a regular suit. After taking various proceedings ineffectually, he instituted a suit for the recovery of the sum to which he was entitled as costs under the decree transferred to him. Held that the plaintiff, as the holder of the decree by assignment, could only recover the amount under it by executing the decree, and not by a separate suit; but that he was entitled to have a decree declaring that the assignment to him of the decree-holder's rights under the decree was valid, and gave him a right to execute it, and that the Court's order under s. 232 which disallowed the execution was an improper one, a suit for this relief being maintainable; for, there being no appeal from orders under s. 232, there would otherwise be no remedy; and that, looking at the plaint and the issues on which the parties were divided, and the fact that the Court which refused the plaintiff's application for execution, referred him to a regular suit, this relief might properly be given in the present suit. *Per* MAHMOOD, J., that the suit was maintainable, inasmuch as the present plaintiff never having been accepted on the record as holder of the decree the questions which were disposed of by the Court executing the decree, as between the plaintiff and the judgment-debtor, could not be regarded as questions within s. 244 of the Civil Procedure Code.

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5. *Attachment of property—Judgment-debtor declared an insolvent—Claim by official assignee to attached property—Appeal from order disallowing claim—Stat. 11 & 12 Vic., c. 21, ss. 7, 49—Civil Procedure Code, ss. 244, 278—“Representative” of judgment-debtor.* A decree-holder, having attached the property of his judgment-debtors in execution of the decree, obtained an order for sale of the attached property. Prior to sale, the judgment-debtors made an application to be declared insolvents and obtained an order under Stat. 11 and 12 Vic., c. 21, s. 7, by which their property was vested in the Official Assignee. An application was then made by the Official Assignee to the Court in which the execution of the decree was pending, for the release of the property from attachment, and that the property might be made over to him. The Court dismissed the application. On appeal, the District Judge reversed the first Court's order. Held that the matter did not come before the Court of First Instance under s. 49 of Stat. 11 and 12 Vic., c. 21, inasmuch as that

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section refers to cases where the insolvent's schedule has been filed, and to debts or demands admitted therein, and, in the present case, no schedule had been filed at the time of the Official Assignee's application; and the Court could therefore only entertain the application under the provisions of the Civil Procedure Code relating to the execution of decrees. *Held* that the Official Assignee could not be held to be a representative of the judgment-debtors within the meaning of s. 244 of the Civil Procedure Code, and his application was not one relating to the execution, discharge, or satisfaction of the decree. *Held* that the Court of First Instance had only jurisdiction in the matter under s. 278 of the Code, and disposed of it under that section, and that the District Judge had no jurisdiction to entertain the appeal.

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Civil Procedure Code, s. 230—*Meaning of "granted."* See *CIVIL PROCEDURE CODE*, s. 230.

6. *Civil Procedure Code*, s. 320—*Transfer of decree to Collector for execution—Jurisdiction—Rules made by Local Government—Civil Procedure Code*, s. 622—*High Court's powers of revision.* A decree passed by a Subordinate Judge upon a bond, in which certain immoveable property was mortgaged, was, in accordance with the rules made by the Local Government under s. 320 of the Civil Procedure Code, transferred to the Collector for execution. A sale in execution took place, and the Collector gave the purchaser a certificate of the sale. Upon this certificate the purchaser applied to the Subordinate Judge to give him possession of a larger amount of property than that specified in the certificate, and upon the refusal of the Court to do so, applied to the Collector to amend the certificate. The amendment having been made as desired, the purchaser again applied to the Subordinate Judge for possession of the amount claimed by him, and the Subordinate Judge again rejected the application, holding that only the lesser amount had been sold in execution of the decree. *Held* that, with reference to the second paragraph of Rule 19 of the Rules framed by the Local Government under s. 320 of the Civil Procedure Code, regarding the transmission, execution, and retransmission of decrees, and published in the *N.-W.P. and Oudh Gazette* of the 4th September 1880, the matter of delivery to the purchaser was within the jurisdiction of the Subordinate Judge, notwithstanding the terms of s. 320, and notwithstanding the ruling of the Full Bench in *Madho Prasad v. Hansa Kuar*. *Held* also that, inasmuch as the Subordinate Judge had jurisdiction to decide the question, and inasmuch as, even if his decision were wrong, the purchaser had a remedy by bringing a regular suit, the matter did not fall within s. 622 of the Civil Procedure Code, so as to call for the interference of the High Court in revision. *Shivanathaji v. Joma Kashinath and Amir Hasan Khan v. Sheo Baksh Singh* referred to.

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7. *Contract superseding decree—Adjustment of decree—Certification—Civil Procedure Code*, s. 258—*Limitation—Acknowledgment in writing—Act XV of 1877*, s. 19. In the course of proceedings in execution of a decree dated the 14th June 1878, the parties, on the 11th January 1881, entered into an agreement, which was registered, and filed in the Court executing the decree. The deed recited that the decree was under execution, and that a mortgage-bond dated the 1st December 1873, in favour of the judgment-debtor by a third party, had been attached and advertized for sale, and that the decree-holder and judgment-debtor had arranged the following method of satisfying the decree: that the judgment-debtor should make over the said bond to the decree-holder, in order that he might bring a suit thereon at his own expense against the obligor, and realize the amount secured by the bond, and out of the amount realized satisfy the decree under execution, with costs and future interest, together with all costs of the suit to be brought against the obligor, and together with a sum due by the judgment-debtor to the decree-holder under a note-of-hand for Rs. 250 with interest; and other details which need not be stated. On the same day that deed was executed, the decree-holder filed a petition in the Court, to the effect, that under the agreement an arrangement had been made for payment of the judgment-debt, by which the judgment-debtor made over to him the bond advertized for sale, in order that the petitioner should file a suit under it at his own cost against the obligor, and realize the debt due under the decree in execution with interest and costs; and he prayed that the sale to be held that day might be postponed, and the application for execution struck off for the present, and previous attachment maintained, and stating that, after realization of the amount entered in the bond advertized for sale, an application for execution would be duly filed. On this the order was that the execution case be struck off the file and the attachment maintained. On the

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24th December 1883, the decree-holder applied for execution of the decree, alleging that the judgment-debtor had failed to make over the bond to him according to the agreement. The judgment-debtor objected that the decree was no longer capable of execution, having been superseded by the agreement of the 11th January 1881, and that the application was barred by limitation, the previous application being dated the 9th November 1880. *Held* that the application was within time; inasmuch as the acknowledgment in the deed of the 11th January 1881, came within the terms of s. 19 of the Limitation Act, so as to originate a fresh period of limitation in respect of the execution of the decree. *Ghansham v. Mukha, Janki Prasad v. Ghulam Ali and Ramhit Rai v. Satgur Rai* followed. *Per* OLDFIELD, J.—That the agreement of the 11th January 1881, did not contemplate, and had not the effect of cancelling the decree and substituting for it a new contract, inasmuch as the deed contained nothing to the effect that the decree was superseded; and all it did was to provide means by which the decree, together with another small sum due by the judgment-debtor to the decree-holder, might be satisfied without having recourse to the sale of the bond attached, and the effect would be that, on realization, satisfaction would be certified in whole or in part to the Court executing the decree. Further, if the arrangement was to be regarded as within the meaning of an adjustment of the decree under s. 258 of the Civil Procedure Code, it could only be recognized by the Court when certified by the decree-holder or judgment-debtor: and in this case the only certification which was made was by the decree-holder, by his petition of the 11th January 1881, which was in respect of a temporary arrangement under which the decree remained in force. *Per* MAHMOOD, J.—That the agreement of the 11th January 1881, was intended by the parties as a performance of the obligation created by the decree, by substituting a fresh obligation founded upon contract; but that the deed could not be regarded as such an adjustment of the decree as satisfied the requirements of s. 258 of the Civil Procedure Code, because the creditor, whilst admitting the creation of a separate contract, took care to say that the decree was to be kept alive, and the attachment thereunder was to subsist; and that therefore the certification of the adjustment was inadequate and could not be recognized in executing the decree.

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8. *Costs—Reversal of decree—Refund of costs recovered by execution—Interest.* A successful appellant in an appeal to the High Court applied, in execution of his decree, for a refund of a sum of money which he had paid to the respondent, by way of costs with interest thereon, in execution of the lower Court's decree. He further applied for interest on the refund claimed at the rate of Rs. 6 per cent. per annum. The respondent objected to paying interest on the refund. *Held* that the appellant was entitled to the interest claimed on the refund of costs. *Forester v. The Secretary of State for India in Council* referred to.

RAM SAHAI v. THE BANK OF BENGAL VIII 262

9. *Decree for sale of mortgaged property—Application for execution before time allowed for payment—Act IV of 1882, ss. 86, 88.* An application for execution of a decree for sale of mortgaged property passed under s. 88 of Act IV of 1882 (Transfer of Property Act), and which directed that if the decree were not satisfied within two months the property should be sold, ought not to be allowed before the expiration of the period therein provided.

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10. *Decree for sale for mortgaged property and for costs—Attachment and sale of other property for whole amount of decree—Suit to set aside execution sale—Civil Procedure Code, ss. 311, 312—Finality of order in execution proceedings.* In execution of a decree on a mortgage-bond, for the sale of the mortgaged property, and for the costs of the suit, amounting to Rs. 1,000, certain houses were attached on the 30th September 1881, which were not part of the mortgaged property. On the objection raised by the judgment-debtors that the decree was by its terms executable only against the mortgaged property, the High Court in appeal decided, on the 6th September 1882, that the houses were not liable to attachment and sale under the decree. In the meantime, on the 15th June 1882, the houses had been put up for sale, and purchased for Rs. 500, and the sale had been confirmed, on the 10th August 1882. The judgment-debtors brought a suit against the purchaser to set aside the sale, on the ground that the houses were not saleable under the decree. *Held* that the decree, in regard to costs was a decree made personal against the judgment-debtor, and conferred a right upon the decree-holder to take out execution for the recovery of those costs, not only against property mortgaged in the bond, but also against the person and other property of the judgment-debtor.

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Per OLDFIELD, J., (MAHMOOD, J., *doubting*) that the attachment and sale in execution of the decree were valid, inasmuch as they were made in respect of the costs as well of the principal and interest decreed. *Per* MAHMOOD, J., that the suit was maintainable, and was not barred by any plea *in limine*. *Abdul Haye v. Nawab Ra* referred to. Also *per* MAHMOOD, J., that inasmuch as the adjudication of the 6th September 1882, was one between the judgment-debtors on the one hand and the decree-holder on the other, and subsequent not only to the sale, but to the confirmation of the sale, and inasmuch as the Court was not then called upon to decide anything in relation to the nature of the decree as to costs, the order then passed could not be used against the purchaser. Also *per* MAHMOOD, J., that it was doubtful whether the attachment having been made for the whole amount of the decree and not for costs, and no separate proceedings having taken place in respect of the personal decree against the judgment-debtor, the attachment, the notification of sale, and the sale itself, were valid; but that everything that was said against those proceedings constituted matters falling under s. 312 of the Civil Procedure Code, which enables parties to object to confirmation of sale; and that therefore, even assuming that the sale and confirmation of sale were subject to the objection of "material irregularity in publishing or conducting" the sale, within the meaning of s. 211, a suit like the present, upon that ground alone, was prohibited by the last part of s. 312.

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11. *Decree payable by instalments—Civil Procedure Code, s. 230—Finality of order made in execution-proceedings.* In 1868 a decree was obtained for Rs. 1,100, which provided that the amount should be paid in instalments, the first instalment being Rs. 200, to be paid at the end of the first year, and that the other instalments should be Rs. 100 at the end of each subsequent year, and that in the event of failure to carry this out, and 2½ months after the falling due of the instalment, the whole amount should be exigible in a lump sum with interest at 8 annas per cent. per mensem. In 1877, the decree-holder applied for execution of the decree, asserting that Rs. 600 had been paid up to that time by five instalments, one of Rs. 200, and four of Rs. 100, each, and that default had been made in payment of the fifth instalment of Rs. 100, and he asked to recover the whole amount due on the decree. No order was passed on this application, and eventually the case was struck off. In 1880, the decree-holder again applied for execution of the decree, upon the same grounds as those upon which the previous application was based. Notice was issued and served, and a warrant issued for the arrest of the judgment-debtor, but eventually the case was struck off. In 1883, the decree-holder on the same grounds made another application for execution. It was contended by the judgment-debtor that execution was barred by s. 230 of the Civil Procedure Code, inasmuch as no instalments had been paid, and even if they had been paid, they could not be recognised, not having been certified. *Held* that the proper time from which to reckon the limitation of twelve years was the fifth year from the date of the bond, the whole claim from the beginning and the order passed in 1880 having gone upon that basis, that the Court could not go behind that order, and that consequently the decree-holder was within time, and might take out execution.

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12. *Decree payable by instalments—Execution of whole decree—Construction of decree—Payments out of Court—Act XV of 1877, sch. II, No. 179 (6)—Civil Procedure Code, s. 258.* A decree passed against the defendant in a suit, dated the 13th March 1877, directed "that the plaintiff should recover the decree-money by instalments, agreeably to the terms of the deed of compromise, and he, in case of default, should recover in a lump sum." The compromise mentioned in the decree provided that the amount in dispute should be paid in ten instalments, from 1284 to 1294 fasli, the first to be paid on the 27th May 1877 (1284 fasli), and the remaining nine instalments on Jaith P'uranmashi of each succeeding fasli year. On the 1st September 1883, the decree-holders applied for execution of the decree, alleging that the first four instalments had been paid, but not any of the succeeding instalments, and they claimed to recover, under the terms of the decree, the fifth and all the remaining instalments in a lump sum. The judgment-debtors contended that the application was barred by limitation, as they had not paid a single instalment, and more than three years had elapsed from the date of the first default; and that, even if the first four instalments had been paid, such payments could not be recognised by the Court as they had not been certified. *Held*, reversing the decision of the Lower Appellate Court, that if the four annual instalments had not been paid under the decree, the execution of the decree was

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- barred by limitation. *Held*, also, that recognition of such instalment was not barred by the terms of s. 258 of the Civil Procedure Code. *Sham Lal v. Kanahia Lal and Fakir Chand Bose v. Madan Mohan Ghose* followed.
- ZAHUR KHAN v. BAKHTAWAR** ... VII 327
13. *Decree prohibiting execution till the expiration of a certain period—Limitation—Act XV of 1877, sch. II, Nos. 178, 179.* A decree, which was passed on the 8th December 1881, in a suit on a simple mortgage-bond contained the following provision:—"If the judgment-debt is not paid within four months, the decree-holder shall have the power to recover it by a sale of the mortgaged property." On the 17th February 1885, the decree-holder applied for execution of the decree. *Held* that, inasmuch as the decree provided expressly that the decree-holder might not apply for its execution till after the expiry of four months from its date, the limitation of art. 178, sch. II of the Limitation Act, and not of art. 179, should be applied to the case; and the application for execution having been made within three years from the 8th April 1882, when the right to ask for execution accrued, was not barred by limitation.
- THAKUR DAS v. SHADI LAL** ... VIII 56
14. *Finality of order made in execution-proceedings construing decree.* In reference to an application for execution of a decree, a Court made an order between the parties, construing the decree to award interest at a certain rate till payment. *Held* that no contrary construction could be placed upon the decree in a subsequent application in the execution-proceedings. *Ram Kirpal v. Rup Kuari* referred to and followed.
- BENI RAM v. NANHU MAL** ... VII 102
15. *Imperfect attachment of immoveable property—Private alienation after such attachment not void—Civil Procedure Code, ss. 274, 276, 295, sch. IV, No. 141.* A judgment-debtor whose property had been attached in execution of a money-decree, sold the property, and out of the price paid into Court the amount of the decree, and prayed that the attachment might be removed. While the attachment was subsisting, and prior to the sale, the holders of other money-decrees against the same judgment-debtor preferred applications, purporting to be made under s. 295 of the Civil Procedure Code, and praying that the proceeds of the sale of the property might be rateably divided between themselves and the attaching creditors. The Court refused to remove the attachment until these creditors had been paid. It was found that the sale by the judgment-debtor was a *bond fide* transaction, entered into for valuable consideration. *Held* that, inasmuch as no order for attachment of the property was passed in favour of the decree-holders in manner provided by s. 274 of the Civil Procedure Code, their claims were not entitled to the protection conferred by s. 276 against private alienations of property under attachment; that these claims were not enforceable under the attachment which was made; that the sale by the judgment-debtor was valid; and that execution of the decrees could not take place. *Per MAHMOOD, J.*—That s. 276 of the Civil Procedure Code, being a restriction of private rights of alienation should be strictly construed; that before property can be subjected to such restriction, there must be a perfected attachment; that the orders passed under s. 295 did not amount to such attachment; and that, even assuming them to amount to such attachment, they, not having been duly intimated and notified, could not make the prohibition of s. 276 applicable to the case. *Mahadeo Dubey v. Bhola Nath Dikhit, Anand Lal Dass v. Jullodhur Shaw, Rameswar Singh v. Ramtaru Ghose, Indro Chunder Baboo v. Dunlop, Gobind Singh v. Zalim Singh and Gumani v. Hardwar Pandey* referred to. Also *per MAHMOOD, J.*—While s. 295 of the Code gives a special right to judgment-creditors as distinguished from simple creditors, it is an essential condition precedent to the exercise of that right that there should be a sale, if execution, and that its result should appear in assets realized by the sale, and therefore, until the sale takes place, no such right can be enforced. *Bishen Chunder Surma Chowdhry v. Mun Mohinee Dabee* referred to.
- GANGA DIN v. KHUSHALI** ... VII 704
16. *Joint ancestral property—Execution against deceased son's interest in hands of the father—Death of judgment-debtor after attachment and before sale—Civil Procedure Code, s. 274—Copy of order for attachment not fixed up in Collector's office.* In execution of a money-decree, an order was issued under s. 274 of the Civil Procedure Code, for the attachment of property which was the joint ancestral estate of the judgment-debtor and his father. A copy of this order was not fixed up in the office of the Collector of the district in which the land was situate,

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as required by s. 274. The sale was ordered and a day fixed for sale, but in consequence of postponements made at the judgment-debtor's request, no sale took place. In the meantime the judgment-debtor died, and the decree-holder applied for execution against the father as representative of the judgment-debtor, whose interest had survived to him. *Held* that the decree-holder had, by the proceedings taken in execution during the son's lifetime, obtained rights over his interest which could not be defeated by his death before sale. *Suraj Bansi Koer v. Sheo Persad Singh* followed. *Held* also that, though the defect in the manner in which the attachment was made might render the attachment ineffectual for the purpose of voiding alienations made, the attachment was effectual against the judgment-debtor, and the defect did not afford a ground for declaring the execution-proceedings ineffectual.

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Limitation. See ACT XV OF 1877, SCH. II, NO. 179 (2).

17. *Material irregularity in publishing or conducting sale in execution—Objection that property sold was not legally saleable—Civil Procedure Code, ss. 244, 311, 312.* An objection by a judgment-debtor to a sale in execution of a decree on the ground that the property which was the subject of sale was not legally saleable, is not a matter which can be entertained by the Court under s. 311 of the Civil Procedure Code, so as to afford a ground for setting aside the sale on account of material irregularity in publishing or conducting it. *Ram Gopal v. Khiali Ram and Janki Singh v. Ablakh Singh* distinguished. *Per* MAHMOOD, J.—The scope of s. 244 of the Civil Procedure Code is limited to matters connected with the execution of the decree between the decree-holder and the judgment-debtor, and covers all the questions which may arise between the decree-holder and the judgment debtor relating to the execution, etc., of the decree. Questions that may arise after the sale are not, strictly speaking, questions relating to the execution, discharge or satisfaction of the decree, within the meaning of cl. (3), s. 244; but, as soon as there has been a sale, the execution of the decree, so far as the decree-holder is concerned, is over, and the question whether the purchaser has purchased anything by the sale is not a question as to the execution of the decree-holder's decree. Also *per* MAHMOOD, J.—The expression "conducting the sale" as used in s. 311 of the Civil Procedure Code, does not include any proceedings unconnected with the actual carrying out of the sale, but refers to the action of the officer who makes the sale, and not to anything done antecedent to the order of sale. *Olpherts v. Mahabir Pershad* referred to.

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18. *Order for sale—Application for execution struck off—Application for restoration—Finality of order.* A decree for money was passed on the 19th March 1865. The first application for its execution, made after Act X of 1877 came into force, was dated the 16th December 1878. On this application an order was made by the Court executing the decree (Munsif) for the sale of certain property belonging to the judgment-debtor. The latter objected to the execution of the decree, on the ground of limitation, and the decree-holders filed an answer to the objection. On the 14th July 1879, the case was struck off, because the decree-holders had not deposited certain process-fees, without the disposal of the objection. On the 1st October 1879 the decree-holders again applied for the sale of the property, and it was ordered to be sold. On the 17th February, the judgment-debtor presented a petition repeating the objection, which, on the 13th March 1880, the Munsif entertained and disallowed. This order was affirmed in appeal by the District Judge, and again by the High Court. Meanwhile, the Munsif had struck off the case from the file of execution cases pending in his Court, on the ground that the records had been despatched to the appellate Court. On the 18th September 1882, the decree-holder again applied for execution of the decree, praying that "the suit might be restored to its number, and that the judgment-debt might be caused to be realized by attachment and sale of the judgment-debtor's property specified in the former schedule." *Held* that the decree-holder was entitled to execution of the decree, and that he could get it under the application which was made on the 1st October 1879, inasmuch as the matter was made *res judicata* by the decree of the High Court in appeal, and it must be taken that that decree was correctly passed, and that the order for sale passed upon it was properly made, and that the sale ought to have taken place. *Held* also that the proper application for the decree-holder to have made in September 1882, was that the case might be restored to the Munsif, and that the present application might be so dealt with as to effect the same result, because

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the prayer contained therein referred to the number of the proceedings of October 1879, and to the schedule of the property then ordered to be sold.

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19. *Powers of Court executing transmitted decree—Civil Procedure Code, ss. 228, 239.* The powers which the foreign Court has, under s. 228 of the Civil Procedure Code, are confined to the execution of the decree, and the Court cannot question the propriety or correctness of the order directing execution, nor can it, with reference to s. 239 of the Code, stay execution except temporarily. *Held* therefore, where the drawers of a hundi, against whom the indorsee from the payee had obtained a decree on the hundi, objected in the Court to which the decree had been transmitted for execution that execution should not be allowed, because the payee had paid the amount of the hundi to the decree-holder, after the decree had been passed, and such Court refused to entertain the objection, that the order of the lower appellate Court directing that the parties should be allowed to produce evidence in regard to the alleged payment, and that, should the Court of First Instance find that the decree-holder had received satisfaction to the full amount of the decree, the judgment-debtors should be absolved from all liability under the decree, could not be maintained.

RAM LAL v. RADHEY LAL ... VII 330

Revival of application—Act XV of 1877, sch. II, No. 179 (4). See CIVIL PROCEDURE CODE, s. 583.

20. *Sale—Property sold before advertised time—Sale invalid.* A sale by public auction in execution of a decree, which is conducted at a time and place other than those properly notified, is not a sale at all within the meaning of the Civil Procedure Code. The time to be notified for a sale by public auction in execution of a decree must be the time of the commencement of the sale, in order that all intending purchasers may be enabled to be present during the whole of the proceedings, and that all who are interested in the property sold may see that there is a fair competition and a good sale. Where property which was advertised for sale by public auction in execution of a decree at 11 A.M., was sold at 7 A.M.,—*held* that the mistake was more than a mere irregularity in conducting the sale, and that the whole of the proceedings were invalid.

CHEDAMI LAL v. AMIR BEG ... VII 676

21. *Sale in execution—Confirmation of sale—Objection that property is not liable to attachment—Civil Procedure Code, ss. 278, 311, 312.* *Held* that an objection made by one whose property was attached and sold in execution of a decree for the payment of money for the performance of which he had become a surety, that he was no party to the decree, and his property was not liable to be attached and sold, and therefore the sale was invalid, was not an objection entertainable under s. 311 of the Civil Procedure Code, and was consequently no ground for setting aside the sale under that section, especially as it was preferred for the first time in appeal, and, moreover, might have been taken under s. 278 at the time of attachment, when the objector would have had his remedy as therein provided.

HUB LAL v. KANHIA LAL ... VII 365

22. *Sale of immoveable property—Error in proclamation of sale as to incumbrance to which property was liable—Civil Procedure Code, ss. 311, 312.* In a sale of immoveable property in execution of a decree, the proclamation of sale notified that the decree-holder held two charges on the property, aggregating about Rs. 1,000. There was, in fact, one charge only, amounting to about Rs. 800. *Held* that the error in the proclamation of sale amounted to such an irregularity in publishing the sale and putting up the property to the biddings of the public as must have materially marred the fairness of the auction and affected the price, and that the sale must therefore be set aside, on the ground of material irregularity in publishing and conducting it.

KANJI MAL v. BIBI SAILO ... VIII 416

23. *Sale of immoveable property in execution before thirty days from date of fixing up proclamation—Material irregularity in publishing or conducting sale—Civil Procedure Code, ss. 290, 311.* An infringement of the rule contained in s. 290 of the Civil Procedure Code, is an irregularity vitiating a sale in execution of decree, and is something more than a material irregularity in publishing a sale to which s. 311 refers.

BAKSHI NAND KISHORE v. MALAK CHAND ... VII 289

24. *Security for restitution of property taken in execution—Reversal of decree—Execution against surety—Civil Procedure Code, ss. 253, 545, 546.* Section 253 of the

Execution of Decrees—(concluded.)

Civil Procedure Code contemplates a suit pending at the time security is given for performance of the decree, and does not apply to a case where the litigation in the Courts of First Instance and of first appeal has ended, and no second appeal has been instituted in the High Court when security is given. The holder of a decree affirmed on appeal by the District Court took out execution to recover costs awarded. Costs were deposited by the judgment-debtor and paid to the decree-holder, and a surety gave a bond by which he undertook to refund the amount to the judgment-debtor in the event of the latter succeeding in appeal to the High Court, and of the decree-holder failing to repay him. The judgment-debtor subsequently filed an appeal to the High Court and was successful, and he then applied on the execution department to recover the amount from the surety. Held that the Court executing the High Court's decree had no jurisdiction to execute it against the surety.

HARDEO DAS v. ZAMAN KHAN VIII 639

25. *The decree to be executed where there has been an appeal.* The effect of the decision of the Full Bench in *Shohrat Singh v. Bridgman* is nothing more than that the last decree is to be regarded as the decree to be executed, whether it reverses, modifies or confirms; but when it affirms and adopts the mandatory part of the first Court's decree, that decree may be, and should be referred to, and the mandatory part of it so affirmed should be executed as though it were the decree of the appellate Court. *Kristo Kinkur Roy v. Rajah Burrodacount Roy* referred to. Where the first Court of appeal affirmed the decree of the Court of First Instance, and the High Court affirmed the decree of the lower appellate Court and dismissed the appeal, and the decree-holder made an application of which the object clearly was to have execution taken under the decree of the appellate Court, by carrying out the mandatory part of the decree of the Court of First Instance, held that the objection that the decree-holder did not in his application expressly ask the Court to execute the decree of last instance was under the circumstances a mere technical objection, and there was no reason why the execution asked for should not be allowed.

GOBARDHAN DAS v. GOPAL RAM VII 366

Twelve years' old decree. See CIVIL PROCEDURE CODE, s. 230.

Ex parte Decree—

See CIVIL PROCEDURE CODE, s. 136.

1. *Appeal—Civil Procedure Code, ss. 103, 108, 540, 560, 584—Construction of statute—General words.* Held by the Full Bench (STRAIGHT, OFFG. C.J., and TYRRELL, J., expressing no opinion), that a respondent in whose absence the appeal has been heard *ex parte*, and against whom judgment has been given, may prefer a second appeal from the decree, under the provisions of s. 584 of the Civil Procedure Code, and his remedy is not limited to an application under s. 560 to the Court which passed the decree to re-hear the appeal. *Ramjas v. Bainnath* approved. *Per* OLDFIELD, J.—There is a distinction between the case of a defendant in a Court of First Instance and that of a respondent in an appellate Court not appearing, with reference to ss. 108 and 560 of the Code. *Lal Singh v. Kunjan* and *Ramshet Bachaset v. Balkishna Ababhat* referred to. *Per* MAHMOOD, J.—The distinction is one of detail merely and not of principle. *Lal Singh v. Kunjan* dissented from. *Zam-ul-ab-din Khan v. Ahmad Raza Khan, Jamait-un-nissa v. Lutf-un-nissa, Ashruff-un-nissa v. Lehareaux, Luckmidas Vithaldas v. Ebrahim Osman, Anantharama v. Madhava Paniker and Modalatha's Case* referred to. Also *per* MAHMOOD, J.—Where two procedures or two remedies are provided by statute, one of them must not be taken as operating in derogation of the other.

AJUDHIA PRASAD v. BALMUKAND VIII 354

2. *"Appearance" of defendant under Civil Procedure Code, s. 101—Civil Procedure Code ss. 64, 100, 108, 157.* The first hearing of a suit was fixed for the 12th December 1893, on which day the defendant did not appear, and the case was adjourned to the 18th December, and as the defendant did not then appear, a decree was passed in favour of the plaintiff. A vakalat-nama had been previously filed on the defendant's part, and he had also objected to an application filed by the plaintiff for attachment of the defendant's property before judgment. Held that these acts on the defendant's part did not constitute an "appearance" by him within the meaning of s. 100 of the Civil Procedure Code, which referred to an appearance in answer to a summons to appear and answer the claim on a day specified, issued under s. 64; that the decree was therefore *ex parte* within the meaning of ss. 100 and 108, an appeal consequently lay to the

Ex parte Decree—(continued.)

High Court under s. 588, cl. (9), from an order rejecting an application to set the decree aside. *Zain-ul-abdin Khan v. Ahmad Rasa Khan* distinguished. *The Administrator-General of Bengal v. Dyaram Das, Bhimacharya v. Fakirappa and Bibee Haloo v. Atwaro* referred to. *Per MAHMOOD, J.*—That the Court on the 18th December, seemed to have acted under s. 157 of the Civil Procedure Code, and, choosing the first of the alternative courses allowed by that section, acted under Ch. VII of the Code, and passed an *ex parte* decree under the provisions of s. 100 of that Chapter.

HIRA DAI v. HIRA LAL VII 588

3. *Suit, Adjournment of hearing of*—"Appearance" of defendant—*Civil Procedure Code*, ss. 108, 157. A Munsif, before whom a suit was pending, fixed, by way of adjournment, a particular date for its disposal. Upon the date so fixed it was necessary to take evidence upon issues of fact which had previously been settled. The plaintiffs appeared on that day. The defendants did not appear, but there was in Court a pleader, who had been instructed by the two principal defendants at the outset and who had filed his *vakalat-nama*. There was nothing to show that he had ever received any other instructions whatever, either as to the facts of the case or the conduct of the defence, or that the defendants had done anything beyond giving the pleader the instructions above referred to. Under these circumstances, the plaintiffs gave their evidence and the Munsif decreed the claim. *Held* that under the circumstances stated, the defendants' pleader must be taken not to have been in Court on the date fixed for the purpose of defending the suit on behalf of the defendants, inasmuch as, upon that part of the case, he had not been instructed; that it was therefore a fair inference that the defendants did not appear and the case was disposed of under s. 157 of the Civil Procedure Code; and that, under these circumstances, the provisions of s. 108 were applicable, and the decree was an *ex parte* decision which it was open to the Munsif to reconsider. *Hira Dai v. Hira Lal* followed.

RAMTAHAL RAM v. RAMESHAR RAM VIII 140

Ex-proprietary Tenancy—

See *SIR-LAND 2*.

Ex-proprietary Tenant—

See *ACT XII OF 1881, SS. 7; 7, 9: LANDHOLDER AND TENANT 1*.

1. *Act XII of 1881, ss. 7, 95 (1)—Determination of rent by Revenue Court—Suit for arrears of rent as so determined for period prior to such determination.* An application was made in the Revenue Court under s. 95 (1) of the N.-W.P. Rent Act (XII of 1881) by the purchaser of proprietary rights in a mahal, for determination of the rent payable by his vendors, who had become, under s. 7, his ex-proprietary tenants in respect of the land they had previously held as *sir*. The Revenue Court, by an order dated the 18th February 1884, fixed the rent at a particular sum payable annually, after making the deduction of four annas in the rupee required by s. 7 of the Rent Act. In May 1884 the purchaser sued the ex-proprietary tenants to recover from them arrears of rent at the sum so fixed for a period of three years prior to the Revenue Court's order. *Held*, by the Full Bench that the plaintiff was entitled to recover arrears of rent for the years in suit at the amount determined by the Revenue Court's order of the 18th February 1884, subject to any question of limitation that might arise.

MAHADEO PRASAD v. MATHURA VIII 189

2. *Nature of the right of occupancy—Act XII of 1881, s. 7—Trees.* In a suit for recovery of possession of zamindari property conveyed by a sale-deed, including certain plots of land which were the defendant vendor's *sir*, the lower Courts held, with reference to s. 7 of the North-West Provinces Rent Act (XII of 1881), that the defendant was entitled to hold possession of the said plots as ex-proprietary tenant, but as it appeared that they had fruit and other trees upon them, the Courts awarded the plaintiff possession of these trees, on the ground that the nature of an ex-proprietary tenure did not entitle the holder to resist a claim of this kind as to the trees upon the land forming the area of such tenure. *Held* that this decision was erroneous, and that the plaintiff's claim to possession of the trees upon the plots in question must be dismissed. *Per MAHMOOD, J.*, that the principle of the maxim *cujus est solum ejus est usque ad celum* was applicable to the case by way of analogy, and that an ex-proprietary tenant had all the rights and incidents assigned by jurisprudence to the ownership of land, subject only to the restriction imposed upon the occupancy-tenure by the statute which created it, and that hence he would be entitled to the trees on the land, and to

Ex-proprietary Tenant—(continued.)

use them as long as the tenure existed. *Bibee Sohodwa v. Smith, Narendra Narain Roy Chowdhry v. Ishan Chandra Sen, Gopal Pandey v. Parsotam Das, Goluck Ram v. Nuba Soonduree Dassee, Shaikh Mahomed Ali v. Bolakee Bhuggut, Ram Baran Ram v. Salig Ram Singh, and Debi Prasad v. Har Dyal* referred to. Also *per* MAHMOOD, J., that it would be impossible to give effect to the lower Courts' decrees without disturbing the ex-proprietary tenant's rights; for if the plaintiff were entitled to possession of the trees, he would be entitled to enter upon the land to get at the trees, because when the law gives a right, it must be understood to allow everything necessary to give that right effect.

DEOK? NANDAN v. DHIAN SINGH ... VIII 467

False Evidence—

See ACT XLV OF 1860, s. 193.

Family Custom—

Wajib-ul-arz—Muhammadan Law—Appeal to Her Majesty in Council—Question of fact. It having been alleged that an estate, by custom, descended to a single heir in the male line, the High Court, concurring with the Court of First Instance, found that this custom had not been proved to prevail in the family. On an appeal contesting this finding, it was argued, among other objections, that the High Court had not given sufficient effect to an entry in the *wajib-ul-arz* of a zamindari village, the principal one comprised in the family estate now in dispute; the last owner of that estate, who held all the shares in the village, having caused an entry to be made to the effect that his eldest son should be his sole heir, the others of the family being maintained. *Held*, that, though termed an entry in a *wajib-ul-arz*, the document was not entitled to the name, but was rather in the nature of a testamentary attempt to make a disposition contrary to the Muhammadan law of descent. The appeal was not taken out of the rule as to the concurrent findings of two Courts, primary and appellate, on a question of fact.

MUHAMMAD ISMAIL KHAN v. FIDAYAT-UN-NISSA ... VIII 516

Foreclosure—

See MORTGAGE 8.

Forgery—

"Dishonestly"—"Fraudulently." See ACT XLV OF 1860, SS. 24, 25.

Fraudulent Transfer—

See ACT III OF 1877, s. 50.

Burden of proof—Muhammadan Law—Sale of immoveable property by Muhammadan in satisfaction of wife's dower—Consideration—Deferred debt. A genuine sale made for good and valid consideration to one creditor, even if effected to delay and defeat another, apart from cases in which either insolvency or bankruptcy is involved, is not void. If a man owes another a real debt, and in satisfaction thereof sells to his creditor an equivalent portion of his property, transferring it to the vendee, and thereby extinguishing the debt, the transaction cannot be assailed, though the effect of it is to give the selected creditor a preference. *Wood v. Dixie, Choune v. Baylis*, and the authorities collected in the notes to *Twyne's Case* referred to. Pending a suit for recovery of a debt, the defendant, who was a Muhammadan, executed a deed of sale, dated in June 1882, of a four annas zamindari share in favour of his wife, the consideration recited therein being the amount of the vendee's deferred dower-debt. Subsequently the creditor obtained a simple money decree against the defendant, and in execution thereof attached the four annas share. The vendee objected to the attachment, on the basis of her sale-deed, but her objection was disallowed on the ground that the instrument was collusive. She thereupon brought a suit against the judgment-creditor for a declaration of her right and to set aside the attachment order. *Held* that if there was in fact a subsisting debt due for dower from the husband to the wife, and he transferred and she accepted the four annas share in satisfaction of it, the transaction was a perfectly legitimate one, and no Court had any power to disturb it. It was for the defendant, the judgment-creditor, to establish either that the deferred dower-debt did not constitute such a present consideration as would support the sale, or that the transaction was merely colourable and a fictitious one, which was never intended to have operation or effect, either as a transfer of the property or an extinguishment of the dower-debt; and that, despite what appeared in the sale-deed, the parties remained in precisely the same position as before it was executed—the four annas still remaining the property of the vendor,

Fraudulent Transfer—(continued.)

and as such liable to the attachment. *Held*, applying the general principles of the Muhammadan law as to deferred debts, that there was good consideration for the sale of June 1882, and that, in the absence of proof of fraud of the kind above indicated, the vendee was entitled to maintain it, and to succeed in the suit.

SUBA BIBI v. BALGOBIND DAS VIII 178

Government Pleader—

See PROSECUTION, WITHDRAWAL FROM.

Grievous Hurt—

See MAGISTRATE.

Guardian—

Muhammadan Law—Mother. See CIVIL PROCEDURE CODE, s. 13.

Heirs—

Right of one of several, to sue creditor for share of debt. See DEBT.

Hereditary Title—

Istemrari patta. See LEASE 1.

High Court—

Reference to. See CIVIL PROCEDURE CODE, s. 617.

High Court's Powers of Revision—

See APPEAL, 4: CIVIL PROCEDURE CODE, SS. 206; 407 (c), 622.

1. *Civil Procedure Code*, ss. 2, 622—*Act XL of 1858 (Bengal Minors Act)*, s. 3—*Certificate of administration*. Under s. 3 of the Bengal Minors Act (XL of 1858), the Civil Court has no power to refuse to admit a person who has obtained a certificate of administration under the Act, to defend a suit on the minor's behalf, as guardian of such minor. Where a Subordinate Judge had so acted,—*held* that the High Court had no power to revise his order under s. 622 of the Civil Procedure Code.

BALDEO DAS v. GOBIND SHANKAR VII 914

2. *Civil Procedure Code*, s. 206—*Order amending decree*. A District Judge, by an order passed under s. 206 of the Civil Procedure Code, altered a decree passed by his predecessor in the terms, "I dismiss the appeal," to read "I accept the appeal," on the ground that his predecessor had obviously meant to say he accepted the appeal, and that the decree as it stood failed to give effect to the judgment. *Held* by the Full Bench that an order passed under s. 206 of the Civil Procedure Code constituted an adjudication separate from that concluded by a decree under the Code passed after the parties had been heard and evidence taken, and that the order in the present case was therefore a separate adjudication, and was not appealable, under s. 588. Also that, in saying that by "dismiss," his predecessor had meant "decree," the Judge had altered the decree in a manner not warranted by the terms of s. 206, that he had therefore exercised his jurisdiction "illegally and with material irregularity," within the meaning of s. 622 of the Code, and that the High Court was consequently competent to reverse his order. The judgment of OLDFIELD, J., reversed, and that of MAHMOOD, J., affirmed.

SURTA v. GANGA... .. VII 875

3. *Civil Procedure Code*, ss. 206, 622—*Order amending decree in respect of court-fee in pre-emption suit*. An order as to costs, contained in a decree for pre-emption, directed that the pleader's fees should be calculated with reference to the value of the claim as set forth in the plaint. Subsequently the Court, professing to act under s. 206 of the Civil Procedure Code, passed an order directing the amendment of the decree by calculating the pleader's fees upon the actual value of the property. *Held* by the Full Bench that the alteration of the decree was improper, and was not an amendment of the kind authorized by s. 206 of the Civil Procedure Code. An order passed under s. 206 amending a decree is a separate adjudication, and is not merely a part of the original decree, and such an order is not appealable under s. 588 of the Code. Such an order, therefore, can be revised by the High Court, under s. 622. The judgment of OLDFIELD, J., reversed, and that of MAHMOOD, J., affirmed.

RAGHUNATH DAS v. RAJ KUMAR VII 876

4. *Civil Procedure Code*, s. 622—*Transfer of interest pending suit*—*Lis pendens*—*Application to bring transferee upon the record*—*Civil Procedure Code*, s. 244.

High Court's Powers of Revision—(continued.)

A decree of the High Court, giving possession of certain shares in a bank to the plaintiff R, was reversed on appeal by the Privy Council. The defendant then applied to the Court of First Instance to order restitution of the shares, which had been realized by the plaintiff. Upon being ordered to produce the shares, R made an application to the Court, professedly under s. 244 of the Civil Procedure Code, in which he alleged that, pending the appeal to the Privy Council, he had transferred the shares to G, his counsel in the case, who had failed to restore them, and he prayed "that the said person might be brought upon the record, and that execution for recovery of the said shares might be given against him." The Court passed an order upon this application, calling on G to show cause why he should not be called upon to restore the shares made over to him by R, and he thereupon filed an answer denying that he was the custodian of the shares, and alleging that he was their purchaser for value. The Court passed an order directing that G's name should be placed on the record, so that the decree might be executed against him. *Held* that the question being one between two judgment-debtors *inter se*, and not between the parties arrayed against each other as decree-holders of the one part, and judgment-debtors or their representatives of the other, the provisions of s. 244 of the Civil Procedure Code were not applicable to the case; that G could not be regarded as "representative" of R within the meaning of that section; that the application by R was meant to be and actually was one praying that, in respect of the scrip, restitution of which was being enforced against him, the person to whom some interest in it, more or less, had come pending the suit, might, in addition to himself, in so far as such interest had passed from him, be brought under the operation of the execution proceedings; that this was an application under s. 372 of the Civil Procedure Code; and the order passed on it being appealable under s. 588 (21), was not open to revision by the High Court under s. 622.

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Criminal Procedure Code, s. 499. See CRIMINAL PROCEDURE CODE, s. 421.

Hindu Law—

See DEBT: RESTITUTION OF CONJUGAL RIGHTS.

Adoption—Jains. See JAINS.

1. *Brahmans—Adoption of sister's son—Suit for partition of property by person in possession making a false claim thereto.* According to the Hindu Law, a Brahman cannot validly adopt his sister's son. B, a childless Hindu and a Brahman, adopted X, his sister's son, and, subsequently apprehending that the adoption was invalid, executed a will by which he left his estate to X. After B's death, X obtained possession, and remained in possession of the estate till his death, which occurred before he had attained majority. After this, joint possession of the estate was obtained by P and S, two widows of B, who set up a right of inheritance from X, as being in the position of mothers to him, in consequence of his adoption by their deceased husband. A suit was brought by S against P for partition of the estate. *Held*, that the adoption of X by B, a Brahman, was invalid, and that P and S were not entitled to succeed him as his heirs. *Held*, also that, inasmuch as the parties had set up a false claim to the estate, and had no estate in law which they could divide, the suit for partition was not maintainable merely by reason of the fact that they were in possession. *Armory v. Delamirie* and *Asher v. Whillock* referred to.

PARBATI v. SUNDAR VIII

Daughter's son—Hindu widow—Decree against widow—Reversioner—Res judicata—Declaratory decree—Act I of 1877, s. 42—Civil Procedure Code, s. 578.

A suit brought against K, the widow of R, a Hindu, by the representatives of R's brothers, H and P, for possession of his estate, ended in a compromise by which the defendant recognised the plaintiffs' rights and conceded that the family was joint. After K's death, M, a daughter of R, brought a suit on her own behalf against the above-mentioned plaintiffs for possession of her father's estate, but afterwards withdrew her claim. Subsequently, S, M's son, who had been born of K's compromise, brought a suit against M and the representatives of H and P to recover possession of the estate, on the allegation that, the family being a joint one, he was entitled, under the Hindu Law, to succeed to such estate, and that both the compromise entered into by K and the withdrawal of the former by M were in fraud of his succession, and did not affect his rights. The Court of First Instance found that the plaintiff was entitled to succeed to the estate, but that, his mother being still alive, he was entitled to possession after her death only, and, upon these findings, gave him a decree declaring his right to

Hindu Law—(continued.)

possession on M's death. The lower appellate Court reversed the decree, holding that the compromise entered into by K was conclusive against the plaintiff's claim, and also that, during his mother's lifetime, he had no *locus standi* to maintain the suit. *Per MAHMOOD, J.*, that the plaintiff's right as a daughter's son (which were not affected by his birth having taken place after his maternal grandfather's death) did not entitle him, under ordinary circumstances, to succeed to his maternal grandfather's estate in a divided Hindu family, during the existence of a daughter, whether she were his own mother or his maternal aunt; and that the claim for possession was therefore rightly dismissed. *Aumirtolal Bose v. Rajoneekant Mitter, Sibta v. Badri Prasad, and Baijnath v. Mahabir* referred to. Also that the prayer in the plaint was wide enough to include a prayer for declaratory relief such as the first Court had given. Also that the rule whereby decrees against a Hindu widow, succeeding to her husband's estate as heir are binding by way of *res judicata* against all who in the order of succession come after her, and in that sense may be dealt with as her representatives, was limited to decrees fairly obtained against the widow in a contested and *bona fide* litigation, and would not apply to the compromise effected by K, which could scarcely be regarded as on a higher footing than an alienation which the widow in possession of her husband's divided estate might have made, and which the plaintiff distinctly alleged had not been fairly obtained. *Rani Anand Koer v. The Court of Wards, Nand Kumar v. Radha Kuari and Katama Natchiar's Case* referred to. Also that M's withdrawal of her suit was not a bar to the suit of the plaintiff. Also that it could not be said that a daughter's son was not, under any condition, competent to maintain a declaratory suit of this nature during the lifetime of his mother or maternal aunt, in respect of his maternal grandfather's property, to the full ownership of which he had a reversionary right. Also that the awarding of declaratory relief as regulated by s. 42 of the Specific Relief Act, is a discretionary power which Courts of equity are empowered to exercise with reference to the circumstances of each case and the nature of the facts stated in the plaint and the prayer of the plaintiff; that so long as a Court of First Instance possesses jurisdiction to entertain a declaratory suit, and entering into the merits of the case arrives at right conclusions and awards a declaratory decree, such a decree cannot be reversed in appeal simply because the discretion has been improperly exercised; and that such improper exercise of discretion under s. 42 of the Specific Relief Act has no higher footing than that of an error, defect, or irregularity, not affecting the merits of the case or the jurisdiction of the Court, within the meaning of s. 578 of the Civil Procedure Code. This does not imply that, even in cases where the discretionary power to award declaratory relief has been exercised wholly arbitrarily and in a manner grossly inconsistent with judicial principles, the Court of appeal would have no power to interfere. *Ram Kanaye Chuckerbutty v. Prosunno Coomar Sein, Sadul Ali Khan v. Khajeh Abdool Gunnee, Sheo Singh Rai v. Dakho, and Damodur Surmah v. Mohee Kant Surmah* referred to. SANT KUMAR v. DEO SARAN VIII

3. *Daughter's son—Missing person—Act I of 1872, ss. 107, 108.* Sections 107 and 108 of the Evidence Act, taken together, do not lay down any rule as to the exact time of the death of a missing person. Whenever the question as to the exact time of death arises, it must be dealt with according to the evidence and circumstances of each case, when the death is alleged to have occurred at any time not affected by the presumption of law as to the seven years. In the case of a sonless Hindu, his separate estate devolves, in the first instance, upon his widow or widows, and thereafter upon the daughter or daughters, and it is not till the death of the daughter or daughters that the daughter's son's right of inheritance initiates; and the death of a daughter's son antecedent to the death of a daughter would prevent the estate from devolving upon the son of such daughter's son. Upon the death of a sonless Hindu, his separate estate devolved upon his two widows, the first of whom had a daughter, who had two sons G and S, G having a son D. After the death of the first widow, the second came into sole possession of the property, and so continued till her death in 1882. At that time S was still living, but G had not been heard of by any of his relatives or friends since 1869 or 1870. In 1884, a purchaser from S claimed possession of the whole estate and was resisted by D, on the ground that the estate had, on the death of the second widow, devolved on his father and S jointly, and S was not competent to alienate it. Held that the question whether the defendant's father was living at the time of the second widow's death in 1882, was a question of evidence governed by ss. 107 and 108 of the Evidence Act; that under the circumstances the defendant's father must be held to have died prior to the time referred to; that consequently, according to the Hindu law, the right of succession to his grandfather's estate did not vest in

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him jointly with the plaintiff's vendor, so as to enable the defendant to claim through him; that the plaintiff's vendor was therefore competent to alienate the entire estate, and the claim must be allowed. *Mashar Ali v. Budh Singh, Jannajay Masumdar v. Keshab Lal Ghose, Guru Das Nag v. Matilal Nag and Parmeshar Rai v. Bisheshar Singh* referred to.
DHARUP NATH v. GOBIND SARAN ... VIII 614

4. *Impartible raj—Succession in joint family to ancestral impartible estate—Right of nearest male collateral—Exclusion of widow where the family is joint, and the estate not separate.* Impartible ancestral estate is not merely, by reason of its being impartible, the separate estate of the single member of the undivided family, upon whom it devolves, so long as the family continues joint. *Chintamun Singh v. Nowlukho Konwari* referred to and followed. A female cannot inherit impartible ancestral estate, belonging to a joint family, under the Mitakshara, when there are any male members of the family who are qualified to succeed as heirs; a rule of law not dependent on custom; and a custom modifying the law in this respect must be a custom to admit females, not a custom to exclude them. *Maharani Hiranath Koer v. Ram Narayan Singh* approved. Where raj estate ancestral and impartible, was not separate property and the family was undivided, and where no special custom existed, modifying the Mitakshara law of succession, held that the nearest male collateral relation of the last Raja, who died without male issue, was entitled to succeed in preference to the Raja's widow. This relation, viz., a brother of the late Raja's deceased father, at one time received an allowance for maintenance out of the family estate. What amounted to an attachment of this, according to a subsequent judicial decision, occurred in 1857. Held that he had not thereby been deprived of his right of succeeding as a member of the joint family. The raj estate in question originated in the partition of a more ancient one with others out of which minor estates were formed. If in the latter there had been descents to widows, no inference hence, to support the widow's claim to inherit in this family, could be drawn. Such minor estates, might have been separate (which estates granted for maintenance probably would be), and in that case the widows of the last holders would have succeeded them in due course of law. Unless connection is shown between families, evidence of a special family custom in one is not evidence of a similar family custom in another.

RAJA RUP SINGH v. RANI BAISNI ... VII 1

5. *Inheritance—Sudras—Illegitimate son.* Held that an Ahir, who was the offspring of an adulterous intercourse, was incapable of inheriting his father's property, even as a Sudra. *Vencatachella Chetty v. Parvathammal, Parisi Nayudu v. Bangaru Nayudu, Viraramuthi Udayan v. Singaravelu, Rahi v. Govinda and Narayan Bharthi v. Laving Bharthi* referred to.

DALIP v. GANPAT ... VIII 387

6. *Joint and undivided Hindu family—Joint and undivided property—Debts of deceased member—Liability of his interest.* J, a member of a joint Hindu family, left two sons, R and S. S borrowed money upon a simple bond, and, after his death, the obligee sued his widow and daughter-in-law upon the bond, obtained a decree against them, and, in execution thereof, brought to sale S's interest in the property. B, the grandson of R, thereupon sued the purchaser to recover the same, on the ground that it was the joint property of S and himself, and could not be attached and sold in satisfaction of S's debt. Held, that on the death of S, his interest passed to the plaintiff by survivorship, and was not liable after his death to any personal debt he had incurred, inasmuch as no charge had been made on the property, and the creditor could not recover his money from the joint property after the death of S when he had not obtained judgment against S and taken out execution by attachment against him. *Suraj Bansi Koer v. Sheo Persad Singh and Rai Bal Kishen v. Rai Sita Ram* referred to.

BALBHADAR v. BISHESHAR ... VIII 495

7. *Joint family—Power of the father to alienate ancestral property for pious purposes.* According to the Hindu law, the power of the father to make alienations of joint ancestral estate without his son's consent extends to provision of a permanent shrine for a family idol. *Gopal Chand Pande v. Babu Kunwar Singh* referred to. In a suit brought by a son to set aside an alienation of ancestral estate by the father for the purpose above-mentioned, the son having contended that the real motive for the gift was not piety to the gods, but malice against him, the Court remitted an issue to the lower appellate Court for the purpose of ascertaining whether the endowment had been made *bonâ fide* for the satisfaction of the idol and the benefit of the donor's soul, or from motives of spite against the plaintiff.

RAGHUNATH PRASAD v. GOBIND PRASAD ... VIII 76

Hindu Law—(continued.)

8. *Joint Hindu family—Alienation by father—Suit by sons to set aside alienation—Duty of sons to pay father's debts—Burden of proof.* The rule enunciated by the Privy Council in *Muddun Thakoor v. Kantoo Lall* and *Suraj Bansi Koer v. Sheo Persad Singh*, "that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes to the knowledge of the vendee or mortgagee," is limited to antecedent debts, i.e., to debts contracted before the sale or mortgage sought to be impeached by the son; and it does not cover cases in which a sum in ready money has been paid over to the father by the vendee or mortgagee. The authorities seem to come to this, that in those cases where a person buys ancestral estate, or takes a mortgage of it from the father, whom he knows to have only a limited interest in it, for a sum of ready money paid down at the time of the transaction, such person, in a suit by the sons to avoid it, must establish that he made all reasonable and fair inquiry before effecting the sale or mortgage, and that he was satisfied by such inquiry, and believed, in paying his money, that it was required for the legal necessities of the joint family, in respect of which the father, as head and managing member, could deal with and bind the joint ancestral estate.

LAL SINGH v. DEO NARAIN SINGH VIII

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9. *Joint Hindu family—Liability of ancestral estate for satisfaction of father's debt when not incurred for immoral purposes.* A suit was brought against G, the head of a joint Hindu family, by S, to whom he had mortgaged ten biswas of ancestral estate as security for a loan, to recover the amount of the loan by enforcement of the mortgage against the entire ten biswas. During the pendency of the suit G died, and his son Z and his widow B were brought on the record as his legal representatives. In support of his claim to enforce the mortgage against the entire ten biswas, and not merely against the share therein which G, during his lifetime, might have got separated, the plaintiff pleaded that the debt incurred by G was of such a character that, according to the Hindu law, his son Z was under a pious duty to discharge it out of his own estate. It was found that, although the father was grossly extravagant and selfish in his expenditure, there was no evidence that the proceeds of the particular loan in question were applied to any special licentious purposes, but that the money was not borrowed to meet any family necessity or laid out in necessary expenses, but used in G's personal expenses. *Held*, that this evidence did not justify the lower Court in decreeing that the debt should be charged on the share of the father alone in the ten biswas mortgaged, as it did not establish that he had wasted the money on immoral purposes, or that the debt was such that a pious son would be free to repudiate it. *Nanoni Babuasin v. Modun Mohun* followed.

SITA RAM v. ZALIM SINGH VIII

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10. *Joint Hindu family—Sale of ancestral estate in execution of decree against father—Effect of sale on son's rights and interests.* When a decree has been made against the father and manager of a joint Hindu family in reference to a transaction by which he has professed to charge or sell the joint ancestral property, and a sale has taken place in execution of such decree of the joint ancestral property without any limitation as to the rights and interests sold, the rights and interests of all the co-parceners are to be assumed to have passed to the purchaser, and they are bound by the sale, unless and until they establish that the debt incurred by the father, and in respect of which the decree was obtained against him, was a debt incurred for immoral purposes of the kind mentioned by *Yajñavalkya*, Ch. II, s. 48, and *Manu*, Ch. VIII, sloka 156, and one which it would not be their pious duty as sons to discharge. If, however, the decree, from the form of the suit, the character of the debt recovered by it, and its terms, is to be interpreted as a decree against the father alone and personal to himself, and all that is put up and sold thereunder in execution is his right and interest in the joint ancestral estate, then the auction-purchaser acquires no more than that right and interest, i.e., the right to demand partition to the extent of the father's share. In this last-mentioned case, the co-parceners can successfully resist any attempt on the part of the auction-purchaser to obtain possession of the whole of the joint ancestral estate, or, if he obtains possession, may maintain a suit for ejectment to the extent of their shares upon the basis of the terms of the decree obtained against the father, and the limited nature of the rights passed by the sale thereunder. *Girdharee Lall v. Kantoo*

Hindu Law—(concluded.)

Lall, Deendyal Lall v. Jugdeop Narain Singh, Suraj Bunsu Koer v. Sheo Persad Singh, Bissessur Lall Sahoo v. Maharaja Luchmessur Singh, Muttayan Chetti v. Sungili Vira Pandia Chinnatambiar, Hurdey Narain Sahu v. Rooder Perakash Misser, Nanomi Babuasin v. Modun Mohun, Ram Narain Lal v. Bhawani Prasad, Gaura v. Nanak Chand, Appovier v. Rama Subba Aiyar, Phul Chand v. Man Singh, Chamaili Kuar v. Ram Prasad, and Rama Nand Singh v. Gobind Singh referred to.

BASA MAL v. MAHARAJ SINGH VIII 205

11. *Mitakshara—Hindu widow—Estate inherited by two Hindu widows from deceased husband—Alienation by one widow.* When their Lordships of the Privy Council have seen fit to place a definite construction upon any point of Hindu law, the High Court is bound by such construction until such time as their Lordships may think fit to vary the same. According to the Mitakshara law, the estate which two Hindu widows take by inheritance from their deceased husband is not several, but joint. The senior of two such Hindu widows is not a manager of such estate, and competent, for purposes of legal necessity, to alienate it without the consent of the other. *Bhugwandeon Doobey v. Myna Bae and Gajapathi Nilamani v. Gajapathi Radhamani* referred to.

RAM PIYARI v. MULCHAND VII 114

12. *Sadhs—Partition between widow and mother, both claiming life interests—Alienation by mother—Reversioner—Declaratory decree.* Upon the death of a Hindu, a dispute as to his separate estate took place between his mother and his widow, which was referred to arbitration and an award was made dividing the property between the disputants. It did not appear that either of them claimed the property absolutely, but they disputed as to who should have a life-interest in it, and this was the subject of the arbitration and of the award. Subsequently the mother executed a deed of gift of part of the property which came to her in favour of her nephews. The daughter and the daughter's sons of the deceased, as reversioners, sued the donees to set aside the gift, asserting that the donor had no power to make it, having under the Hindu law a life-interest only in the property. The parties were Sadhs. *Held* that the Hindu law of inheritance was presumably applicable to the parties, and the defendants had not shown that any custom among the Sadhs, having the force of law, prevailed opposed to the Hindu law. *Held* that inasmuch as the donor was in any circumstances entitled to maintenance, and the decision come to upon the arbitration was to put her in possession of half the property, but only on the footing of a woman's interest for life, the defendants could not set up any title by adverse possession on her part to defeat the claim of the reversioners. *Held* also that the plaintiffs were competent to maintain the suit as reversioners to the widow, and were entitled to a decree for a declaration that the gift should not affect any of their rights as reversioners after the widow's death.

GOPI CHAND v. SUJAN KUAR VIII 646

13. *Stridhan—Succession.* Upon the death of a childless Hindu widow who had been married in one of the four approved forms of marriage, S, one of the collateral relatives of her husband, stating that his minor son had been adopted by her, obtained possession of certain property, which had formed her *stridhan*, and mutation of names was effected in the minor's favour in the revenue records. A suit was instituted against S and his son by C, on the allegation that he and J, who were collateral relatives of the widow's husband, were entitled, under the Hindu Law, to succeed in moieties to the properties left by her as her *stridhan*, and claiming recovery of possession of half her property. In defence the adoption was pleaded, and another plea was that the widow had left a brother who, in the absence of the adoption, would succeed to the property, to the exclusion of the plaintiff. The Court of First Instance held that the alleged adoption had not been proved. In the lower appellate Court the plea as to adoption was given up. *Held* that, upon the facts found, the plaintiff was the heir of the deceased widow, and as such entitled to succeed to her *stridhan* under the Hindu law. *Thakoor Deyhee v. Baluk Ram* followed. *Munia v. Puran* distinguished.

CHAMPAT v. SHIBA VIII 393

Hindu Widow—

See ACT I OF 1877, S. 42: DECLARATORY DECREE 2: HINDU LAW 4 AND 11: PRE-EMPTION 4.

Decree against widow—Reversioner—Res judicata. See HINDU LAW 2.

Hindu Widow—(continued.)

1. *Decree against widow—Fraud—Reversioner.* Upon the death of R, a Hindu, who was separate from his brother S, his widow G became life-tenant of his estate and his daughter B became entitled to succeed after G's death. In 1882, a suit was brought by S and G against V to recover the value of a branch of a mango tree wrongfully taken by the defendant, and for maintenance of possession over the grove in which the tree was situate. The suit was dismissed, and it was decided that R was not the owner of the grove, nor was G the owner. In 1885, B brought a suit against G, S, V, and A, to whom V had sold some of the trees, claiming a declaration of her right and possession of the grove, upon the allegation that the proceedings of 1882 were carried on in collusion between S and G on the one hand and V on the other, for the purpose of improperly preventing her from asserting her rights. *Held* that if the suit of 1882 was a genuine suit and was properly contested by the then plaintiffs, though S might have been improperly joined as plaintiff, any decision then passed against G would be binding upon the present plaintiff, and estop her again litigating questions which were then decided. *Held* also that if the plaintiff's specific allegation of fraud and collusion in the proceedings of 1882 were established, and even if the decree of 1882 did dispose of the question now sought to be re-opened, the decision in that suit would not be binding on the plaintiff under the circumstances. *Held* also that if it should turn out that there was fraud and collusion in the proceedings of 1882, and an attempt to interfere with the plaintiff's right as reversioner to the grove on the death of her mother, she would be entitled in the present suit to claim not only a declaration of her right, but also to have the grove reduced into the possession of the life-tenant; and that such relief could be given upon this form of plaint. *Katama Natchiar's Case, Adi Deo Narain Singh v. Dukharam Singh and Sant Kumar v. Deo Saran* referred to.

SACHIT v. BUDHUA KUAR VIII 429

2. *Re-marriage—Presumption of legality of marriage—Act XV of 1856.* L sued for possession of certain immoveable property as the widow and heiress of a Hindu, a Gaur Rajput, and governed by the law of the Mitakshara, alleging him to have been at the time of his death separate from the other members of his family. The suit was dismissed by the lower appellate Court, on the grounds that the plaintiff at the time when her connection with the deceased began was the widow of one of his cousins; that, according to the custom of the caste, the marriage of a widow with a relative of her husband was invalid; and that consequently the plaintiff could not be considered the lawfully married wife of the deceased, and entitled as such to the inheritance of his estate. *Held* that the plaintiff having in the first Court given evidence to show that she was married to the deceased and that her two infant daughters were the offspring of that marriage, and, looking to the provisions of Act XV of 1856, the presumption was in favour of the legality of such marriage until the contrary was shown, i.e., until the defendants had established that, according to the custom of the caste of Gaur Rajputs, the marriage of a cousin with his deceased cousin's widow was prohibited.

LACHMAN KUAR v. MARDAN SINGH VIII 143

Murt—

See CRIMINAL PROCEDURE CODE, s. 35 : MAGISTRATE.

Husband and Wife—

See MUHAMMADAN LAW 6 : RESTITUTION OF CONJUGAL RIGHTS.

Impartible Raj—

See HINDU LAW 4.

Inheritance—

See CONDITION RESTRAINING ALIENATION : DEBT : MUHAMMADAN LAW 2 AND 3.

Insolvent—

See STATUTE 11 AND 12 VIC., c. 21, s. 24.

Insolvent Judgment-debtor—

See CIVIL PROCEDURE CODE, s. 351 (a), s. 351 (b).

Instalment Bond—

See LIMITATION.

Interest—

See BOND : CIVIL PROCEDURE CODE, s. 583 : EXECUTION OF DECREE 8 : MORTGAGE 8 AND 14.

Bond—Interest after due date—Measure of damages. See BOND 3.

Mortgage—Redemption—Act IV of 1882, ss. 83, 84. See MORTGAGE 14.

"Istemrari Patta"—

Hereditary title. See LEASE 1.

Jains—

Adoption—Hindu Law—Second adoption by widow. In a suit to which the parties were Jains, and in which the plaintiff claimed a declaration that he was adopted by the defendant to her deceased husband, and that as such adopted son he was entitled to all the property left by her deceased husband, it was found that, subsequent to the husband's death, the defendant had adopted another person, who had died prior to the adoption of the plaintiff and without leaving widow or child. *Held* that the powers of a Jain widow, except that she can make an adoption without the permission of her husband or the consent of his heirs, and may adopt a daughter's son, and that no ceremonies are necessary, are controlled by the Hindu law of adoption, and the Kritima form of adoption not being recognized by the Jain community, or among the Hindus of the North-Western Provinces, it must be assumed that the widow had power to make a second adoption, and that such adoption was to her husband. *Held*, therefore, that the adoption of the plaintiff was valid and effective. *Held* that the effect of the second adoption being to make the second adopted son the son of the deceased husband, he must be treated as if he had been born, or at all events conceived, in the husband's lifetime, and his title related back to the death of the elder brother, the first adopted son : so that if the elder brother left no widow or child who would succeed him to the exclusion of his younger brother, the second adopted son would succeed as heir to the father. *Sheo Singh Rai v. Dakhu* referred to. IAKHMI CHAND v. GATTO BAI VIII 319

Joint Ancestral Property—

See EXECUTION OF DECREE 16.

Joint Hindu Family—

See HINDU LAW 6, 7, 8, 9 AND 10 : PRE-EMPTION 19.

Partnership—Suit by one member for debt due to family firm. In a suit for money lent, brought by the father of a joint Hindu family who carried on jointly an ancestral money-lending business, the plaintiff stated, in examination, that he had ceased to take an active part in the management of the affairs of the firm, and that the control of its business was in the hands of his sons, whom he described as "maliks". *Held* that, under the circumstances, the plaintiff could not maintain the suit in his individual capacity, and without joining his sons as plaintiffs with him, his sons being his partners in the ancestral business, and he not being the managing member or proprietor.

JUGAL KISHORE v. HULASI RAM VIII 264

Judgment—

See APPEAL 3.

Of criminal appellate Court. See CRIMINAL PROCEDURE CODE, s. 421.

Judicial Notice—

See ACT XLV of 1860, s. 296.

Jurisdiction—

See EXECUTION OF DECREE 6.

1. *Assignment of rent of land—Suit by assignee against tenant—Civil and Revenue Courts—Act XII of 1881, s. 93 (d).* A suit by the person, to whom a landholder has assigned rents payable to him by tenants, for the recovery of the money so assigned, is a suit cognizable in the Civil Courts and not in the Revenue.

GANGA PRASAD v. CHANDRAWATI VII 256

Civil and Revenue Courts. See RENT-FREE GRANT.

2. *Civil and Revenue Courts—Declaration that land is plaintiff's sir and defendant a lessee—Bandholder and tenant.* A zamindar claimed a declaration that certain land was his sir and that the defendants were in possession thereof as his lessees. The defendants resisted the claim on the ground that they were tenants of the land at fixed rates, and not lessees of it as the plaintiff's sir. *Held* that the suit raised the question whether the land was sir, in respect of which no

Jurisdiction—(continued.)

- occupancy-rights could be created except by contract, and whether the defendants were the plaintiff's lessees, and that this was a question purely of contract, and one which was cognizable in the Civil Courts.
- KAULESHAR PANDAY *v.* GIRDHARI SINGH ... VII 383
3. *Civil and Revenue Courts—Landholder and tenant—Declaratory decree—Act XII of 1881, s. 95 (n).* A suit in which the plaintiff claims, as the tenant of land, that he may be declared to be the tenant, and that the defendant, the landholder, may be restrained from interfering with his right to the land as a tenant, and in which the defendant denies the relation between him and the plaintiff of landholder and tenant, is not a suit which is exclusively cognizable in the Revenue Court.
- SHEODISHT NARAIN SINGH *v.* RAMESHAR DIAL ... VII 188
4. *Civil and Revenue Courts—Resumption of rent-free grant—Act XII of 1881, ss. 30, 95 (c)—Act XIX of 1873, s. 241 (h).* A zamindar brought a suit to recover possession of certain land in the village which was held by the defendants rent-free, in consideration of rendering services as *khera-patis*, on the ground that he was entitled, as zamindar, to dispense with their services, and that, therefore, they no longer possessed any right to hold the land. The claim was resisted by the *khera-patis* on the ground that for many years they had been in possession of the land as *muafi*-holders. *Held* that the dispute so raised was a matter which could form the subject of an application to resume a rent-free grant within the meaning of s. 30 of the N.-W. P. Rent Act (XII of 1881), and that the cognizance of the suit by the Civil Court was therefore barred by cl. (c) of s. 95 of that Act, and that, for similar reasons, the Civil Court, under cl. (h) of s. 241 of the N.-W. P. Land Revenue Act (XIX of 1873), could not exercise jurisdiction over the matter of the suit.
- TIKA RAM *v.* KHUDA YAR KHAN ... VII 191
5. *Civil and Revenue Courts—Suit by lessee of occupancy tenant for recovery of possession—Act XII of 1881, s. 95 (n).* Section 95 (n) of the N.-W.P. Rent Act (XII of 1881) is applicable to a suit by the lessee of an occupancy-tenant to recover possession of the land under the lease, from which the lessor has ejected him, and such a suit is exclusively cognizable by the Revenue Courts. *Muhammad Zaki v. Hasrat Khan and Ribban v. Partab Singh distinguished.*
- CHRIDDU *v.* NARPAT ... VIII 62
6. *Competency of Subordinate Judge to try Munsif's case—Act XVI of 1868, ss. 13, 15, 16—Act VI of 1871, ss. 19, 20—Civil Procedure Code, ss. 15, 25, 57 (a), 578.* *Per PETHERAM, C.J., and BRODHURST, MAHMOOD, and DUTHOIT, JJ.*—The object of ss. 19 and 20 of the Bengal Civil Courts Act, 1871, was to create in the District Judge, Subordinate Judge, and Munsif concurrent jurisdiction up to Rs. 1,000. *Per PETHERAM, C. J.*—Section 15 of the Civil Procedure Code is a proviso to those sections. The word "shall" in that section is imperative on the suitor. The word is used for the purpose of protecting the Courts. The suitor shall be obliged to bring his suit in the Court of the lowest grade competent to try it. The object of the Legislature is that the Court of the higher grade shall not be overcrowded with suits. Whenever an Act confers a benefit, the donee may exercise the same or not at his pleasure. The proviso is for the benefit of the Court of the higher grade, and it is not bound to take advantage of it. If it does not wish to try the suit, it may refuse to entertain it. If it wishes to retain the suit in its Court, it may do so; it is not bound to refuse to entertain it. *Per DUTHOIT, J.*—The words in s. 57 of the Civil Procedure Code "shall be" are an instruction which the Court is bound to follow; and they are therefore a restraint upon jurisdiction. The effect, therefore, of the concurrent jurisdiction of Subordinate Judges and Munsifs is not to allow to a Subordinate Judge discretion as to accepting or not accepting for trial by himself suits cognizable by the inferior tribunal. *BRODHURST and MAHMOOD, JJ.*—Section 15 of the Civil Procedure Code is a rule of procedure, not of jurisdiction, and whilst it lays down that a suit shall be instituted in the Court of the lowest grade, it does not oust the jurisdiction of the Courts of higher grades. *Russick Chunder Mohunt v. Ram Lal Shaha and Sufee-ool-lah Sircar v. Begum Bibi followed.* *Per OLDFIELD, J.*—Section 15 of the Civil Procedure Code is a provision entirely of procedure as distinct from jurisdiction, and its effect on s. 19 of the Bengal Civil Courts Act is that the jurisdiction of the District Judge and Subordinate Judge extends to all original suits cognizable by the Civil Court, subject in its exercise to a certain procedure namely, that the suits be instituted in the Court of lowest grade competent to try them. *Held* therefore, by PETHERAM, C.J., and OLDFIELD,

Jurisdiction—(continued.)

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BRODHURST, and MAHMOOD, JJ., where a Subordinate Judge had tried a suit which a Munsif, a Court of a lower grade, might have tried, that the Subordinate Judge had not acted without jurisdiction. The plaint in such suit had been in the first instance presented to the Munsif, who had returned it, to be presented to the Subordinate Judge. *Per* DUTHOIT, J.—The decree of the Subordinate Judge would not be liable to be reversed in appeal for want of jurisdiction, for the jurisdiction was there, though it ought not to have been exercised. This view of the matter was consistent with the received canon of construction, that unless the Legislature uses negative words, or words showing an intention to treat the observance of a rule of procedure as essential, the rule will ordinarily be treated as a direction only. Under the circumstances, therefore, the District Judge had, in appeal, correctly refused to entertain the plea of defect in jurisdiction. *Per* MAHMOOD, J.—The institution of a suit in a Court of higher grade than the Court which is competent to try it is not a question either as to the jurisdiction or affecting the merits of the case. It is a question of the kind provided for by s. 578 of the Civil Procedure Code, and the irregularity is not one which affects "the merits of the case or the jurisdiction of the Court" within the meaning of that section. The plea of want of jurisdiction can be entertained for the first time at any stage of a suit, provided there is on the record sufficient material to substantiate it.

NIDHI LAL v. MAZHAR HUSAIN ... VII 230

7. *Jurisdiction of Civil Court—Act XII of 1881, ss. 10, 95 (a)—Suit by landlord to determine nature of tenant's tenure.* The cognizance of the Civil Courts of a suit by a landholder for a declaration that a tenant is not a tenant at fixed rates, or an occupancy-tenant, but a tenant-at-will, is barred by the provisions of s. 95 (a) of the N.-W.P. Rent Act, 1881.

THE MAHARAJA OF BENARES v. ANGAN ... VII 112

8. *Jurisdiction of Civil Court—Landholder and tenant—Suit for recovery of land of which tenant has been dispossessed—Relation of landlord and tenant admitted—Act XII of 1881, s. 95 (n).* A landholder served a notice of ejectment on G, under the provisions of s. 36 of the Rent Act (N.-W.P.), as a tenant-at-will. Under the provisions of s. 39 of the Act G contested his liability to be ejected, on the ground that he was not a tenant-at-will but one holding by virtue of an agreement executed in his favour by the landholder. The question of G's liability to be ejected was decided adversely to him, and he was ejected under s. 40 of the Act. He subsequently sued the landholder in the Civil Court for possession of the land, by virtue of the agreement, alleging that his ejectment was a breach of such agreement. The landholder's defence to this suit was that G had been rightfully ejected. *Held* that inasmuch as the relation of landlord and tenant between the parties at the time of the proceedings under the Rent Act was admitted, and the dispute in the suit could appropriately form the subject of an application under cl. (n) of s. 95 of that Act, the suit was not cognizable in the Civil Courts. *Muhammad Abu Jafar v. Wali Mahammad, Sukhdaik Misr v. Karim Chaudhri, Kanahia v. Ram Kishen distinguished. Shimblu Narain Singh v. Bachcha* referred to.

GANGA RAM v. BENI RAM ... VII 148

9. *Landholder and tenant—Suit for the removal of trees—Act XV of 1887, sch. II, No. 32—Civil and Revenue Courts—Act XII of 1881, s. 93 (b).* *Held* that a suit by a landholder for the removal of certain trees planted by the defendants upon land held by them as the plaintiffs' occupancy-tenants was cognizable by the Civil and not by the Revenue Court. *Deodat Twari v. Gopi Misr* referred to. *Held* also that No. 32, sch. II of the Limitation Act (XV of 1877) applied to the suit. *Raj Bahadur v. Birmha Singh, Anrit Lal v. Balbir, and Kedarnath Nag v. Kheturpaul Sritirunro* referred to.

GANGADHAR v. ZAHURRIYA ... VIII 446

10. *Liability of land to assessment of revenue—Jurisdiction of Civil Court—Declaratory decree—Act XIX of 1873, s. 241.* The Civil Courts are not debarred by s. 241 of Act XIX of 1873 (N.-W.P. Land Revenue Act) from taking cognizance of a suit for a declaration that land, which the revenue officers seek, under the provisions of that Act, to assess to revenue, is included in an area which has already been permanently settled, and is therefore not liable to further assessment. A title to hold land free from assessment to revenue cannot be acquired by any length of possession revenue free. *The Government v. Rajah Raj Kishen Singh, Collector of Futehpur v. Mungles Pershad, Rajah Raghnath Suhare v. Bishey Singh, Zoolfikar Ali v. Ghunsam Baree, and Sri Uppu Lakshmi Bhayamma Garu v. Purvis* referred to.

THE SECRETARY OF STATE FOR INDIA v. RAM UGRAH SINGH ... VII 140

Jurisdiction—(concluded.)

11. *Partition of Mahal—Civil Courts—Act XIX of 1873, s. 241 (f).* B, the recorded proprietor of a 7 biswas 10 biswansis share in a village the recorded area of which was 476 bighas and 5 biswas, purchased a 16 biswansis and 13½ kachwansis share in the same village. In 1872, at the time of settlement, B was recorded as the proprietor of an 8 biswas 6 biswansis and 13½ kachwansis share, and the area of this was recorded as 476 bighas and 5 biswas, that is to say, the same area as was recorded before the purchase. In 1876, H purchased B's rights and interests in the village and in 1877 applied for partition of the share of which he had been recorded proprietor, and the same was partitioned, an area of 476 bighas and 5 biswas being allotted to him. Subsequently he brought a suit against the proprietors of the other estates into which the village had been divided for 61 bighas 4 biswas and 8 biswansis of land, alleging that, at the settlement of 1872, the area of B's rights and interests had been erroneously recorded as only 476 bighas and 5 biswas. *Held* that the suit would lie in the Civil Court, being barred by the provisions of s. 241 (f) of the N.-W.P. Land Revenue Act (XIX of 1873).

HABIBULLAH v. KUNJI MAL ... VII 447

12. *Place of suing—Suit for sale of mortgaged property—Civil Procedure Code, ss. 16, 20.* In 1879 R gave J a bond containing a simple mortgage of immoveable property. Subsequently R and P jointly gave D a bond containing a simple mortgage of the same property. In 1881 D obtained a decree for the sale of the property under his mortgage, and it was put up for sale and purchased by the plaintiffs. In 1882 J obtained a decree in the Court of the Munsif of G (within the local limits of whose jurisdiction the property was not situated), for enforcement of his mortgage-bond by sale of the property. The plaintiffs objected to the sale, and, their objection having been disallowed, brought a suit for cancellation of J's decree, so far as it ordered the sale. *Held* that J's decree could only be regarded as a simple money-decree because, as shown by s. 16 of the Civil Procedure Code, the Munsif had no power under the law to direct enforcement of hypothecation against immoveable property situate beyond the local limits of his jurisdiction, and neither the proviso to s. 16 nor s. 20 of the Code met the circumstances. *Held*, therefore, that the plaintiffs were entitled in this suit to have it declared that J's decree was a simple money-decree only, on the basis of which no process in execution could issue in respect of the property in dispute to oust the plaintiffs' possession from any part of it.

GUDRI LAL v. JAGANNATH RAM ... VIII 117

Statute, Construction of. See MORTGAGE 7.

13. *Suit for dissolution of partnership—Winding up—Act IX of 1872, s. 265—Civil Procedure Code, ss. 11, 213, 215, sch. IV, Form No. 113.* The ordinary Civil Courts have jurisdiction to try a suit for dissolution of a partnership, their jurisdiction to try such suits not being ousted by s. 265 of the Contract Act, 1872.

RAMJIWAN MAL v. CHAND MAL ... VII 227

Suit for redemption of mortgage. See MORTGAGE 7.

Lambardar and Co-sharer—

Collection of rents by co-sharer—Suit by lambardar for money had and received.
See VENDOR AND PURCHASER 1.

1. *Government revenue—Payment by lambardar of revenue due by co-sharer—Charge—Act XII of 1881, s. 93 (g).* In execution of a decree obtained by a lambardar under s. 93 (g) of the N.-W.P. Rent Act, the decree-holder caused to be attached a certain share upon which the arrears of Government revenue which he had satisfied had accrued. In defence to a suit brought by certain purchasers of the same property from the judgment-debtors to have it declared that the property was not liable to sale under the decree, and to remove the attachment, the decree-holder pleaded that, by the fact of paying the arrears of revenue due on the estate of the plaintiffs' vendors, he had obtained a charge on it, and could bring it to sale to satisfy the decree. *Held* that a charge of this nature could not be enforced in execution of a decree which was merely a personal one for arrears of Government revenue against persons against whom it was passed by a Revenue Court not competent to establish or enforce a charge on property, or to do more than pass a personal decree, and whose powers in execution were confined to realization from personal and immoveable property of the judgment-debtors. *Nugender Chunder Ghose v. Sreemutty Kaminee Dossee* referred to.

LACHMAN SINGH v. SALIG RAM ... VIII 384

Lambardar and Co-sharer—(Continued.)

2. *Suit by co-sharer for profits—Burden of proof—Act XII of 1881, s. 209.* When a co-sharer claims a dividend on the full rental of the mahal, and the lambardar pleads in reply that the actual collection fell short of that rental, the burden of proof lies on the co-sharer to show that the deficient collection was attributable to the conduct of the lambardar, in the sense of s. 209 of the N.-W.P. Rent Act (XII of 1881), before he can succeed in getting a decree for a sum in excess of the actual collections.

DHANAK SINGH v. CHAIN SUKH VIII 61

Landholder and Tenant—

See JURISDICTION 2, 3, 7 AND 8: OCCUPANCY-TENANT.

1. *Ex-proprietary tenant—Relinquishment of ex-proprietary rights—Act XII of 1881 (N.-W.P. Rent Act), ss. 9, 31.* Held by the Full Bench that an ex-proprietary tenant is not competent to relinquish his holding to his landlord by private arrangement. *Per* PETHERAM, C. J.—Section, 31 of the N.-W. P. Rent Act (XII of 1881) was enacted absolutely in the interests of the cultivator, and provides in effect, that although the occupancy-tenant may not be turned out, and may not transfer his rights, he is not to be regarded as bound to his holding, that he may relinquish it, and that, in that case, he is not liable for rent; but this provision must not be taken advantage of by letting the zamindar buy the holding, and thus introducing a new cultivator, contrary to the prohibition contained in s. 9.

INDAR SEN v. NAUBAT SINGH VII 847

2. *Mortgage by conditional sale of occupancy-rights to zamindar—Act XVIII of 1873 (N.-W.P. Rent Act), s. 9—Act XII of 1881 (N.-W.P. Rent Act), ss. 2, 9.* The occupancy-tenant of certain land, before the N.-W.P. Rent Act (XII of 1881) came into force, mortgaged his rights to his zamindars by a deed of conditional sale. The zamindars sued the heirs of the conditional vendee for foreclosure and possession of the mortgaged property. Held by the Full Bench that the terms of the judgment of the Full Bench in *Nank Ram Singh v. Murli Dhar* were directly applicable to the case, and that the transaction of mortgage, which was subsequently to become a sale, was not a transaction to which s. 2 of the Rent Act applied, because the sale would not have effect till after the Act came into operation.

MURLI RAI v. LEDRI VII 851

3. *Notice to quit—Act IV of 1882 (Transfer of Property Act), s. 106.* On the 11th December 1882, A, who had on the 1st July 1882, let rooms in a dwelling-house to B, sent a letter to the tenant in the following terms:—"If the rooms you occupy in the house No. 5, Thornhill Road, are not vacated within a month from this date, I will file a suit against you for ejectment, as well as for recovery of rent due at the enhanced rate." On the 1st February 1883, the lessor instituted a suit against the tenant for ejectment, with reference to the above letter. Held by the Full Bench, with reference to the terms of s. 106 of the Transfer of Property Act, that the letter was not such a notice to quit as the law required, inasmuch as it was not a notice of the lessor's intention to terminate the contract at the end of the month of the tenancy. *Per* STRAIGHT, J., *quære*, whether the letter was a notice to quit at all. Also *per* STRAIGHT, J.—A notice to quit must be certain, at all events, in respect of the date of the determination of the tenancy: in other words, there must be a clear and explicit intimation to the tenant as to the date after which he will, if he remains in occupation of the premises, become a trespasser. *Ahearn v. Bellman* distinguished. The judgment of the MAHMOOD, J., reversed, and that of OLDFIELD, J., affirmed.

BRADLEY v. ATKINSON VII 899

4. *Notice to quit—Act IV of 1882 (Transfer of Property Act), ss. 106, 111.* On the 11th December 1882, A, who had on the 1st July 1882, let rooms in a dwelling-house to B, sent a letter to the tenant in the following terms:—"If the rooms you occupy in the house No. 5, Thornhill Road, are not vacated within a month from this date, I will file a suit against you for ejectment as well as for recovery of rent due at the enhanced rate." On the 1st February 1883, the lessor instituted a suit against the tenant for ejectment, with reference to the above letter. Held by OLDFIELD, J. (MAHMOOD, J., *dissenting*), that with reference to the terms of s. 106 of the Transfer of Property Act, the letter was not such a notice to quit as the law required, inasmuch as the notice did not expire with the end of a month of the tenancy, and that this defect was not cured by the circumstance that the lessor waited until the end of the month to enforce his right to eject by suit. Held by MAHMOOD, J. (OLDFIELD, J., *dissenting*) that the letter dated

Landholder and Tenant—(continued.)

the 11th December 1882, was a valid notice to quit under ss. 106 and 111 of the Transfer of Property Act, and sufficient to determine the tenancy, inasmuch as it gave the tenant more than fifteen days' notice, and its terms were such that he could with perfect safety have acted upon it by quitting the premises at the proper time—namely by the end of the month, which he must be presumed to have known was the right time to leave, without any risk of incurring liability to payment of further rent, the landlord having clearly indicated his intention to terminate the tenancy, and the notice being binding upon him; that the additional time given by the notice must be taken to have been given for the convenience of the tenant and not with the object of continuing the tenancy; and that the suit for ejectment, not having been brought till long afterwards, was maintainable. *Doe v. Smith, Ahearn v. Bellman, Nocoordass Mullick v. Jewraj Baboo and Jagut Chander Roy v. Rup Chand Chango* referred to. Also per MAHMOOD, J.—The words "fifteen days" in s. 106 of the Transfer of Property Act imply a fixation of the shortest period of notice allowed by the section; and the term "expiring" means that the terms of the notice must be such as to make it capable of expiring according to law at the right time, so as to render it safe for the tenant to quit co-incidentally with the end of a month of the tenancy, without incurring any liability to payment of rent for any subsequent period.

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... VII 596

5. *Suit by landholder for declaration of right to take land from occupancy-tenant for cultivation of indigo—Wajib-ul-arz—Act I of 1877 (Specific Relief Act) s. 42.* The zamindars of a village sued an occupancy-tenant for a declaration of their right to maintain a custom which was thus recorded in the *wajib-ul-arz*:—"When necessary, one or two bigbas out of the tenants' lands are taken with their consent (*ba khushi*) for sowing indigo." Upon the basis of this entry, they claimed to be entitled to take a portion of the occupancy-holding at a certain period of the year, for the purpose of cultivating indigo. Held by the Full Bench that the word "*khushi*" used in the *wajib-ul-arz* indicated that the land was only to be taken with the occupancy-tenant's consent, and the document created no right of the nature alleged—namely, to take the land despite the tenant. Per TYRRELL, J.—That the suit was not maintainable under the special provisions of the Specific Relief Act (I of 1877).

SHEOBARAN v. BHAIRAO PRASAD

... VII 880

Suit for the removal of trees—Act XV of 1877, sch. II, No. 32—Jurisdiction—Civil and Revenue Courts—Act XII of 1891, s. 93 (b). See JURISDICTION 9.

6. *Transfer of "right of occupancy"—Lease—Mortgage—"Zar-i-peshgi" lease—Act XII of 1881 (N.-W.P. Rent Act), ss. 8, 9.* The occupancy-tenants of certain land executed *zar-i-peshgi* lease in favour of certain persons, by which, in consideration of a sum of money, it was agreed that the latter should have the right of occupying and cultivating the occupancy-holding as tenants for a term of years at a nominal rent. In pursuance of this agreement, those persons obtained possession. The zamindar thereupon brought a suit against them for ejectment, and to have the *zar-i-peshgi* lease set aside. Held by the Full Bench that the *zar-i-peshgi* lease was a transfer of occupancy-rights, within the meaning of s. 9 of the N.-W.P. Rent Act (XII of 1881), and was therefore invalid. Per PETHERAM, C.J.—A right of occupancy means nothing but the right to live on and cultivate land as one's own. Per STRAIGHT, J.—The last sentence of s. 8 of the Rent Act should not be read as declaring that any occupancy-tenant may sub-let his land, but that the scope of the proviso is limited to tenant who actually occupy or cultivate land under a written lease, without having acquired a right of occupancy. *Haji Hidayatullah v. Ram Niwas Rai* referred to.

ABADI HUSAIN v. JURAWAN LAL

... VII 866

Lease—

1. *Istemrari patta—Hereditary title—Construction of patta.* In an instrument described as a perpetual lease (*patta istemrari*) the lessor covenanted as follows:—"So long as the rent is paid I shall have no power to resume the land. The lessees shall have no power to sell the land in any way. I have therefore executed these few words by way of a perpetual lease, that it may be used when needed." Upon the death of one of the lessees, his heir, who was in possession of the land which formed the subject of the lease, claimed to be the lessee of a moiety thereof of the ground that the lease was one creating a heritable interest. The claim was allowed by the settlement officer, and the lessor thereupon brought a suit to have it declared that he was entitled to eject the defendant, under s. 86 of the N.-W.P. Rent Act (XII of 1881), as being a tenant-at-will, and to set aside the settlement

-(continued.)

officer's order. *Held* that the mere use of the word *istemrari* in the instrument did not *ex vi termini* make the instrument such as to create an estate of inheritance in the lessee; that the words "so long as the rent is paid I shall have no power to resume the land" did not show any meaning or intention that the lease was to be in perpetuity; and that the defendant (even should he be the legal heir and representative of one of the lessees) could not resist the plaintiff's claim. *Tulshy Pershad Singh v. Ramnarain Singh* followed. *Lakhu Kowar v. Hari-krishna Singh* dissented from.

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2. *Lease for one year—Lease exceeding one year—Act III of 1877, ss. 17 (d), 18 (c).* A *kabuliyat* dated the 6th May 1880, and executed by the lessee of a house in favour of the lessors, set forth that the house was let to the former at an annual rent of Rs. 3, for a term of one year. It also contained this stipulation:—"I (the lessee) do declare that I shall continue to pay the annual rent every year, and that if I should fail to pay the rent in any year, the owners of the house shall be at liberty to recover the rent through the Court." The lease was not registered. In a suit by the lessors against the lessee for possession of the house and for Rs. 7-8, arrears of rent, the defendant pleaded that, according to the right construction of the lease, he was entitled to occupy the house and the lessors were not entitled to eject him therefrom, so long as he paid the annual rent of Rs. 3; that he had duly paid rent at the agreed rate from the 6th May 1880 to the 6th May 1884; and that, under these circumstances, the plaintiffs were not entitled to either of the reliefs claimed. *Held* that the lease was for one year only, and, thus falling under s. 18 of the Registration Act (III of 1877), it was admissible in evidence without registration; that the defendant had been a mere tenant-at-will since the expiry of the year 1880-81; and that the plaintiffs were therefore entitled to possession of the house. *Hand v. Hall* referred to.

KHAYALI v. HUSAIN BAKHSH

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Lease from year to year—Act VIII of 1871, s. 17 (4). See ACT VIII OF 1871, s. 17 (4).

Lex loci—

See MAJORITY 2.

License—

Revocation of. Works of permanent character executed by licensees—Act V of 1882, ss. 60, 61. In a suit by a zamindar to have his right declared to build a house on some waste land in the mauza, the defendants, who were tenants in the mauza, resisted the claim on the ground that they had built wells and water-courses on the land, and had a right also to use it as a threshing-floor and for stacking cow-dung. *Held* that the defendants having acquired no right adverse to the plaintiff as owners, by prescription or otherwise, in the land, their right of use could only be as licensees of the plaintiff; and although he could not interfere with their right to the wells, which were works of a permanent character, and on which the defendants had incurred expenses, he could revoke the license as to the other use claimed of the land, and his claim to build the house should therefore be decreed.

THE LAND MORTGAGE BANK OF INDIA v. MOTI

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Limitation—

See ACT IX OF 1871, SCH II, NO. 132: CIVIL PROCEDURE CODE, s. 407 (c): EXECUTION OF DECREE 2 AND 7: PRE-EMPTION 7: VENDOR AND PURCHASER 2. Act XV of 1877, Sch. II, Nos. 118, 141. See ACT XV OF 1877, SCH. II, NO. 118.

Burden of proof—Instalment bond—Indorsement of payment of instalments. Where a defendant sets up the defence of limitation, he must plead it, and show that the claim is barred. If, when the plaintiff has proved his case, the facts show that the cause of action accrued at a date earlier than the period of limitation, and the plea of limitation has been set up by the defendant, the latter will be entitled to take advantage of the plaintiff's evidence that the claim is barred, and to have judgment given in his favour. The obligee of a bond, by which the obligor covenanted to pay the sum of Rs. 8,800 by annual instalments of Rs. 200, and in which it was also agreed that payments of the instalments should be indorsed on the bond, brought a suit against the obligor, alleging default in payment and claiming to recover the amount of the bond. He gave credit for payment of the instalments for seven years, and alleged that his cause of action arose upon default in payment of the eighth instalment. The bond showed on its face indorsements of the payments for which credit was given. The obligor alleged that no instalments were paid after the third year; that, therefore, the debt became due at an

Limitation—(continued.)

earlier date than that stated by the plaintiff, and that the claim was barred by limitation. *Held* that inasmuch as the defendant adduced no evidence to show that the latter instalments were not paid, and inasmuch as the evidence produced by the plaintiff did not show that the debt accrued at a date earlier than the limitation period, the plea of limitation failed.

RADHA PRASAD SINGH v. BHAJAN RAI ... VII 677

Suit for redemption—Burden of proof. See MORTGAGE 6.

Limitation Act—

Construction of. See ACT XV OF 1877, s. 14.

Lis pendens—

See HIGH COURT'S POWERS OF REVISION 4.

Magistrate—

Powers of. Act XLV of 1860, s. 71—*Criminal Procedure Code, ss. 39, 235—Rioting, grievous hurt, and hurt—Punishment for more than one of several offences—Powers of Magistrate of first class conferred on Magistrate of second class during trial—Power to sentence as first class Magistrate—Charge, Alteration of.* On the 8th August 1884, a Magistrate of the second class began an inquiry in a case in which several persons were accused of rioting and of voluntarily causing grievous hurt. On the 6th September, the powers of a Magistrate of the first class were conferred on the Magistrate by an order of Government, which was communicated to him on the 8th September. On the 9th September, the case for the prosecution having closed, the Magistrate framed charges against each of the accused under ss. 323 and 325 of the Penal Code, recorded the statements of the accused and the evidence for the defence, and on the 10th September, convicted the accused of all the charges passing upon each of them in respect of each charge sentences which he could pass as a Magistrate of the first class, but could not have passed as a Magistrate of the second class. On appeal the Sessions Judge, on the ground that the prisoners had committed the offence described in s. 148 of the Penal Code, held that the sentences passed by the Magistrate were illegal, as being inconsistent with the provisions of s. 71, paragraphs 2 and 4; and he accordingly reduced the sentences of imprisonment which the Magistrate had passed to the maximum of imprisonment which the Magistrate could have inflicted under s. 148. *Held* by the Full Bench (PETHERAM, C.J., and BRODHURST, J., dissenting) that the sentences passed by the Magistrate were legal. *Per* OLDFIELD, MAHMOOD, and DUTHOIT, JJ., that, with reference to the terms of s. 39 of the Criminal Procedure Code, a Magistrate of the second class who has begun a trial as such and continued it in the same capacity up to the passing of sentence, and who, prior to passing sentence, has been invested with the powers of a Magistrate of the first class, is competent to pass sentence in the case as a Magistrate of the first class. *Per* OLDFIELD and DUTHOIT, JJ., that the provisions of s. 71 of the Penal Code had no application to the case, inasmuch as the offences of causing grievous hurt and hurt formed no part of the offence of rioting. *Per* PETHERAM, C.J., that a case must be taken to be tried upon the day the trial commences; that, for all the purposes of the trial, the Magistrate in this case retained the status of a Magistrate of the second class; and that he was, therefore, not competent to pass sentence as a Magistrate of the first class. Also *per* PETHERAM, C.J., that the Judge, in this case, had no power to alter the charge or to frame a new charge in any way. *Per* BRODHURST, J., that the sentences passed by the Magistrate were, as a whole, illegal; that, if he had convicted the accused under s. 148 of the Penal Code, his order would, under the circumstances, have been legal; that a Court of Appeal is not competent to alter the finding of a Magistrate, so as to convict an accused person of an offence which the Court of which the order is in appeal was not competent to try; and that a member of an unlawful assembly, some members of which have caused grievous hurt, can be legally punished for the offence of rioting as well as for the offence of causing grievous hurt. *Empress v. Dungar Singh* referred to.

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Magistrate of the First Class—

See CRIMINAL PROCEDURE CODE, s. 437.

Majority—

1. *Capacity to contract—Muhammadan over 16 years of age before Act IX of 1875 came into force—Muhammadan Law—Act IX of 1872 (Contract Act), s. 11—Act XL of 1858 (Bengal Minors Act), s. 26—Act IX of 1875 (Majority Act), s. 2 (c).* In a suit upon a bond executed on the 5th June 1875, by a Muhammadan who at

Majority—(continued.)

that date was sixteen years and nine months old, the defendant pleaded that at the time when the bond was executed he was a minor, and that the agreement was therefore not enforceable as against him. *Held* that the defendant, having at the date of the execution of the bond, reached the full age of sixteen years, and so attained majority under the Muhammadan law, which, and not the rule contained in s. 26 of the Bengal Minors Act (XL of 1958), was the law applicable to him, under s. 2 (c) of the Indian Majority Act (IX of 1875) before the latter Act came into force, was competent in respect of age to make a contract in the sense of s. 11 of the Contract Act (IX of 1872), and the agreement was therefore enforceable as against him. The rule contained in s. 26 of the Bengal Minors Act is limited by its terms to "the purposes of that Act," which provides exclusively for the care of the persons and property of minors possessed of property which has not been taken under the protection of the Court of Wards; and it is to such persons only, when they have been brought under the operation of the Act as in it provided, that the prolongation of nonage under s. 26 applies.

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2. *Age of Minor, suit against—Civil Procedure Code, s. 443—European British subject not domiciled in India—Act IX of 1875—Contract—Lex loci—Act IX of 1872, s. 11—Cheque—Liability of indorser—Act XXVI of 1881, ss. 35, 43.* A cheque was indorsed in blank by a European British subject who, at that time, was under twenty years of age and was temporarily residing, and not domiciled, in British India. It was subsequently dishonoured, and a suit was then brought by the Bank which had cashed the cheque to recover the amount from the indorser and the drawer. The former alleged that the drawer had requested him to sign his name to the cheque, saying that it was a mere matter of form, and he would not be liable for the amount, and that the Bank would only cash the cheque when indorsed by him, and in consequence he consented to indorse it, but that he did so without any intention of incurring liability as indorser, that he received no consideration, and that his indorsement was in blank, and not in favour of the Bank, and was converted into a special indorsement without his knowledge and consent. The Court held that at the time of indorsement the indorser was a minor under English law, and dismissed the suit on the ground of minority. *Held* that, if the Court was satisfied of the fact of the defendant's minority, it should have complied with the provisions of s. 443 of the Civil Procedure Code. *Held* that, assuming the indorser to have been *sui juris*, the indorsement, taken in conjunction with the facts proved, established a contract by which the indorser was bound to pay the cheque. *Per* STRAIGHT, OFFG. C.J., and DUTHOIT, J., that it was by no means clear or certain that there was any rule of international law recognizing the *lex loci contractus* as governing the capacity of the person to contract; but that, assuming such a rule to be established; the specific limitation of the Indian Majority Act (IX of 1875) to "domiciled persons" necessarily excluded its application to European British subjects not domiciled in British India; that s. 11 of the Contract Act must be interpreted as declaring that the capacity of a person in point of age to enter into a binding contract was to be determined by his own personal law, wherever such law was to be found; that this rule was not affected by the Majority Act, so far as concerned persons temporarily residing but not domiciled in British India, whose contractual capacity was still left to be governed by the personal law of their personal domicile; and that such law in the case of European British subjects, was the common law of England, which recognized twenty-one as the age of majority. *Per* OLDFIELD, J., that by the rule of the *jus gentium* as hitherto understood and recognized in England, the *lex loci* would govern in respect to the capacity to contract, but that in framing the Indian Majority Act, which has the *lex loci* on the subject in India, the Legislature would appear not to have adopted the rule, but, by limiting the operation of the Act to the persons domiciled in British India, to have intentionally excluded from its operation persons not domiciled there, and to have left such persons to be governed by the law of their domicile. *Per* BRODHURST, J., that Act IX of 1875 was intended by the Legislature to be applicable, and in fact was applicable, only to European British subjects domiciled in those parts of India referred to in s. 1, and that to any other European British subject whose domicile was in England, but who was temporarily residing in any part of India above alluded to, the privileges and disabilities of minority attached until he had attained the age of twenty-one years.

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Marshalling—

See MORTGAGE 10.

Mesne Profits—

See CIVIL PROCEDURE CODE, s. 244.

Minor—

Muhammadian Law—Custody of children. See MUHAMMADAN LAW 1.

Muhammadian Law—Mother—Guardian. See CIVIL PROCEDURE CODE, s. 18.

Suit against. See MAJORITY 2.

Misjoinder—

Dismissal of suit for. See CIVIL PROCEDURE CODE, s. 13.

Missing Person—

Act I of 1872, ss. 107, 108. See HINDU LAW 3.

Act I of 1872, s. 108—Muhammadian Law—Act VI of 1871, s. 24. The rule contained in s. 108 of the Evidence Act governs the case of a Muhammadan who has been missing for more than seven years, when the question of his death arises in cases to which, under the provisions of s. 24 of Act VI of 1871 (Bengal Civil Courts Act), the Muhammadan law is applicable. *Per MAHMOOD, J.*—The rule of the Muhammadan law, that a missing person is to be regarded as alive till the lapse of ninety years from the date of his birth is, according to the most authoritative texts of the Muhammadan law itself, a rule of evidence and not of "succession, inheritance, marriage, or caste, or any religious usage or institution" within the meaning of s. 24 of Act VI of 1871.

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Mitakshara—

See HINDU LAW 11.

Mortgage—

See ADVERSE POSSESSION: CIVIL PROCEDURE CODE, s. 295: OCCUPANCY-TENANT: PRE-EMPTION 18: RELEASE: SIR-LAND 1.

1. *Act XII of 1881, s. 8—Act X of 1859, s. 6—Occupancy-tenure—Sir-land.* Where land, originally the sir of a proprietor, has been transferred to a mortgagee, and has in his hands lost its character of sir, and has been leased to a tenant on the usual conditions of a tenancy, which otherwise do not bar the acquisition of a right of occupancy in the land, such a right will be acquired by twelve years' occupancy under s. 8 of the Rent Act. In 1846, B mortgaged a share in a village together with certain land which was recorded as his sir, and which was so described in the deed of mortgage. After the mortgage it ceased to be recorded as his sir, and was recorded as land held by tenants in the same way as other lands in the estate. In 1857 it was leased to S, and in 1863 to H, and from 1863 to 1882 remained in the possession last-mentioned lessee. In 1882 B redeemed the mortgage, and subsequently brought a suit against H to establish that the land was his sir, and for possession of it. *Held* by the Full Bench that there being nothing in the terms of the mortgage-deed to indicate that the land was transferred to the mortgagee to be held as sir, and the land having ceased to be recorded as the sir of the proprietor, and not having been leased as the sir of the lessor, it had not retained its character as sir when the defendant's tenancy commenced, so as to prevent him from acquiring a right of occupancy therein under the provisions of s. 8 of the Rent Act. *Per MAHMOOD, J.*, that there is nothing in the law to prevent a zamindar from relinquishing his rights in sir-land and converting it into land held by ordinary tenants; that the mortgage-deed of 1846 showed that the sir right in the land in suit had been relinquished by the mortgagor; and that the sir-land once relinquished by the zamindar ceases to have that character, and cannot prevent the accrual of the occupancy-right within the meaning either of s. 6 of Act X of 1859 or of s. 8 of Act XII of 1881. The right of occupancy conferred by the Legislature upon cultivators of more than twelve years' standing is a right wholly independent of the wishes either of the zamindar or his mortgagees in possession, and when a cultivator acquires such a right, it cannot be taken as in the nature of a grant from either of them. The right of occupancy may thus be acquired during the currency of a usufructuary mortgage and during the period of the mortgagee's possession of the zamindari rights, and the zamindar upon redeeming the mortgage cannot disturb the possession of such occupancy-tenants on the ground that, when he mortgaged the zamindari, it was free of such occupancy-tenures. *Heeroo v. Dhores* referred to. HARPAL SINGH v. BAL GOBIND

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2. *Annulment of settlement—Fresh settlement—Act XIX of 1873, ss. 43, 159, 165.* A settlement of land belonging to G, and which he had mortgaged, having been annulled under s. 158 of the N.-W.P. Land Revenue Act (XIX of 1878), the land was farmed by the Collector of the district under s. 159. The revenue having fallen

Mortgage—(continued.)

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into arrears the Collector, under the same section, took the land under his own management. Subsequently, under ss. 165 and 43 of the Act, the land was settled with G's wife. *Held* that the Court was precluded by the terms of s. 241 (f) of the Revenue Act from entering into the question whether the settlement was legally made by the Collector with the wife of the mortgagor; that she must therefore be taken to represent such rights and interests as the mortgagor possessed, and that consequently the estate was liable in her hands for the mortgage, and the mortgagee was entitled to claim foreclosure against her.

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By conditional sale. See PRE-EMPTION 6, 7 AND 8.

First and second mortgagees—Sust by first mortgagee for sale of mortgaged property—Second mortgagee not made a party—Act IV of 1882, ss. 78, 85. See CIVIL PROCEDURE CODE, S. 13.

First and second mortgages—Registered and unregistered documents—Fraudulent transfer—Act IV of 1882, s. 53. See ACT III OF 1877, S. 50.

3. *First and second mortgages—Payment by purchaser of mortgaged property of first mortgage—Right of purchaser to benefits of first mortgage—Right of second mortgagee to bring to sale mortgaged property.* The purchasers of the equity of redemption of land which had been mortgaged in 1866 and 1874 to different persons paid off the prior mortgage. The second mortgagee sued to bring the property to sale in satisfaction of his mortgage. *Held* that the prior mortgage was not extinguished and that the purchaser of the equity of redemption had, by paying off that mortgage, acquired an equitable right to its benefits, which they could use against the second mortgage. *Gokaldas Gopaldas v. Puranmal Premsukhdas* followed. *Per* OLDFIELD, J., (MAHMOOD, J., *dissenting*), that the prior mortgage afforded a defence against the claim of the second mortgagee seeking to bring the property to sale. *Gokaldas Gopaldas v. Puranmal Premsukhdas* followed. *Per* MAHMOOD, J., that the ruling of the Privy Council in *Gokaldas Gopaldas v. Puranmal Premsukhdas* did not go beyond laying down the proposition that when the purchaser of the equity of redemption pays off a prior mortgage, which carries with it the right of possession of the mortgaged property, the mortgage is not extinguished for all purposes; but such purchaser, acquiring the benefits of the usufructuary mortgage, is entitled to remain in possession, and can successfully resist a suit by a subsequent usufructuary mortgagee seeking to disturb such possession. Also *per* MAHMOOD, J., that although the persons who had paid off the prior mortgage were entitled to claim its benefits, they could not be understood to have acquired rights greater than those which the prior mortgagee himself possessed; that as holders of the equity of redemption they could not resist the suit which aimed at enforcing a valid security, and as, persons entitled to the benefits of the prior mortgage, they were at best in the position of assignees of that mortgage; that the union of the two capacities could not confer upon them rights higher than those which the mortgage they had paid off created; that a puisne incumbrancer is not prevented by the mere fact of the existence of a prior mortgage from enforcing his security without paying off the prior mortgage, so long as such enforcement does not clash with the rights secured by the prior mortgage; and that, therefore, the purchaser of the equity of redemption held that right subject to the plaintiff's mortgage of 1874, and the fact of their having redeemed the prior mortgage did not place the equity of redemption on a better footing, though it entitled them to the benefits of that mortgage secured to them in the same manner as to the original mortgagee whose rights they had acquired by subrogation. *Gaya Prasad v. Salik Prasad, Ramu Naikan v. Subbaraya Mudali, and Mul Chand Kuver v. Lallu Trikam* referred to.

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4. *First and second mortgages—Payment by purchaser of mortgaged property of first mortgage—Right of purchaser to benefits of first mortgage—Right of second mortgagee to bring to sale mortgaged property—Registered and unregistered instruments—Optional and compulsory registration—Act III of 1877, s. 50.* At a sale in execution of a decree, J purchased certain property which was at that time subject to two mortgages; the first under an unregistered deed in favour of M and dated in 1872, and the second under a registered deed in favour of L and dated in 1880. The registration of the latter both deeds was optional, the former under Act VIII of 1871, and the latter under Act III of 1877. J subsequently satisfied the mortgage under the registered deed of 1880, which was delivered to him. M then brought a suit to recover the money due to him under the mortgage-deed of 1872 by sale of the mortgaged property. *Held* by OLDFIELD, J., that applying the rule laid down by the Privy Council in *Gokaldas Gopaldas v. Puranmal Premsukhdas*, J, having paid off the mortgage under the registered deed of 1880,

Mortgage—(continued.)

should have the benefits of that mortgage, and was entitled to set up the deed which he held against the unregistered deed of 1872, against which under s. 50 of the Registration Act (III of 1877) it would take effect as regards the property comprised in it. *Lachman Das v. Dip Chand* referred to. *Per* MAHMOOD, J., that the word "unregistered" in s. 50 of the Registration Act must, in reference to the circumstances of the present case, be read as "not registered under Act VIII of 1871," and that, so reading the section, the registered mortgage-deed of 1880 was entitled to priority over the unregistered mortgage-deed of 1872. *Lachman Das v. Dip Chand* and *Sri Ram v. Bhagirath Lal* distinguished. Also *per* MAHMOOD, J., that the position of J by reason of his having paid off the registered mortgage of 1880, could at best be that of an assignee of that mortgage having priority over the mortgage-deed on which the plaintiff was suing; that such priority could not enable him to place the equity of redemption upon a higher footing than it would have been had he not paid off the registered mortgage of 1880; and that, as a consequence, the sale of the property in enforcement of the mortgage of 1872 should be allowed to take place, but subject to the rights of priority which J had acquired by reason of his having paid off the registered mortgage of 1880. *Sirbadh Rai v. Raghunath Prasad* and *Gokaldas Gopaldas v. Puranmal Prensukhladas* referred to.

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5. *First and second mortgages—Payment by purchaser of mortgaged property of first mortgage—Right of second mortgagee to bring to sale mortgaged property subject to first mortgage.* In 1874 a plot of land, No. 111, which, in 1866, had been mortgaged to L, was with other property mortgaged to R. In 1878 the equity of redemption in plot No. 111 was purchased by J, who paid off the mortgage of 1866. R brought a suit against J, to bring to sale the whole of the property included in the mortgage of 1874. The Court of First Instance decreed the claim in part, exempting from the decree plot No. 111, on the ground that the defendant, by reason of having purchased the equity of redemption in that plot and having paid off the mortgage of 1866, stood in the position of a first mortgagee of that plot and his mortgage had priority over the plaintiff's mortgage of 1874. The Full Bench modified the decree of the Court of First Instance by inserting after the words "land No. 111 be exempted from the hypothecation lien" the words "in that property the interest of the plaintiff as second mortgagee only to be sold." *Per* OLDFIELD, J., that the second mortgagee could not bring the land to sale so as to oust the first mortgagee, whose mortgage was usufructuary, and get rid of the first mortgage without satisfying it; but that he had a right to sell such interest as he possessed as second mortgagee. *Per* STRAIGHT, J., that the plaintiff was entitled to bring to sale the property charged to him under his mortgage of 1874, subject to the rights existing in favour of the first mortgagee of 1866; in other words, that a purchaser at a sale in execution of the decree would have no further right than a right to take the property subject to the right of the first mortgagee to possession of the property included in his instrument, and his other rights under that instrument, so long as it endured.

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6. *Joint mortgage—Redemption by one mortgagor—Suit by other mortgagor for his share—Suit for redemption—Act IV of 1882, ss. 95, 100—Limitation—Act XV of 1877, Nos. 134, 148—Burden of proof.* K and J jointly mortgaged 96 sahams or shares of an estate to C, giving him possession. C transferred his rights as mortgagee to T and M. In execution of a decree for money against K held by M, K's rights and interests in the mortgaged property were sold, and were purchased by P, whose heirs paid the entire mortgage-debt. R, an heir of J, sued the heirs of P, to recover from them possession of J's sahams in the mortgaged property, on payment of a proportionate amount of the mortgage-money paid by P. The plaintiff alleged that the mortgage to C had been made forty years before suit. The defendants contended that a much longer period had expired since the date of the mortgage, that forty-one years had elapsed since C transferred his rights as mortgagee, that they had redeemed the property twenty-one years ago and had been since its redemption in proprietary and adverse possession of the sahams in suit, and that the suit was barred by limitation. Neither party was aware of the date of the mortgage, and neither adduced any proof on the point. *Held*, applying the equitable principle adopted in ss. 95 and 100 of the Transfer of Property Act (IV of 1882), that the owner of a portion of a mortgaged estate, which has been redeemed by his co-mortgagor, has the right to redeem such portion from his co-mortgagor, and a suit brought for that purpose would be in the nature of a suit for redemption, and would naturally fall within the definition of No. 148, sch. II

Mortgage—(continued.)

of the Limitation Act (XV of 1877), and it was not possible for one of two mortgagors, redeeming the whole mortgaged property behind the back of the other, to change the position of that other to something less than that of a mortgagor, or to abridge the period of limitation within which he ought to come in to redeem. *Held*, therefore, that No. 148, and not No. 134, of sch. II of the Limitation Act was applicable to the suit. *Unrunnissa v. Muhammad Yar Khan* distinguished. *Pancham Singh v. Ali Ahmad* referred to. *Held*, also, that the defendants being admittedly in possession, though the existence of a mortgage as the origin of their possession was conceded by them, it lay upon the plaintiff to give *prima facie* proof of the subsistence of that mortgage at the date of suit, but that assuming that notice was given to the defendants by the plaintiff to produce the mortgage-deed, and that they failed to do so, very slight evidence would have been sufficient to satisfy the obligation which lay on the plaintiff. *Kishan Dutt Ram v. Narandar Bahadoor Singh* referred to.

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Joint mortgage—Suit for redemption—Jurisdiction—Court-fee—Valuation of suit—Subject-matter in dispute—Act VII of 1870, s. 7, art. ix—Act VI of 1871, s. 20—*Statute, Construction of*. A deed of mortgage was executed by P, T, and S for Rs. 4,000. A, the purchaser of the share of S, brought a suit for recovery of possession of one-third of the mortgaged property against the mortgagees, who had purchased the shares of P and T, the other mortgagors. *Held* by the Full Bench, with reference to s. 7, art. ix of the Court Fees Act (VII of 1870), that the defendants-mortgagees having bought up the equity of redemption of two of the mortgagors and *pro tanto* extinguished their mortgage-debt, and so by their own act empowered the plaintiff to sue for redemption of one-third of the property, the principal money now secured as between them and the plaintiff must now be regarded as one-third of the original mortgage amount, namely, Rs. 1,333-5-4, more particularly as fiscal enactments should, as far as possible, be construed in favour of the subject. *Balkrishna Dhondo v. Nagvekar* referred to. *Held* also, with reference to the terms of s. 20 of the Bengal Civil Courts Act (VI of 1871), that the "subject-matter in dispute" in suits of this kind was the amount of the mortgage-debt and the mortgagee's rights which were sought to be paid off; that from the terms of the plaint it was obvious that in the present case the subject-matter in dispute was Rs. 1,333-5-4, the one-third of the original mortgage sum of Rs. 4,000; and that it was therefore beyond the limits of the Munsif's pecuniary jurisdiction. *Per MAHMOOD, J.*—It is a rule of construction that while in cases of taxation everything must be strictly construed in favour of the subject, in questions of jurisdiction, the presumption is in favour of giving jurisdiction to the highest Court. Observations by MAHMOOD, J., as to the subject-matter of suits for the redemption of mortgages, and the mode in which the value of such subject-matter should be calculated for purposes of jurisdiction.

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3. *Mortgage by conditional sale—Foreclosure—Suit for possession of mortgaged property—Regulation XVII of 1806, s. 8—Conditions precedent—Demand for payment of mortgage-money—Proof of service of notice—Proof of notice being signed by the Judge—Proof of forwarding copy of application with notice—Act IV of 1882*. The provisions as to the procedure to be followed in taking foreclosure proceedings under Regulation XVII of 1806 are not merely directory, but strict satisfaction of the prescribed conditions therein laid down precedes the right of the conditional vendee to claim the forfeiture of the conditional vendor's right, and the various requirements of that section have to be strictly observed in order to entitle a mortgagee to come into Court, and, upon the basis of the observance of those requirements, to assert an absolute title to the property of the mortgagor. *Norender Narain Singh v. Dwarka Lal Mundur and Madho Pershad v. Gajadhar* followed. In a suit for possession of immoveable property by a conditional vendee under a deed of conditional sale, alleged to have been foreclosed under Regulation XVII of 1806, it appeared that, except a recital in the application for foreclosure itself, there was nothing to show that any preliminary demand was ever made upon the mortgagors for payment of the mortgage-debt; that there was no proof of the "notice" itself having been served upon the mortgagors, which it lay upon the plaintiff to establish; that there was nothing to show that the notice which was issued was signed by the Judge to whom the application was made; that it was not proved that a copy of the application was forwarded along with the notice to the mortgagors, or that its terms were ever brought to their knowledge. *Held*, applying to the case the principles stated above, that the provisions of Regulation XVII of 1806 had not been

Mortgage—(continued.)

satisfied, and that the plaintiff had not fulfilled his obligation, namely, to prove affirmatively that those provisions were strictly followed. *Held*, also, that to treat the suit as one instituted under the Transfer of Property Act, and to allow the plaintiff to obtain such relief as he would be entitled to by that Act, would be to countenance an entire change in the nature and character of the suit as it was originally instituted, and that this was a course not sanctioned by the law.

SITLA BAKHSH v. LALTA PRASAD VIJI 988

9. *Mortgage by conditional sale—Interest—Foreclosure.* A deed of mortgage by conditional sale, executed in 1872, giving the mortgagee possession, contained a stipulation that the principal money should be paid within ten years from the date of execution of the deed, and that, in default of such payment, the conditional sale should become absolute. It contained the following condition as to interest:—"As to interest, it has been agreed that the mortgagee has no claim to interest, and the mortgagor has none to profits." The mortgagee, however, did not obtain possession. In 1878, the mortgaged property was purchased by the appellant at a sale in execution of decrees. In 1884, the mortgagee brought a suit for foreclosure against the purchaser and the heirs of the mortgagor, claiming the principal money with interest at 8 annas per cent. per mensem. The defendants pleaded that the plaintiff was not entitled to claim interest. *Held* that, whatever claim the mortgagee might have against his mortgagors for compensation or damages by way of interest in consequence of the failure to get possession under the contract, he had none enforceable in this respect against the land, which had passed free from charge for interest to the purchaser. *Rameshar Singh v. Kanahia Sahu* referred to.

ALLAH BAKHSH v. SADA SUKH VIII 182

10. *Purchaser of part of mortgaged property without notice—Suit for sale of whole property in satisfaction of mortgage—Marshalling—Apportionment.* The equities which apply to a puisne incumbrancer in the marshalling of securities apply also to a *bond fide* purchaser for value, without notice, of a portion of property the whole of which was subject to a prior incumbrance. *Tulsi Ram v. Munnoo Lal, Nowa Koer v. Abdul Rahim, Bishonath Mookerjee v. Kisto Mohan Mookerjee, and Khetoesee Cherooria v. Banee Madhub Doss* referred to. The mortgagees of two properties, one of which had, subsequently to the mortgage, been purchased for value *bond fide* by one who had no notice of the incumbrance, brought a suit to enforce their lien against both the properties originally owned by the mortgagor, impleading as defendants both the mortgagor and the purchaser. *Held* that, while there was no doubt that, if the purchaser was compelled to pay more than the share of the mortgage-debt apportioned on the property purchased by him, he would be entitled to contribution, yet, in a suit so framed, and having regard to the array of parties, such an apportionment could not be made at the stage of second appeal.

RODH MAL v. RAM HARAKH VII 711

11. *Redemption—Suit to redeem brought before expiration of term of mortgage.* A mortgage-deed, dated the 15th March 1883, stipulated that the mortgagor would "pay the interest every year, and the principal in ten years," that "the principal shall be paid at the promised time and the interest every year," and that upon failure by the mortgagor to pay the principal and interest "at the stipulated period," the mortgagee should be at liberty to realize the debt from the mortgaged property and from the other property and against the person of the mortgagor. The mortgagor instituted a suit for redemption on the 16th July 1884. *Held*, upon a construction of the mortgage-deed, that the advance by the mortgagee to the mortgagor was for a period of ten years certain; that the case was essentially one in which, looking to the merits of the matter between the parties, their obligations were mutual and reciprocal, and there was nothing in the terms of the deed to take it out of the ordinary rules applicable to documents of the kind; and that while on the one hand the mortgagee could not enforce his rights during the period of ten years, on the other hand the mortgagor was not entitled, before that period had expired, to redeem the property. *Vadju v. Vadju* referred to.

RAGHUBAR DAYAL v. BUDHU LAL VIII 95

12. *Transfer of mortgaged property by mortgagee in exchange for similar property—Right of mortgagor to property acquired by exchange.* In 1865 N was in possession of six shops in a market-place at Etawah. He was in possession of two as mortgagee and of the remaining four as proprietor. The Municipal Committee of Etawah, having decided to establish the market in a fresh place and to use the site of the

Mortgage—(continued.)

old market for other purposes, arranged with N to take the sites of his six shops in the old market-place and to give him in lieu of them sites for six shops in the new. Under this arrangement he built six shops in the new market-place. Subsequently, the mortgagor of one of the old shops claimed possession of one of the six new ones on payment of the mortgage-money and cost of constructing the shop. *Held* that the claim could not be allowed, inasmuch as it could be justified only by proof of an agreement binding upon the parties at the time when the transaction occurred that some specific one among the new shops should be substituted for the old one which was the subject of the mortgage, and it had not been found that any such agreement was made.

NIDHI LAL v. MAZHAR HUSAIN VII

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13. *Usufructuary mortgage—Interest—Waiver.* By a deed of usufructuary mortgage dated in 1875, a sum of Rs. 30,000, with interest at Re. 1 per cent. per mensem, was advanced on the security of certain property for a period of ten years. The deed contained various provisions for securing the payment of interest to the mortgagee, and among these, a provision that he should have possession of the property and take the profits on account of interest, the profits being fixed at a certain amount yearly, leaving an agreed balance of interest to be paid yearly in cash. There was also a provision that, in the event of possession not being given, the mortgagee might treat the principal money as immediately due, and recover it at once with interest at the rate of Re. 1-6 per cent. per mensem. The mortgagee did not take possession of the mortgaged property, and took no steps to obtain such possession, or to recover the money for nine years, during which no interest was paid. In November 1884, the mortgagee brought a suit against the mortgagors to recover the mortgage-money, claiming interest from the date of the mortgage-deed to the date of the suit at Re. 1-6 per cent. per mensem. *Held* that the fair inference of fact from the circumstances above described was that the mortgagee waived the provisions for securing and recovering the interest, and that the transaction must be looked at as simply one of a loan for the specified period at the agreed rate, i.e., Re. 1 per cent. per mensem.

GANGA SAHAI v. LACHMAN SINGH VIII

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14. *Usufructuary mortgage—Pre-emption—Redemption—Interest—Act IV of 1882, ss. 51, 83, 84.* Although a successful pre-emptor becomes substituted for the original transferee, and thus becomes entitled to the benefits of the transfer, those benefits cannot be claimed by him for any period antecedent to such substitution itself, and a pre-emptor, before his pre-emption is actually enforced, possesses no such right in the subject of pre-emption as would entitle him to any benefits arising out of the property which he is entitled to take, but has not yet taken. The original vendee cannot, whilst he is in possession, be regarded as a trespasser, who would have no right to enjoy the usufruct of the property which he has purchased. *Uodan Singh v. Muneri Khan* dissented from. *Manik Chand v. Rameshwar Rao, Baldeo Pershad v. Mohun and Ajudhia v. Baldeo Singh* followed. In February 1883, a decree for pre-emption was obtained in respect of a mortgage by conditional sale executed in August 1882. On the 23rd August 1883, the decree-holder executed his decree by depositing the principal amount of the mortgage-money, and obtained possession of the property in substitution for the original mortgagee. In June 1884, the mortgagor, proceeding under s. 83 of the Transfer of Property Act, deposited in Court the sum of Rs. 699, claiming the same to be adequate for redemption. The case was, however, struck off in consequence of the pre-emptor's objection to receiving the deposit on the ground that it did not include the interest due on the mortgage. The deposit remained in Court, and on the 21st August 1884, the mortgagor deposited a further sum on account of interest, but this also the pre-emptor refused to receive, for the same reason as before. In a suit by the mortgagor for redemption of the mortgage, it was found that the amount deposited was all that was due on the mortgage on the 21st August 1884. *Held* that until the 23rd August 1883, when the defendant enforced his pre-emptive decree by depositing the consideration for the conditional sale of August 1882, he had no such interest in the subject of pre-emption as would entitle him to any benefits arising therefrom, and that the defendant was not entitled to claim any interest on the mortgage-money for the period antecedent to the 23rd August 1883. *Semle* that the proper person entitled to receive the interest for that period was the original conditional vendee, and the Court which passed the decree for pre-emption should have allowed him the amount of such interest in addition to the principal mortgage-money. *Ashik Ali v. Mathura Kandu* referred to. *Held*, with reference to s. 84 of the Transfer of Property Act (IV of 1882), that the Courts below were right in not allowing interest to the

Mortgage—(concluded.)

defendant after the 21st August 1884, when the plaintiff, to his knowledge, deposited the whole money due on the mortgage. *Held*, with reference to the last paragraph of s. 51 of the same Act, that the Courts below were wrong in subjecting their decrees in favour of the plaintiff to the condition that the defendant should not be evicted till the crops he had sown were cut.

DEO DAT v. RAM AUTAR ... VIII 502

15. *Usufructuary mortgage—Redemption—Regulation XXXIV of 1803, ss. 9, 10—Act XXVIII of 1855—Act XIV of 1870—Act IV of 1882, s. 2.* A deed of usufructuary mortgage executed in 1846, under which the mortgagee had obtained possession, contained the following conditions:—"Until the mortgage-money is paid, the mortgagee shall remain in possession of the mortgaged land, and what profits may remain after paying the Government revenue are allowed to the mortgagee and shall not be deducted at the time of redemption. At the end of any year, the mortgagors may pay the mortgage-money and redeem the property. Until they pay the mortgage-money neither they nor their heirs shall have any right in the property." In 1884, a representative in the title of one of the original mortgagors sued to redeem his share of the mortgaged property, upon the allegation that the principal amount and interest due upon the mortgage had been satisfied from the profits, and that he was entitled to a balance of Rs. 45. It was found that from the profits, after deducting Government revenue, the principal money with interest at the rate of 12 per cent. per annum had been realized, and that the surplus claimed by the plaintiff was due to him. The lower appellate Court dismissed the suit, on the ground that under s. 62 (b) of the Transfer of Property Act (IV of 1882), and with reference to the terms of the deed of mortgage, the plaintiff was not entitled to recover the property until he paid the mortgage-money. *Held* that, although the word "interest" was not specifically used, the natural and reasonable construction of the deed was that it was arranged that the mortgagee should have possession of the property and enjoy the profits thereof, until the principal sum was paid, in lieu of interest. *Held* that the provisions of ss. 9 and 10 of Regulation XXXIV of 1803, which was in force when the deed of mortgage was executed, were not affected or abrogated by Act XXVIII of 1855 or Act XIV of 1870 or Act IV of 1882; that these provisions were incidents attached to the mortgagor's rights, of which he was entitled to have the benefit; and that the contract of mortgage being subject to these provisions, the charge would have been redeemed as soon as the principal mortgage-money with 12 per cent. interest had been realized by the mortgagee from the profits of the property.

SAMAR ALI v. KARIM-ULLAH ... VIII 402

16. *Usufructuary mortgage—Satisfaction of mortgage-debt from usufruct—Suit for whole mortgaged property by some of several mortgagors.* In a suit by some of several co-mortgagors to redeem the entire property mortgaged, on the ground that the mortgage-debt had been satisfied out of the usufruct,—*held* that the plaintiffs could only claim their own shares, and the Court of First Instance should determine the extent of the shares after making the other co-mortgagors parties.

FAKIR BAKHSR v. SADAT ALI ... VII 376

Words creating simple mortgage. See BOND 3.

Mosque—

Religious endowment—Form of suit—Right to sue—Civil Procedure Code, ss. 30, 539. Every Muhammadan who has a right to use a mosque for purposes of devotion is entitled to exercise such right without hindrance, and is competent to maintain a suit against any one who interferes with its exercise, irrespective of the provisions of ss. 30 and 539 of the Civil Procedure Code. Section 30 of the Civil Procedure Code applies only to cases in which many persons are jointly interested in obtaining relief, and not to cases in which an individual right has been violated. *Zafarayab Ali v. Bakhtawar Singh* referred to. *Jan Ali v. Ram Nath Mundul* dissented from.

JAWAHRA v. AKBAR HUSAIN ... VII 171

Muhammadan Ecclesiastical Law—

See ACT XLV OF 1860, s. 296.

Muhammadan Law—

See ACT XLV OF 1860, s. 296: MAJORITY 1: MISSING PERSON: PRE-EMPTION 10.

Alienation by widow—Rights of other heirs—Minor—Mother—Guardian. See CIVIL PROCEDURE CODE, s. 13.

Muhammadian Law—(continued:)

1. *Custody of children—Act IX of 1861, s. 5—Appeal.* The Muhammadian law takes a more liberal view of the mother's rights with regard to the custody of her children than does the English law, under which the father's title to the custody of his children subsists from the moment of their birth, while, under the Muhammadian law, a mother's title to such custody remains till the children attain the age of seven years. An application was made by a Muhammadian father under s. 1 of Act IX of 1861 that his two minor children, aged respectively 12 and 9 years, should be taken out of the custody of their mother and handed over to his own custody. The application having been rejected by the District Judge, an appeal was preferred to the High Court as an appeal from an order. It was objected to the hearing of the appeal that, in view of s. 5 of Act IX of 1861, the appeal should have been as from a decree, and should have been made under the rules applicable to a regular appeal. *Held* that, looking to the peculiar nature of the proceedings, the objection was a highly technical one, and as all the evidence in the case was upon the record and was all taken down in English, it would only be delaying the hearing of the appeal upon very inadequate grounds, if the objection were allowed. *Held*, also, that, according to the principles of the Muhammadian law, the appellant was by law entitled to have the children in his custody, subject always to the principle, which must govern a case of this kind, that there was no reason to apprehend that by being in such custody they would run the risk of bodily injury, and that (without saying that this exhausted the considerations, that might arise, warranting the Court in refusing an application for the custody of minors), there was nothing in the record in this case which disclosed any proper ground to justify the refusal of the application.

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2. *Inheritance—Devolution not suspended till payment of deceased ancestor's debts.* A creditor of A, a deceased Muhammadian, under a hypothecation bond, obtained a decree on the 20th December 1876, for recovery of the debt by enforcement of lien against M, one of A's heirs, who alone was in possession of the estate; and, in execution of the decree, the whole estate was sold by auction on the 21st March 1878, and purchased by the decree-holder himself. J, another of A's heirs, was not a party to these proceedings. On J's death, her son and heir, A H, conveyed to M A, the rights and interests inherited by him from his mother, namely, her share in A's estate. The purchaser of the share thereupon brought a suit against the decree-holder for its recovery. *Held* that immediately upon the death of A, the share of his estate claimed in the suit devolved upon J; that she being no party to the decree of the 20th December 1876, her share in the property could not be affected by that decree, nor by the execution sale of the 21st March 1878; that upon her death that share devolved upon her son, who conveyed his rights to the plaintiff; that the plaintiff was therefore entitled to recover possession of the share which he had purchased; but that he could not do so without payment to the defendant of his proportionate share of the debts of A, which were paid off from the proceeds of the auction-sale of the 21st March 1878. *Jafri Begam v. Amir Muhammad Khan* followed.

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3. *Inheritance—Devolution not suspended till payment of deceased ancestor's debts—Decree in respect of deceased ancestor's debts passed against heir in possession of estate—Decree not binding on other heirs not parties thereto and not in possession, so as to convey their shares to auction-purchaser in execution—Recovery of possession by other heirs contingent on payment of proportionate shares of debt for which decree was passed.* Upon the death of a Muhammadian intestate, who leaves unpaid debts, whether large or small with reference to the value of his estate, the ownership of such estate devolves immediately on his heirs, and such devolution is not contingent upon, and suspended till, payment of such debts. A decree relative to his debts, passed in a contentious or non-contentious suit against only such heirs of a deceased Muhammadian debtor as are in possession of the whole or part of his estate, does not bind the other heirs who, by reason of absence or other cause, are out of possession, so as to convey to the auction-purchaser, in execution of such a decree the rights and interests of such heirs as were not parties to the decree. In execution of a decree for a debt due by a Muhammadian intestate, which was passed against such of the heirs of the deceased as were in possession of the debtor's estate, the decree-holder put up for sale and purchased certain property which formed part of the said estate. One of the heirs, who was out of possession, and who was not a party to these proceedings, brought a suit against the decree-holder for recovery of a share of the property sold in execution of the decree, by right of inheritance. *Held* by

Muhammadian Law—(continued.)

the Full Bench that the plaintiff was not entitled to recover from the auction-purchaser in execution of the decree possession of his share in the property sold, without such recovery of possession being rendered contingent upon payment by him of his proportionate share of the ancestor's debt for which the decree was passed, and in satisfaction whereof the sale took place. *Wahid-un-nissa v. Sheobrattun, Assamatthem Nessa Bibi v. Roy Lutchmeeput Singh, Mazhar Ali v. Budh Singh, Bachman v. Bachman, Hamir Singh v. Musamat Zakia, and Muttyjan v. Ahmed Ally* referred to by MAHMOOD, J.

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4. *Legitimacy—Effect of acknowledgment of sonship.* Held by PETHERAM, C.J., that, according to the Muhammadan law, the effect of an acknowledgment by a Muhammadan that a particular person, born of the acknowledger's wife before marriage, is his son in fact, though the acknowledger may never have treated him as a legitimate son or intended to give him the status of legitimacy, is to confer upon such person the status of a son capable of inheriting as legitimate, unless conditions exist which make it impossible that such person can have been the acknowledger's son in fact. *Ashruf-ood-Dowlah Ahmed Hossein Khan v. Hyder Hossein Khan, Muhammad Azmat Ali Khan v. Lalli Begum and Sadakut Hossein v. Mahomed Yusuf* referred to. In a suit for possession, by right of inheritance, of a share of the property of a deceased Muhammadan by a person alleging himself to be a son of the deceased, the defendants pleaded that the plaintiff was not a son, but a step-son, having been born of the deceased's wife before her marriage. The plaintiff filed certain letters and other documents in which the deceased in express terms referred to him as his son; and he contended that these references amounted to acknowledgments of him as a son made by the deceased, which, under the Muhammadan law, entitled him to inherit as a legitimate son. Held by PETHERAM, C. J., (BRODHURST, J., dissenting), that the acknowledgment by the deceased of the plaintiff as his son in fact conferred upon the latter the status of a legitimate son capable of inheriting the deceased's estate, although the evidence showed that the deceased never treated him as a legitimate son, or intended to give him the status of legitimacy. Held by BRODHURST, J., contra, that the documents above referred to did not show more than that the deceased regarded the plaintiff as his step-son; that the plaintiff was never called his son except by courtesy and in the sense in which a European would ordinarily describe his step-son as his son; and that there was no sufficient evidence of the acknowledgment from which an inference was fairly to be deduced that the deceased ever intended to recognize the plaintiff, and give him the status of a son capable of inheriting. *Sadakut Hossein v. Mahomed Yusuf* referred to.

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5. *Muhammadian widow—Dower Widow's heir—Determination of amount of dower.* A Muhammadan widow lawfully in possession of her husband's estate occupies a position analogous to that of a mortgagee, and her possession cannot be disturbed until her dower-debt has been satisfied, and after her death her heirs are entitled to succeed her in such possession, and if wrongfully deprived thereof, to maintain a suit for its recovery. Held that the ruling of the Court in *Balund Khan v. Janes* that where a defendant is found to be in possession of landed property in lieu of dower, and it is held that the plaintiff is not entitled to sue for possession of the property until such claim for dower has been satisfied it is not necessary to determine the question of the amount of such dower, the matter being one which could be settled properly in a suit for an account of what was due as dower, was not applicable to a case where the plaintiffs seeking to recover possession did not claim as heirs of the widow's husband, but as heirs of the widow herself, and where the decree for possession passed in their favour would remain undisturbed even if an amount less than that fixed by the lower appellate Court were found to be what was due as dower.

AZIZULLAH KHAN v. AHMAD ALI KHAN VII

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6. *Suit for restitution of conjugal rights—Dower—Plea of non-payment—Form of decree.* According to the Muhammadan Law, marriage is a civil contract, upon the completion of which by proposal and acceptance, all the rights and obligations which it creates, arise immediately and simultaneously. There is no authority for the proposition that all or any of these rights and obligations are dependent upon any condition precedent as to the payment of dower by the husband to the wife. Dower can only be regarded as the consideration for connubial intercourse by way of analogy to price under the contract of sale. Although prompt dower may be demanded at any time after marriage, the wife is under no obligation to make such demand at any specific time during coverture, and it is only upon

Muhammadan Law—(concluded.)

such demand being made that it becomes payable. This claim may be used by her as a means of obtaining payment of the dower, and as a defence to a claim for cohabitation on the part of the husband without her consent; but, although she may plead non-payment, the husband's right to claim cohabitation is antecedent to the plea, and it cannot be said that until he has paid prompt dower his right to cohabitation does not accrue. The sole object of the rule allowing the plea of non-payment of dower is to enable the wife to secure payment. Her right to resist her husband so long as the dower remains unpaid is analogous to the lien of a vendor upon the sold goods while they remain in his possession and so long as the price or any part of it is unpaid; and her surrender to her husband resembles the delivery of the goods to the vendee. Her lien for unpaid dower ceases to exist after consummation, unless at such time she is a minor or insane or has been forced, in which case her father may refuse to surrender her until payment. It cannot in any case be pleaded so as to defeat altogether the suit for restitution of conjugal rights, which is maintainable upon the refusal of either party to cohabit with the other; and it can only operate in modification of the decree for restitution by rendering its enforcement conditional upon payment of so much of the dower as may be regarded as prompt, in accordance with the principle recognized by Courts of equity under the general category of compensation or lien, when pleaded by a defendant in resistance or modification of the plaintiff's claim. It is a general rule of interpretation of the Muhammadan law that in cases of difference of opinion amongst the juriconsults, Imam Abu Hanifa and his two disciples. Qazi Abu Yusuf and Imam Muhammad, the opinion of the majority must be followed; and in the application of legal principles to temporal matters, the opinion of Qazi Abu Yusuf is entitled to the greatest weight. *Moonshée Buzloor Ruheem v. Shums-oon-nissa Begum, Mulleeka v. Jumeela, Raneé Khajooroonissa v. Raneé Ryeesoonissa, Nawab Buhadoor Jung Khan v. Uzeez Begum, Jaun Beebee v. Sheikh Moonshée Beparee, Gatha Ram Mistree v. Moolhita Kochin Attenh Doomoonée, and Fidan v. Mazhar Husain* referred to. *Sheikh Abdul Shukkoar v. Raheem-oon-nissa, Wilayat Husam v. Allah Rakhi, Nasrat Husain v. Hamidan, and Nasir Khan v. Umrao* overruled. In a suit brought by a husband for restitution of conjugal rights, the parties being Sunni Muhammadans governed by the Hanafi law, the defendant pleaded that the suit was not maintainable, as the plaintiff had not paid her dower-debt. The plaintiff thereupon deposited the whole of the dower-debt in Court. It appeared that the defendant's dower had been fixed without any specification as to whether it was to be wholly or partly prompt. It also appeared that she had attained majority before the marriage, and that she had cohabited with the plaintiff for three months after marriage, and there was no evidence that she had ever demanded payment of her dower before the suit was filed, or that she had refused cohabitation on the ground of non-payment. Besides the plea already mentioned, she also relied upon allegations of divorce and cruelty, but these allegations were found to be untrue. The lower appellate Court dismissed the suit, holding that, inasmuch as the plaintiff had not paid the dower-debt at the time when he brought his suit, he had no cause of action under the provisions of the Muhammadan law. *Held*, by the Full Bench, that the lower appellate Court's view of the Muhammadan law relating to conjugal rights and the husband's obligation to pay dower was erroneous; and that the plaintiff, under the circumstances of the case, had a right to maintain the suit.

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Wajib-ul-ars. See FAMILY CUSTOM: FRAUDULENT TRANSFER: PRE-EMPTION 23: WILL.

Municipal Rules—

Infringement of rules—Prosecutions. See ACT XV OF 1883, s. 69.

Murder—

1. *Culpable homicide not amounting to murder—Grave and sudden provocation—Act XLV of 1860, ss. 300, Exception 1, 302, 304.* An accused person was convicted of culpable homicide not amounting to murder in respect of the widow of his cousin, who lived with him. The evidence showed that the accused was seen to follow the deceased for a considerable distance with a *gandasa* or chopper, under circumstances which indicated a belief on his part that she was going to keep an assignation, and with the purpose of detecting her in doing so. He found her in the act of connection with her paramour and killed her with the chopper. *Held* that the conviction must be altered to one of murder, as the accused went deliberately in search of the provocation sought to be made the mitigation of his offence, and

Murder—(continued.)

under the circumstances, disclosed it could not be said that he was deprived of self-control by grave and sudden provocation. *Queen-Empress v. Damarua and Queen-Empress v. Mohan* referred to.

QUEEN-EMPRESS *v.* LOCHAN ... VIII 635

2. *Culpable homicide not amounting to murder—Grave and sudden provocation—Act XLV of 1860, ss. 300, Exception 1, 302, 304.* Upon the trial of a person charged with the murder of his wife, it was proved that the accused had entertained well-founded suspicions that his wife had formed a criminal intimacy with another person; that one night the deceased, thinking that her husband was asleep stealthily left his side; that the accused took up an axe and followed her, found her in conversation with her paramour in a public place, and immediately killed her. *Held* that the act of the accused constituted the crime of murder, the facts not showing "grave and sudden provocation" within the meaning of s. 300, Exception 1, of the Penal Code, so as to reduce the offence to culpable homicide not amounting to murder. *Queen-Empress v. Damarua* distinguished by STRAIGHT, OFFG. C.J.

QUEEN-EMPRESS *v.* MOHAN ... VIII 322

Notice—

See CIVIL PROCEDURE CODE, SS. 492, 494.

Bona fide transferee for value of mortgaged property—Ignorance of existing incumbrance. *Held* that a statement in answer to interrogatories, which was made by the purchaser of mortgaged property, to the effect that, at the time of the purchase, he was aware of the mortgage and believed that it had been satisfied, was no proof of the purchase having been made after notice of a prior mortgage, inasmuch as it was inconsistent with the knowledge of an existing incumbrance.

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To quit. See LANDHOLDER AND TENANT 3 AND 4.

N.-W. P. Government Notification—

No. 865, dated the 3rd November 1869. Rule VI, *Legality of.* See ACT XV OF 1883, s. 69.

Objections—

By respondent to decree. See APPEAL 3.

Occupancy—

Right of. See ACT XII OF 1881, SS. 7, 9: LANDHOLDER AND TENANT 2, 5 AND 6.

Occupancy Tenant—

Suit for ejectment—Act by tenant inconsistent with purpose for which land was let—

Mortgage of occupancy-holding—Cancellation of mortgage before suit for ejectment

—Act XII of 1881 (N.-W.P. Rent Act), ss. 9, 93 (b), 149. An occupancy-tenant

made a usufructuary mortgage of his holding, and afterwards had the land and the mortgage-deed returned to him, and the mortgage was cancelled. Subse-

quently, the landlord instituted a suit for ejectment, on the ground that by the

mortgage the tenant had committed an act inconsistent with the purpose for

which the land was let, within the meaning of Act XII of 1881 (N.-W.P. Rent

Act), s. 93 (b). *Held* by OLDFIELD, J., that, apart from the question whether

executing a mortgage of his holding was an act within the meaning of s. 93 (b) of

the Rent Act, the mortgage having been cancelled, there was no cause of action

left, and the penalty should not be enforced, with reference to s. 149. *Held* by

MAHMOOD, J., that the occupancy tenure could not be brought to an end except

on grounds clearly provided by the law; and the execution of the mortgage,

though illegal and void, was not "any act or omission detrimental to the land"

or "inconsistent with the purpose for which the land was let" within the

meaning of s. 93 (b) of the Rent Act, and furnished no ground for ejectment.

Gopal Pandey v. Parsotam Das and Naik Ram Singh v. Murlidhar referred to.

Also *per* MAHMOOD, J.—The terms of s. 93 (b) of the N.-W.P. Rent Act apply,

exempli gratia, to cases in which land is given to a tenant for purposes of culti-

vation, and is used by him for building or other purposes.

DEBI PRASAD *v.* HAR DAYAL ... VII 691

Occupancy Tenure—

See MORTGAGE 1.

Offence—

See ACT XLV OF 1860, ss. 224, 225.

Made up of several offences. Rioting—Grievous hurt—Criminal Procedure Code, s. 235—Act XLV of 1860, ss. 146, 147, 149, 325. Three persons who were convicted (i) of riot under s. 147 of the Penal Code, (ii) of causing grievous hurt in the course of such riot, were respectively sentenced to six months' rigorous imprisonment under s. 147, and three months' rigorous imprisonment under s. 325. *Held* by PETHERAM, C.J., and STRAIGHT and TYRKELL, JJ., that inasmuch as the evidence upon the record showed that the three prisoners had committed individual acts of violence with their own hands, which constituted distinct offences of causing grievous hurt or hurt separate from and independent of the offence of riot, which was already completed, and the fact of the riot was not an essential portion of the evidence necessary to establish their legal responsibility under s. 325 of the Penal Code, the separate sentences passed under ss. 147 and 325 were not illegal. *Queen-Empress v. Ram Partab* distinguished. *Per* BRODHURST, J., that the evidence showed that only one of the three prisoners had caused grievous hurt with his own hands, and that the others could only be properly convicted of that offence under the provisions of s. 149 of the Penal Code; but that the separate sentences passed under ss. 147 and 325 were not illegal. *Queen-Empress v. Dungar Singh* followed. Also *per* BRODHURST, J.—Illustration (g) of s. 235 of the Criminal Procedure Code does not apply merely to the case of persons who, in addition to the offence of rioting, have with their own hands committed the further offences of voluntarily causing grievous hurt and of assaulting a public servant when engaged in suppressing a riot; and the convictions referred to in the Illustration relate especially to convictions obtained under the provisions of s. 149 of the Penal Code.

QUEEN-EMPRESS v. RAM SARUP ... VII 757

Offences—

Distinct. See CRIMINAL PROCEDURE CODE, s. 35.

Official Assignee—

Claim by, to attached property. See EXECUTION OF DECREE 5.

Pardah-Nashin—

1. *Civil Procedure Code, ss. 129, 136—Discovery of documents.* In a suit brought by two Muhammadan *pardah-nashin* ladies for recovery of immoveable property by right of inheritance, an order was passed under s. 129 of the Civil Procedure Code, requiring the plaintiffs to declare by affidavit "all the papers connected with the points at issue in the case which were or had been in their possession or control." After some ineffectual proceedings, the plaintiffs were peremptorily ordered to file their affidavit on a certain date. On that date an affidavit was filed on their behalf by their brother and mukhtar, with a list of their documentary evidence, but the affidavit and list was considered defective upon several grounds, one of which was that it ought to have been made by the plaintiffs personally. Further time was then given to the plaintiffs to amend these defects, and ultimately they filed an affidavit purporting to be made by them personally, praying that the Court would have it verified in any manner thought proper, provided that their *pardah-nashini* were not interfered with. The Court, under s. 136 of the Code, dismissed the suit for want of prosecution, in consequence of the orders under s. 129 not having been complied with, though ample opportunity had been given to the plaintiffs, and no sufficient ground for non-compliance had been shown. *Held*, without going into the question of the sufficiency or non-sufficiency of the action of the plaintiffs, with regard to the orders made under s. 129 of the Code, that, looking at the disabilities of the plaintiffs and the circumstances of their suit, the case was not one in which it was expedient to enforce the liability to which they might have exposed themselves under the peculiar provisions of s. 136.

KALIAN BIBI v. SAJDAR HUSAIN KHAN ... VIII 265

1. *Execution of deeds.* A suit was brought upon a bond purporting to have been executed on behalf of two Muhammadan *pardah-nashin* ladies by their husbands, and to charge their immoveable property. The bond was compulsorily registrable, and it was presented for registration by a person who professed to be authorized by a power-of-attorney in that behalf. The only proof given by the plaintiff that this power-of-attorney was executed by the ladies, or with their knowledge and consent, was the evidence of a witness who deposed that he was not personally acquainted with them nor did he know their voices, that he went to their residence, that there were two women behind a *pardah* whom the executants of the bond said were their respective wives, and that these women acknowledged they had

Pardah-Nashin—(continued.)

made the power-of-attorney. There was nothing to show that the ladies had ever benefited in any way from the money advanced under the bond. *Held* that, even if the ladies behind the *pardah* were in fact the two defendants, this evidence would not be enough to bind them, and that it was for the plaintiff, who sought to bring their property to sale on the strength of a transaction with them, to show that they were free agents in the matter, and, having a clear knowledge of what they were doing, accorded their consent to it. *Busloor Raheem v. Shumsoonnissa Begum, Ashgar Ali v. Debroos Banoo Begum, and Sudisht Lal v. Shsobarat Koer* referred to by MAHMOOD, J.

BEHARI LAL v. HABIBA BIBI

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Pardon—

Tender of, to accomplice who has pleaded guilty. See CRIMINAL PROCEDURE CODE, s. 388.

Partition of Mahal—

See JURISDICTION 11: PRE-EMPTION 12.

Partnership—

See JOINT HINDU FAMILY.

Arbitration. See CIVIL PROCEDURE CODE, ss. 525, 526.

Suit for dissolution of. See JURISDICTION 13.

Penalty—

See BOND 2.

Plaint—

Amendment of. See PRE-EMPTION 4.

Rejection, etc., of. See CIVIL PROCEDURE CODE, s. 53.

Rejection of. See CIVIL PROCEDURE CODE, s. 44, RULE (a).

Pleadings—

See ACT I OF 1877, s. 21.

Practice—

See CIVIL PROCEDURE CODE, ss. 53; 492, 494: WITNESSES.

1. *Accused not defended—Court to test statements of witnesses for prosecution.* *Per* PETHERAM, C.J.—Where an accused person is not defended, the Court should, in the interests of justice, test the statements of the witnesses for the prosecution by questions in the nature of cross-examination.

QUEEN-EMPERESS v. KALLU

... VII 160

2. *Appeal—Security for costs—Civil Procedure Code, s. 549—Application that appellant be required to give security—Order directing appellant to show cause—Absence of counsel to support application—Dismissal of application—Application to restore case to register—Civil Procedure Code, ss. 98, 99, 647.* A petition was made under s. 549 of the Civil Procedure Code, praying that an appellant might be required to give security for the costs of the appeal. The ground upon which the petition was based was that the appellant was not pecuniarily in a position to pay the costs of the appeal if it should be dismissed. An order was passed directing the appellant to show cause why the prayer of the petitioner should not be granted. When the petition came on for hearing, no one appeared to support it or to show cause against it, and it was accordingly rejected. An application was subsequently made on behalf of the petitioner, praying that the case might be restored to the register, on the ground that counsel for the petitioner, was absent on the occasion of the hearing for fifteen minutes only, and that, as no one on behalf of the appellant had appeared to show cause, the petition should have been granted, and the absence of petitioner's counsel was immaterial. *Held* that the matter was dealt with by s. 98 of the Civil Procedure Code, and that s. 647 of the Code, prescribing that the procedure laid down for suits should be followed as far as it could be made applicable in proceedings other than suits, made s. 99 the rule by which the Court was to be guided. *Held* also that although no general rule could be laid down that the absence of counsel, when a case has been called on, should be treated as by itself a sufficient reason for restoring to the register either a regular suit, or an appeal, or a miscellaneous application, but each case of the kind must be dealt with according to its own particular circumstances, in the present case, taking the circumstances into consideration, an absence of counsel for fifteen minutes was not enough to preclude the Court from restoring the petition to the register.

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Practice—(continued.)

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3. *Civil Procedure Code, s. 549—Appeal—Poverty of appellant—Security for costs.* Held by the Full Bench (TYRELL, J., *dubitante*), without laying down any general rule by which the exercise of the discretion conferred by s. 549 of the Civil Procedure Code should be governed, that the mere fact of the poverty of an appellant, standing by itself, and without reference to any general facts of the case under appeal, ought not to be considered sufficient alone to warrant his being required to furnish security for costs.
JIWAN ALI BEG v. BASA MAL ... VIII 203

Pre-emption—

See ADVERSE POSSESSION: WAJIB-UL-AZ.

1. *Acts or omissions by pre-emptor's authorized agent binding on pre-emptor.* It is a general rule of pre-emption that any act or omission on the part of a duly authorized agent or manager of the pre-emptor has the same effect upon pre-emption as if such act or omission had been made by the pre-emptor himself.
HARIHAR DAT v. SHEO PRASAD ... VII 41
2. *Conditional decree—"Finality" of decree—Holiday—Act XV of 1877, s. 6, sch. II, No. 156—Execution of decree—Sale of property by decree-holder before obtaining possession—Decree-holder's right not forfeited.* A decree in a suit to enforce a right of pre-emption directed that the purchase-money should be paid within a certain period from the date the decree became "final." The period of limitation prescribed for an appeal from this decree expired on a day when the Court was closed. Held that the decree did not become "final" before the day the Court re-opened. *Shaikh Erwas v. Mokuna Bibi* followed. The holder of a decree enforcing a right of pre-emption, who subsequently to the date of the decree sells the property to a "stranger" and permits the latter to pay the purchase-money decreed into Court, does not by such conduct debar himself from obtaining possession of the property in execution of the decree. *Rajjo v. Lalman and Sarju Prasad v. Jamna Prasad* distinguished.
RAM SAHAI v. GAYA ... VII 107
3. *Hindus—Local custom—Sale to a stranger.* The right of pre-emption, when it exists among Hindus, is a matter of contract or custom agreed to by the members of a village or community. Such a custom is not properly described as attached to the land, and as soon as any members of a Hindu community, who have agreed to be governed by it, sell to any one who is a stranger to the agreement, the land is no longer subject to pre-emption.
HIRA v. KALLU ... VII 916
4. *Hindu widow—Joinder of plaintiffs one of whom had no right to sue for pre-emption—Amendment of plaint.* The plaintiffs in a suit to enforce a right of pre-emption based on the *wajib-ul-az* of a village, which gave the right to "co-sharers," alleged themselves to be jointly interested in the village, and, in their plaint, claimed relief jointly. One of the two plaintiffs was the widow of a co-sharer in the village, who, at the time of his death, was a member of a joint Hindu family. Held that, inasmuch as the widow had only a right of maintenance out of the estate of her husband, she was not a co-sharer in the village, and therefore had no right to claim to pre-emption. Held, further, with reference to the manner in which the plaint was framed, that the other plaintiff could not claim pre-emption entirely on his own account without amending the plaint, but that it was too late for him to take such a course. *Damodar Das v. Gokal Chand* referred to.
KARAN SINGH v. MUHAMMAD ISMAIL KHAN ... VII 860
5. *Joint purchase by co-sharers and stranger—Pre-emptor not compelled to pre-empt share purchased by co-sharers.* If a co-sharer associates a stranger with him in the purchase of a share, another co-sharer is entitled to pre-empt the whole of the property sold, but it is not obligatory upon him to impeach the sale, so far as the co-sharer vendee is concerned.
HARJAS v. KANHYA ... VII 118
6. *Mortgage by conditional sale—Act XV of 1877, sch. II, No. 120—Time from which period of limitation begins to run.* A mortgagee under a deed of mortgage by conditional sale obtained a final order for foreclosure under Regulation XVII of 1806 in December 1875. He then sued to have the conditional sale declared absolute and for possession of the mortgaged property, obtaining a decree for the relief sought in April 1881. In a suit for pre-emption in respect of the mortgage—held, with reference to art. 120, sch. II of the Limitation Act, which was applicable to the case, that the pre-emptor's full right to impeach the sale had not accrued until the mortgagee had obtained the decree of April 1881, declaring the conditional sale absolute and giving him possession. *Rasik Lal v. Gajraj Singh and Prag Chaubey v. Bhajan Chaudhri* referred to.
UDIT SINGH v. PADARATH SINGH ... VIII 54

Pre-emption—(continued.)

7. *Mortgage by conditional sale—Limitation—Acquiescence—Equitable estoppel—Wajib-ul-arz—“Nearer co-sharer.”* The two joint owners of a two annas eight pies share in a village jointly executed two deeds of mortgage by conditional sale, each for a share of one anna four pies, in favour, respectively, of R and A, co-sharers in the village, and related to the vendors. In 1875 the conditional sale in favour of R became absolute, and he was recorded as proprietor of half the share of the vendors and obtained possession thereof. In 1882, A foreclosed his mortgage and obtained possession of the other half share. R thereupon claimed the right to purchase the half share so acquired by A, on the allegation that he had a right of pre-emption in respect thereof, having become the vendee in 1875 of the other half share, and therefore being the “nearer co-sharer” of the vendors within the meaning of the *wajib-ul-arz*, and also being nearer in relationship to the vendors than A. The *wajib-ul-arz* provided that each co-sharer was competent to transfer his own share, but that, when making a transfer, it was incumbent on him to notify the same to his near co-sharer, and, on his refusal, to other sharers in the village. The lower appellate Court held that the plaintiff was estopped from preferring a claim to pre-emption, on the ground that he had acquiesced in the conditional sale in favour of the defendant, and also that he had no right to pre-emption under the *wajib-ul-arz*. Held that inasmuch as from 1875 to 1882 the only owners of the two annas eight pies share were the plaintiff and the mortgagors, they were the only two co-sharers in respect of this particular share, although there were other co-sharers in the village; that the plaintiff must, therefore, be regarded as a “nearer co-sharer” of the vendors than the defendant within the meaning of the *wajib-ul-arz*, and that as such he was entitled to claim pre-emption. Held also that the right of pre-emption which arose upon the sale was a new right, and not the same as that which arose at the time of the mortgage, inasmuch as the *wajib-ul-arz* distinctly contemplated the right of pre-emption as arising upon the two different events of mortgage and sale; that the alleged acquiescence of the plaintiff pre-emptor therefore occurred at a time when the right claimed by him was not yet in existence, and that consequently the claim was not barred.

RUP NARAIN v. AWADH PRASAD VII

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8. *Mortgage by conditional sale—Wajib-ul-arz—“Transfer”—Act IV of 1882, s. 58.* A clause in the *wajib-ul-arz* of a village gave a right of pre-emption in respect of “transfer” by the sharers of their rights and interest by sale and mortgage. Held that a deed of conditional sale of a share in the village, which did not transfer possession, was a transfer of an interest in the village, and was sufficient to let in the right of pre-emption. *Sheoratan Kuar v. Mahipal Kuar* allowed.

AZIMAN BIBI v. AMIR ALI VII

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9. *Muhammadian Law—Acquiescence in sale—Relinquishment of right.* According to the Muhammadan law, if a pre-emptor enters into a compromise with the vendee or allows himself to take any benefit from him in respect of the property which is the subject of pre-emption, he by so doing is taken to have acquiesced in the sale and to have relinquished his pre-emptive right. In a suit to enforce the right of pre-emption founded on the Muhammadan law, it appeared that the purchasers, by an agreement made with the plaintiffs on the same date as the sale in respect of which the suit was brought, agreed to sell the property to the plaintiffs any time within a year, and if the latter paid the price and purchased the property for themselves. Held that by the very fact of their taking the agreement, the plaintiffs had relinquished their right of pre-emption and were precluded from enforcing it.

HABIB-UN-NISSA v. BARKAT ALI VIII

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10. *Muhammadian Law—Muhammadian vendor and pre-emptor and Hindu purchaser—Act VI of 1871 (Bengal Civil Courts Act), s. 24—“Religious usage or institution—“Parties.”* Held by the Full Bench that, in a case of pre-emption where the pre-emptor and the vendor are Muhammadans and the vendee a non-Muhammadan, the Muhammadan law is to be applied of the matter in advertisement to the terms of s. 24 of the Bengal Civil Courts Act (VI of 1871). *Sheikh Kudratulla v. Mohini Mohan Shaha* dissented from. Per PETHERAM, C.J., and OLDFIELD, J., that, by the provisions of s. 24 of the Bengal Civil Courts Act, the Court was not bound to administer the Muhammadan law in claims for pre-emption; but that, on grounds of equity, that law had always been administered in respect of such claims as between Muhammadans, and it would not be equitable that persons who were not Muhammadans, but who had dealt with Muhammadans in respect of property, knowing the conditions and obligations under which the property was held, should, merely by reason that they were not themselves subject to the Muhammadan law, be permitted to evade those conditions and obligations.

Pre-emption—(continued.)

Per MAHMOOD, J., that by a liberal construction, the rule of the Muhammadan law as to pre-emption is a "religious usage or institution" within the meaning of s. 24 of the Bengal Civil Courts Act, and, as such, is binding on the Courts.

Also *per* MAHMOOD, J., that the word "parties," as used in s. 24 of the Bengal Civil Courts Act, does not mean the parties to an action, but must be interpreted with reference to the inception of the right to be adjudicated upon.

Also *per* MAHMOOD, J.—The right of pre-emption is not a right of "*re-purchase*" either from the vendor or from the vendee, involving any new contract of sale; but it is simply a right of *substitution*, entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. The history and nature of the right of pre-emption discussed by MAHMOOD, J. *Shumsh-ool-nissa v. Zohra Bibi, Chundo v. Hakeem Alm-ood-deen, Ibrahim Saib v. Muni Mir Uddin, Moti Chand v. Mahomed Hossein Khan, and Dwarka Das v. Husain Bakhsh* referred to.

GOBIND DAYAL v. INAYATULLAH VII

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11. *Notice to pre-emptor of projected sale—Purchase-money—Inaction of pre-emptor—Acquiescence.* The plaintiff in a suit to enforce the right of pre-emption alleged that the true consideration for the sale was less than the amount stated in the sale-deed. It was found that he made no communication to the vendor after he became aware that a sale was being negotiated, nor did he make it known to him that, while he stood upon his pre-emptive right, he declined to pay the price stated in the deed, because it was not the consideration agreed on between the vendor and the vendee. *Held* that the plaintiff was bound, instead of remaining silent, to communicate to the vendor that he was prepared to purchase at the price within a reasonable time, and that, not having done so, he must be taken to have countenanced the completion of the bargain with the vendee and to have waived his right of pre-emption.

BHAIRON SINGH v. LALMAN VII

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12. *Partition of property sold on application of vendee—Silence of pre-emptor—Waiver—Estoppel.* Subsequently to the sale of a one-third share in a village, the vendee applied for partition of the share. A co-sharer, who had a right of pre-emption in respect of the sale, made no objection to this application, and the partition was effected. The co-sharer afterwards set up a claim to pre-emption. *Held* that there was nothing in the conduct of the pre-emptor which could amount to estoppel, or to a waiver of his right of pre-emption. *Motee Sah v. Goklee* distinguished and dissented from, and *Bhairon Singh v. Lalman* referred to, by MAHMOOD, J.

THAMMAN SINGH v. JAMAL-UD-DIN VII

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13. *Profits of property accruing between purchase and transfer to pre-emptor.* B purchased a share in a mahal on the 3rd January 1880 (Pus, 1287 fasli). A sued B and the vendor to enforce his right of pre-emption, and, on the 24th March 1882 (Chait, 1289 fasli), obtained a final decree enforcing the right. Subsequently B as a co-sharer in the mahal, during 1288 fasli, claimed from A, as lambardar of the mahal, the profits of the share for 1288 fasli. *Held* that the pre-emptive right which was declared in the suit instituted by A, when it was once established, existed and must be presumed to have taken effect on the date when the subsequently awarded sale to B took place, and therefore there was no period of time during which B was properly in possession of the share and entitled to profits from A in his character of lambardar, but A must be presumed to have been in possession and entitled to the profits from the date of the sale to B.

AJUDHIA v. BALDEO SINGH VII

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14. *Right pleaded in defence to suit for possession by purchaser of co-sharer's rights and interests.* A co-sharer of a village, who is in possession, cannot plead the existence of a right of pre-emption in defence to a suit for possession by the purchaser of the rights and interests of another co-sharer.

AJUDHIA BAKHSH SINGH v. ARAB ALI KHAN VII

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15. *Rival pre-emptor impleaded as defendant—Act XV of 1877, sch. II, Nos. 10, 120—Remand—Civil Procedure Code, ss. 562, 564.* Two suits to enforce the right of pre-emption in respect of a particular sale having been instituted, the plaintiff in the one first instituted was added as a defendant to the other. *Held* that, as regards him, the second suit constituted a claim by one pre-emptor against another for determination of the question whether the plaintiff or the defendant had the better right to pre-empt the property, which was a claim essentially

Pre-emption—(continued.)

declaratory in its nature; and there being no specific provision for such a claim in the Limitation Act, it was governed by art. 120 of that Act, and the right to sue accrued when the first suit was instituted.

DURGA v. HAIDAR ALI VII 167

16. "Sale"—*Wajib-ul-arz*—Act IV of 1882, s. 54—*Fraudulent omission to transfer by registered instrument*. The *wajib-ul-arz* of a village gave the co-sharers a right of pre-emption in cases where any one of them should wish to "transfer his share, wholly or partly, by sale or mortgage." One of the co-sharers entered into a transaction by which he transferred the possession of his share to a stranger for Rs. 300, and had mutation of names effected in the Revenue Department; but, in order to avoid the right of pre-emption, the parties omitted to execute or register a deed of sale in respect of the transfer. *Held* by the Full Bench (MAHMOOD, J., *dissenting*) that the transaction gave rise to the right of pre-emption within the meaning of the *wajib-ul-arz*. *Per* PETHERAM, C.J., that the terms of the *wajib-ul-arz* meant that if any co-sharer transferred his right wholly or partly, the right of pre-emption should arise; that although the legal interest in the share was never transferred, the effect of the transaction in question was to transfer absolutely the whole right of possession from the vendor to the vendee, and that it was therefore such a transfer as let in the right of pre-emption. *Per* STRAIGHT, J., that inasmuch as the defendants deliberately omitted to observe the necessary legal formality of a registered instrument with the object of defeating the pre-emptive right, it was very doubtful whether a Court of equity would be justified in allowing them to set up, and in giving effect to, a defence based upon their own intentional evasion of the law. *Per* OLDFIELD and BRODHURST, JJ., that the failure of the parties to the transfer to comply with the requirements of s. 54 of the Transfer of Property Act (IV of 1882), as to the manner in which the transfer should be made, did not alter the nature of the transaction or affect the fact that a sale had been made, and could not affect a pre-emptor's right in respect of it. *Per* MAHMOOD, J., that a valid and perfected sale was a condition precedent to the exercise of the pre-emptive right; that in the present case nothing had happened which could properly be termed a "sale" within the meaning of the *wajib-ul-arz*; that the application for mutation of names not having been registered, the provisions of s. 54 of the Transfer of Property Act prevented it from taking effect as a sale, or passing the ownership from the vendor to the vendee; and that therefore, under the *wajib-ul-arz*, the right of pre-emption could not arise.

JANKI v. GIRJADAT VII 492

17. *Sale to a co-sharer and stranger—Specification of interest sold to stranger and price—Right of pre-emption of vendee-co-sharer*. The principle of denying the right of pre-emption, except as to the whole of the property sold, is that by break-up the bargain the pre-emptor would be at liberty to take the best portion of the property and leave the worst part of it with the vendee. The rule applies only to those transactions which, while contained in one deed, cannot be broken up or separated. It should be limited to such transactions, and the reason of it does not exist where the shares sold are separately specified, and the sale to the stranger is distinct and divisible, though contained in the same deed as the sale to the co-sharers. The *ratio decidendi* of *Bhawani Prasad v. Damru* explained. *Sheodyal Ram v. Bhyro Ram* distinguished. *Guneshee Lal v. Zaraul Ali* and *Manna Singh v. Ramadkin Singh* dissented from. A co-sharer in a village conveyed by deed of sale certain land to four persons, three of whom were co-sharers in the same *patti* as the vendor. The deed contained a specification of the interests purchased and the considerations paid by the co-sharers and the stranger vendees respectively. In a suit for pre-emption by certain co-sharers of the same *patti* as the vendor the lower appellate Court held that although the co-sharers-vendees had a pre-emptive right of the same degree as the plaintiffs, nevertheless they, having joined a stranger with them in purchasing the property, had forfeited their right and could not resist the claim even in respect of such portions as they had purchased under the sale-deed. *Held* that this view was erroneous, and that inasmuch as the deed of sale contained an exact specification of the shares purchased by the co-sharers-vendees, who had an equal right of purchase to that of the plaintiffs in respect of such shares, and as the shares purchased and the consideration paid by the stranger vendee were also exactly specified, the lower Court should not have decreed the claim for pre-emption as to that portion of the property which had been purchased by the co-sharers.

SHEOBHAROS RAI v. JIACH RAI VIII 462

Pre-emption—(continued.)

18. *Simple mortgage*—"Transfer"—*Wajib-ul-ars*—*Mortgage*—*Charge*—*Act IV of 1882 (Transfer of Property Act)*, ss. 58, 100. The *wajib-ul-ars* of a village gave a right of pre-emption to co-sharers on a transfer (*intikal*) by sale or mortgage (*rahn*) by a co-sharer of "rights and interests" (*hakkiyat*). Per PETHERAM, C.J., that, as a simple mortgage, as defined in s. 58 of the Transfer of Property Act, 1882, by giving a right to sell, transfers an interest in the property mortgaged, a simple mortgage of his share by a co-sharer created a right of pre-emption under the terms of the *wajib-ul-ars*. Per MAHMOOD, J.—The circumstance that possession had not been transferred to the mortgagee was one which had no bearing on the question whether a right of pre-emption arose under the terms of the *wajib-ul-ars* in the case of a simple mortgage. The word "*intikal*," as used in Hindustani, has the broadest meaning in connection with "alienation," "conveyance," "assignment," or "transfer," of rights in immoveable property. The word "*hakkiyat*" means rights and interests, in the legal sense of the phrase. The word "*rahn*" is a generic word indicating all that is included in the English word "mortgage," and is not limited to usufructuary mortgages, but includes simple mortgages also. When general words are used in a document, they must be understood in a general sense, unless they are accompanied by any expression limiting or restricting their ordinary meaning, or unless such limitation or restriction arises from necessary implication. The words "*intikal*" "*hakkiyat*" and "*rahn*" in the *wajib-ul-ars* could be understood only in the most general use. "Mortgage," as understood in Indian law, includes simple mortgage as well as usufructuary, and one is as much a "transfer of an interest in specific immoveable property" as the other. A simple mortgage is a "transfer," being the transfer of the right of sale. Held, therefore, by MAHMOOD, J., that a right of pre-emption accrued under the terms of the *wajib-ul-ars* in the case of a simple mortgage by a co-sharer of his share to a "stranger." Per BRODHURST, J., that one of the entries in a statement showing the transfers which had taken place in the village at or about the time the *wajib-ul-ars* was framed, which statement was connected with the *wajib-ul-ars* related to a simple mortgage, from which it appeared that it was the intention that the co-sharers should have the right of pre-emption in all cases of mortgage, whether usufructuary or otherwise, and therefore a right of pre-emption accrued under the terms of the *wajib-ul-ars* in the case of a simple mortgage. Per DUTHOIT, J., that a pre-emptive right was raised by the terms of the *wajib-ul-ars* only upon the occurrence of a transfer of a share in the property of the mahal, and a simple mortgage was not a transfer of property. OLDFIELD, J.—The word "transfer" used in the *wajib-ul-ars* was not intended to refer to a simple mortgage, but to mortgages where possession of the property passes to the mortgagee. The obligors of a bond for the payment of money covenanted as follows:—"To secure this money, we have mortgaged a five gandas share out of a ten gandas share in each of the villages, etc. So long as the principal amount with interest is not paid, the hypothecated share will not be sold or mortgaged to any one." Held (PETHERAM, C.J., dissenting) that the bond created a simple mortgage. Per PETHERAM, C.J., that the bond gave the obligee a charge only on the property. SHEORATAN KUAR v. MAHIPAL KUAR VII 259
- Usufructuary mortgage—Redemption—Interest.* See MORTGAGE 14.
19. *Wajib-ul-ars*—"Co-sharer"—*Joint Hindu family*. The members of a joint and undivided Hindu family, other than that member who is recorded in the Collector's book as a sharer in the mahal, are "co-sharers," for the purposes of pre-emption, in the sense of the *wajib-ul-ars*. GANDHARP SINGH v. SAHIB SINGH VII 184
20. *Wajib-ul-ars*—*Co-sharers*—"Village"—*Effect of perfect partition on covenants contained in the wajib-ul-ars*. The *wajib-ul-ars* of a village contained a covenant among the co-sharers that, in the event of any one of them selling his share, a right of pre-emption should be enforceable, first by a "near shareholder," next by a partner in the *hoke*, and, thirdly, by a partner in the village. The village was subsequently divided into three separate mahals by means of a perfect partition under the N.-W.P. Land Revenue Act (XIX of 1873). Held that the agreement regarding pre-emption remained in force after the partition. The term "village," as used in the *wajib-ul-ars*, means a definite area of land with houses upon it, and does not necessarily imply a joint ownership of such land, inasmuch as after partition there may remain some community of interest, and things held and used in common by all the inhabitants. Every one who lives in that area has a share in it, and may, therefore, be regarded as a "shareholder" within the meaning of the *wajib-ul-ars*. GOKAL SINGH v. MANNUL LAL VII 772

Pre-emption—(continued.)

21. *Wajib-ul-arz—Partition of mahal—Mode of division of property where there are several pre-emptors equally entitled.* The *wajib-ul-arz*, framed in 1856, of a village consisting of several pattis or thokes gave a right of pre-emption to the owners of each thoke in respect of property situate in every other thoke when such property was sold to any one having no share in the village co-parcenary. The mahal subsequently became the subject of perfect partition under the N.-W. P. Land Revenue Act (XIX of 1878), and one of the pattis was constituted a separate mahal and a new *wajib-ul-arz* was framed for it. Prior to the partition, a proprietor of land both in the pattis which remained in the original mahal and in the patti which formed the new mahal, sold property in both to a stranger. Thereupon a co-sharer in the original mahal brought a suit for pre-emption in respect of the property situate therein which had been sold, excluding the property situate in the new mahal. *Held* that the effect of the partition was to exclude property situate in the new mahal from the operation of the *wajib-ul-arz* framed in 1856, and to place it under new conditions as to the right of pre-emption; that the plaintiff could, after the separation, exercise no such right against and in respect of shareholders and property so separated, nor could the separate shareholders exercise any right of pre-emption against the plaintiff and his property remaining in the mahal from which they had separated; and that the suit to pre-empt that portion only of the property sold which was situate in the original mahal was maintainable. *Durga Prasad v. Munsai, Hulasai v. Sheo Prasad, Kashi Nath v. Mukhta Prasad, Motee Sah v. Mussammut Gokli, Ram Prasad v. Buljeet Singh, Oomur Khan v. Moorad Khan and Salig Ram v. Debi Prasad* referred to. *Per* MAHMOOD, J.—The rule of the Muhammadan law, that where more persons than one owning the property in virtue of which the pre-emptive right exists appear for the purpose of suing, their rights are to be taken as equal *per capita*, with reference to the number of pre-emptors and not with reference to the number of the shares of each pre-emptor in such property, is so consistent with justice, equity and good conscience that it must be followed in cases of rival suits for pre-emption under the *wajib-ul-arz*, where there is nothing to show that the rival pre-emptors are not equally entitled.

JAI RAM v. MAHABIR RAI, &C. ... VII 720

22. *Wajib-ul-arz—Purchase of share subsequent to sale—Purchaser's right of pre-emption.* Where there is a right of pre-emption under the *wajib-ul-arz*, which a shareholder could claim and enforce in respect of a sale of property, a person purchasing the said shareholder's interest in the village subsequently to the sale cannot claim and enforce pre-emption as his vendor might have done.

SHEO NARAIN v. HIRA ... VII 535

23. *Wajib-ul-arz—Right of pre-emptor to stand in the position of the purchaser.* A co-sharer of a village sold part of his share to a stranger. This sale was subject to a right of pre-emption created by the *wajib-ul-arz* in favour of the partners of the vendor. Only a part of the purchase-money was paid in cash, it being agreed that the balance should remain on credit, and be secured by two deeds in which the property was hypothecated by the purchaser to the vendor. *Held* that it could not be said that the partners of the vendor had not only the right of pre-emption, but also the right to be put in the same position with reference to all the peculiar incidents of the payment of the purchase-money as that arranged between the vendor and purchaser.

NIHAL SINGH v. KOKALE SINGH ... VIII 29

24. *Wajib-ul-arz—"Rights and interests"—"Qimat"—"Sale"—"Exchange."* The *wajib-ul-arz* of a village gave a right of pre-emption by a clause providing that in case of transfer by any co-sharer of his rights and interests (*haqiqat*), his partners should have a right to purchase the property transferred at the same price (*qimat*) as the vendee had given. One of the co-sharers transferred to a stranger one biswa and six dhurs of a grove or garden in exchange for another piece of land. *Held* by the Full Bench that this transaction was a transfer of *haqiqat* within the terms of the *wajib-ul-arz*. *Held* also that the plot of land which was given in exchange for the one biswa and six dhurs must be considered as a price (*qimat*), within the terms of the *wajib-ul-arz*. *Per* MAHMOOD, J., that the word "*qimat*" must be interpreted in the sense given to it by the Muhammadan law, including not only money, but other kinds of property capable of being valued at a definite sum of money, and covering the consideration of "sale" as well of exchange as defined in ss. 54 and 118 of the Transfer of Property Act (IV of 1882) respectively.

NIAMAT ALI v. ASMAT BIBI... VII 626

Pre-emption—(concluded.)

25. *Wajib-ul-arz*—"Transfer"—"Sale." On the 1st September 1881, L and R entered into an agreement (which was duly registered) with B, that in consideration of their bringing a suit for recovery of a twelve annas share in a village which B claimed by right of inheritance against G, they should receive a moiety of the share. L and R found funds for the prosecution of two suits in respect of the shares, which on the 5th April 1882, were compromised, B getting one anna and three pies out of the twelve annas originally claimed by her. In that compromise B stated as follows:—"I make over one anna to L and R, my partners, in lieu of the prosecution of the two cases. I, the plaintiff, shall remain in possession of the remaining three pies." Meanwhile, on the 3rd September 1881, G had sold three annas out of the twelve annas share to M. On the 3rd April 1883, M brought a suit against L and R, claiming the right of pre-emption in respect of the one anna which they had acquired from B, on the allegation that the transfer of the share had taken place on the 5th April 1882. This claim was based on the *wajib-ul-arz* of the village, which gave a right of pre-emption to the co-sharers of any sharer wishing to transfer his share. Held that the compromise of the 5th April 1882, was only a re-adjustment of the amount of the interest in the share between B and L and R; that the real transfer to L and R was given effect to on the 1st September 1881, and that, this having been prior to the acquisition by M of any right in the village, he was not a co-sharer at the time of the transfer, and that he had consequently no right as against L and R by way of claim for pre-emption.

LACHMI NARAIN v. MANOG DAT ... VII 291

26. *Wajib-ul-arz*—Transfer under compromise and decree thereupon to person claiming pre-emption. An appeal having been preferred from a decree in a suit for pre-emption, based on the *wajib-ul-arz* of a village, the parties to the suit entered into a compromise whereby the plaintiff-pre-emptor relinquished his claim to a part of the property in dispute in favour of the defendants-vendees, and the latter admitted his claim in respect of the remainder of the property. Upon this compromise a decree was passed. Subsequently a co-sharer in the village where the property was situate brought a suit for pre-emption, upon the contention that the compromise and the decree passed thereon amounted to a transfer to the plaintiff in the former suit, within the meaning of the *wajib-ul-arz*. Held that the suit was not maintainable.

HANUMAN RAI v. UDIT NARAIN RAI ... VII 917

27. *Wajib-ul-arz*—Vendor and purchaser—Clause fixing price in case of sale to a co-sharer—Sale to a stranger for higher price—Agreement running with land—Pre-emptor entitled to take property on payment of price fixed in *wajib-ul-arz*—Purchaser entitled to recover purchase-money. The *wajib-ul-arz* of a village contained a provision that any co-sharer desiring to sell his share should offer it to the other co-sharers before selling it to a stranger, and further, that, in case of sale to a co-sharer, the price to be paid should be calculated in proportion to the price for which a particular share had been sold in 1860. One of the co-sharers, without first offering his share to the other co-sharers, sold it to a stranger for a price higher than that which would be payable according to the above-mentioned provision. A suit for pre-emption was brought by a co-sharer against the vendor and the purchaser, and the plaintiff claimed the benefit of the sale upon payment of a sum calculated according to the condition of the *wajib-ul-arz* relating to sales between co-sharers. Held by the Full Bench that the condition of the *wajib-ul-arz* regarding the price to be paid for the share was still binding on the land, notwithstanding the sale; that a co-sharer was entitled to purchase the share at the price agreed before it could be sold to any one else, and, in case of sale to a stranger, could call on the vendor and the purchaser to hand it over on payment of such price; and that, if the stranger vendee had paid more than was payable according to the *wajib-ul-arz*, he was entitled to recover it from the vendor. *Akbar Singh v. Juala Singh* distinguished by TYRELL, J.

KARIM BAKHSH KHAN v. PHULA BIBI ... VIII 102

Private Defence—

Right of. See ACT XLV OF 1860, s. 353.

Privy Council Decree—

Execution for costs—Rate of exchange—Civil Procedure Code, s. 610—Meaning of "for the time being." See CIVIL PROCEDURE CODE, s. 610.

Prosecution—

Withdrawal from. Government Pleader—Public Prosecutor—Criminal Procedure Code, s. 494. Held by the Full Bench that a person appointed by the Magistrate of the District, under s. 492 of the Criminal Procedure Code, to be Public Prosecutor for the purpose of a particular case tried in the Court of Session has not the power of a Public Prosecutor with regard to withdrawal from prosecution under s. 494.

QUEEN-EMPRESS v. MADHO VIII 291

Public Highway—

Diversion of road—Right of owners of land adjoining old road—Grant by Municipality of land forming old road—Act XV of 1873, s. 38. There is a presumption that a highway, or waste land adjoining land. Section 38 of Act XV of 1873 (N.W.P. and Oudh Municipalities Act) was not intended to deprive persons of any private right of property they might have in the land used as a public highway, or to confer such rights on the Municipality, nor has the section any such effect. In a case where such land ceased to be used as a public highway, and was granted by the Municipality to third persons, who proceeded to build thereon,—held that the owners had a good cause of action against such persons for the demolition of the buildings and restoration of the property to its original condition.

NIHAL CHAND v. AZMAT ALI KHAN VII ... 362

Public Nuisance—

See ACT XLV OF 1860, s. 291.

Public Prosecutor—

See PROSECUTION.

Duty of. See WITNESSES.

Public Servant—

See ACT XLV OF 1860, s. 21.

Framing incorrect record. See ACT XLV OF 1860, ss. 24, 25.

Punishment—

For more than one of several offences. See MAGISTRATE.

Purchase-money—

See PRE-EMPTION 11.

Purchaser for Value without Notice—

See ADVERSE POSSESSION.

Question for Court executing Decree—

See CIVIL PROCEDURE CODE, ss. 244 : 583.

Registered and Unregistered Documents—

See ACT III OF 1877, s. 50 : MORTGAGE 4.

Registration—

Place of. Act VIII of 1871 (Registration Act), ss. 28, 85—"Whole or some portion of the property." The terms of s. 28 of Act VIII of 1871 must not be construed in their literal sense, inasmuch as to do so would defeat the intention of the Legislature that registration should be made with reference to the locality of the property to which the document relates; and hence the words of the section "some portion of the property" must be read as meaning some substantial portion. A bond which purported to mortgage 500 square yards of land situate at P, two entire villages and shares in fourteen villages in the G district, and a village in the C district, and which required registration under Act VIII of 1871, was registered at P. Held that the bond was not properly registered in accordance with the provisions of s. 28 of Act VIII of 1871. Per MAHMOOD, J.—The imperative direction of s. 28 of Act VIII of 1871 is addressed not to the registering officer, but to the person presenting a document to that officer for registration; and therefore s. 85, which refers only to defects in the appointment or procedure of the registering officer, could not cure the irregularity which was committed under s. 28.

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Regulation—

XXXIV of 1803, ss. 9, 10. See MORTGAGE 15.

XVII of 1806, s. 8. See MORTGAGE 3.

VII of 1822, s. 9, cl. i. See WAJIB-UL-ARZ.

Release—

Mortgage—Agreement, for fresh consideration, between mortgagee and third person for release of property from mortgage—Release not required to be in writing and registered. The mortgagee of immoveable property under a hypothecation bond entered into an agreement with one who was not a party to his mortgage to release part of the property from liability under his mortgage. This agreement was not in writing and registered. The mortgagee subsequently sought to enforce the hypothecation against the whole of the mortgaged property. *Held* that the agreement, being a new contract for a fresh consideration between persons who were not parties to the mortgage, was not, as between the parties to the mortgage, a release which the law required to be in writing and registered. *Held* also that the party to the agreement with the mortgagee might have come into Court as a plaintiff to enforce the same, and that it was equally competent for him to plead it in avoidance of the mortgagee's claim to bring to sale the property referred to therein. *Nash v. Armstrong* referred to

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Religious Endowment—

See MOSQUE.

Remand—

See ARBITRATION 4.

Appeal from order of remand—Civil Procedure Code, ss. 562, 564, 566, 584, 588 (28), 590. Where a lower appellate Court, instead of remanding a suit under s. 566 of the Civil Procedure Code, erroneously remands it under s. 562, and the party aggrieved by its order appeals to the High Court, under cl. (28), s. 588, the High Court cannot deal with the case as if it were a first appeal from a decree. All that the High Court can do is to rectify the procedure of the lower appellate Court and to direct that it decide the case itself on the merits. *Badam v. Imrat* distinguished. *Rannarain v. Bhawanidin and Sheoamber Singh v. Lallu Singh* referred to.

SOHAN LAL v. AZIZ-UN-NISSA BEGAM ... VII 136

Rent—

• See EX-PROPRIETARY TENANT 1.

Services. See RENT-FREE GRANT.

"Rent-free Grant"

• "Rent"—*Services—Jurisdiction—Civil and Revenue Courts—Act XII of 1881, ss. 3 (2), 30, 95 (c)—Act XIX of 1873, ss. 3 (4), 79-89, 241 (h).* A suit was brought for the ejectment of the defendant from certain land, on the allegations that it was rent-paying land which had been granted to the defendant's vendor by the plaintiff's father free from payment of any rent, on condition that he should perform certain services as a mimic, and that these services were discontinued by the defendant's vendor. The plaintiff endeavoured to resume the land in the Revenue Court as a rent-free grant under s. 30 of the N.W.P. Rent Act (XII of 1881), but the application was rejected. In answer to the suit, the defendant pleaded that it was not cognizable by the Civil Court. *Held* by OLDFIELD, J., (MAHMOOD, J., *dissenting*) that the suit could not be held to be one to resume rent-free grant, inasmuch as there was no rent-free grant at all in the sense of s. 30 of the Rent Act, and that the Civil Court therefore had jurisdiction to entertain the suit. *Held* by MAHMOOD, J., that the land constituted a rent-free grant, that the claim was one for the resumption of such grant or subjecting it to assessment to rent, and that, under these circumstances, the suit was not cognizable by the Civil Court. *Per* OLDFIELD, J.—The definition of the term "rent" in s. 3 of the Rent Act was intended to include services or labour rendered for the use of land, and the grantee in the present case was a tenant who rendered rent in this sense on account of the use of the land. Further, there was no such grant as is contemplated by s. 30 of the Rent Act, inasmuch as that section refers to grants for holding land exempt from the payment of rent alluded to in s. 10 of Regulation XIX of 1793, and that Regulation, assuming it to refer to grants free from payment of rent as well as of revenue, contemplated grants not only free from payment of rent in cash or kind, but free from payment of anything in lieu thereof. A tenure such as in the present case, where the land was land originally paying rent in cash, and where the cash rent was exchanged for rendition of services, is not a rent-free grant within the meaning of the Regulation, nor consequently of s. 30 of the Rent Act. *Mutty Lall Sen Gynwal v. Deshkar Roy and Pura Mal v. Padma* referred to. *Per* MAHMOOD, J.—The services connected with the grant in this case did not constitute "rent" within

"Rent-free Grant"—(continued.)

the meaning either of the N.-W.P. Rent Act or of the N.-W.P. Land Revenue Act (XIX of 1873), and the word "render" in s. 8 of the former Act does not include or imply the rendering of services or labour. The word "rent" is probably used as the equivalent of the Hindustani words *lagan* or *poth*, representing the compensation receivable by the landlord for letting the land to a cultivator, and s. 3 of the Rent Act, where it uses the expressions "paid, delivered, or rendered," must be taken to refer respectively to rent paid in cash, to rent delivered in kind, and to rent rendered by appraisement or valuation of the produce. The grant in the present case was a rent-free grant of the nature of *chakran* or *chakri*, i.e., service-tenure, to which s. 41 of the Regulation, VIII of 1793 related. The incidents of the tenure would be governed by s. 30 of the Rent Act and ss. 79-84 of the Land Revenue Act, being matters outside the jurisdiction of the Civil Court. The scope of s. 40 of Regulation XIX of 1793 is not limited to permanent rent-free grants, and the present suit was in respect of a matter falling within s. 95 (c) of the Rent Act, and "provided for in ss. 79 to 89, both inclusive," of the Land Revenue Act, within the meaning of s. 241 (h) of the latter Act. *Puran Mal v. Padma*, *Tika Ram v. Khuda Yar Khan*, and *Forbes v. Meer Mahomed Tuguee* referred to.

WARIS ALI v. MUHAMMAD ISMAIL VIII 552

Res judicata—

See APPEAL 3 : CIVIL PROCEDURE CODE, S. 13.

Civil Procedure Code, s. 13—Meaning of "between parties under whom they or any of them claim." See CIVIL PROCEDURE CODE, S. 13.

Civil Procedure Code, ss. 562, 588 (28)—*Second appeal—Civil Procedure Code*, ss. 565, 566—*Determination of case by High Court*. In a suit for pre-emption, based on the *wajib-ul-ars* of a village, the Court of First Instance dismissed the claim on the ground that no right of pre-emption had been proved to exist in the village. The lower appellate Court, dissenting from this opinion, reversed the first Court's decree and remanded the case under s. 562 of the Civil Procedure Code for a decision on the remaining question of fact, viz., the amount of the consideration for the sale. In appeal from the order of remand, the High Court, on the 3rd January 1884, observed that it was not disposed to interfere with the finding of fact that the plaintiffs had a right of pre-emption, and accordingly dismissed the appeal, but added that the Judge was in error in remanding the case under s. 562 of the Code; that his order must so far be set aside; and that he should proceed under s. 565 or s. 566, as might be applicable. The Judge, on receipt of this order, replaced the case on his file, remitted an issue to the Court of First Instance, under s. 566, as to the amount of consideration, and, accepting the first Court's finding upon that issue, decreed the plaintiffs' claim. In second appeal by the defendants the High Court was of opinion that the Judge had disposed of the case upon a condition of things which the plaintiffs had never asserted, inasmuch as he had treated the right of pre-emption which was in issue as one arising from custom, and not, as alleged by the plaintiffs, as arising from a contract between the ancestors of the parties. All the evidence necessary to the determination of the case was on the record. *Held*, by the Full Bench, that the defendants were not prevented by the operation of the High Court's order of the 3rd January 1884, from disputing the right of pre-emption, inasmuch as that order was a decision of a merely interlocutory character passed in the same suit, and the questions of fact involved therein were decided only so far as was necessary for the purpose of passing the order, and it could not be regarded as determining the main question in the suit, which was still open, and must be decided in the final decree in the suit. *Per* STRAIGHT, J., that the jurisdiction of the High Court in appeal under s. 588 of the Code from the Judge's order of remand was, like the jurisdiction of the Judge in passing the order, limited by the terms of s. 562; and hence the remark made in the High Court's order, dealing with the plaintiffs' right of pre-emption could only be regarded as an *obiter dictum*, and not as determining any question as to the pre-emptive right. *Held*, per PETHERAM, C.J., and OLDFIELD and TYRELL, JJ., that the High Court was competent, in second appeal from the Judge's decree, to look into the evidence already on the record for the purpose of finding whether a right of pre-emption existed, in fact, in the village, if the evidence for answering this question was already on the record, and that, in such a case the question need not be referred to the Court of First Appeal. *Bal Kishen v. Jasoda Kuar* referred to. *Per* STRAIGHT and BRODHURST, JJ., *contra*. *Bal Kishen v. Jasoda Kuar* referred to.

DEOKISHEN v. BANSI VIII 172

Res judicata—(continued.)

Dismissal of suit under s. 10, cl. ii, Act VII of 1870—Dismissal of suit for misjoinder—Dismissal of suit "in its present form." See CIVIL PROCEDURE CODE, s. 18.

Hindu widow—Decree against widow—Reversioner. See HINDU LAW 2.

Set-off. See SET-OFF 2.

Restitution—

See CIVIL PROCEDURE CODE, s. 588.

Restitution of Conjugal Rights—

Husband and wife—Hindu law—Suit by Hindu husband out of caste at time of suit

—Decree for restitution conditional on plaintiff's obtaining restoration to caste. In a suit by a Hindu, a *sumar* by caste, against his wife for restitution of conjugal rights, it was found that the plaintiff, in consequence of having left his wife and cohabited with a Muhammadan woman (whom, however, he had left at the time of suit), had been turned out of caste, but that the misconduct of which he had been guilty was not of such a character as to render him liable to perpetual ex-communication, and upon making certain amends, he could obtain restoration to his caste. *Held* that, while the plaintiff was entitled to come into Court for the relief prayed, unless, in the circumstances above stated, the marriage had, under the Hindu law, been dissolved, the Court was bound, when asked to employ coercive process to compel a wife to return to her husband, not to disregard any reasonable objection she might raise to such process being granted, either on the ground that she had been subjected before to personal injury or cruelty at the hands of her husband, or that she went in fear of one or the other, or that the husband was actually living in adultery with another woman, or that, if she resumed cohabitation or association with him, he being outcasted, she would herself incur the risk of being put out of caste. *Held*, therefore, that in decreeing a claim of this description, a Court was entitled, if it saw good reason to do so, while recognizing the civil rights of a husband to his wife, to put such conditions upon the enforcement of his rights by legal process as the circumstances of the case might fairly demand; and that, applying this principle to the present case, the defendant might reasonably ask the Court, before compelling her return to her husband, to make it a condition that he should first obtain his restoration to caste. *Held* also that, under the Hindu Law, the fact that a husband had had adulterous intercourse with another woman, which had ceased at the time of suit, was not an answer to a claim by him for restitution of conjugal rights.

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Resulting Trust—

See TRUST.

Resumption—

Of rent-free grant. See JURISDICTION 4.

Revenue—

Liability of land to assessment of. See JURISDICTION 10.

Reversioner—

Hindu Law—Daughter's son—Hindu widow—Decree against widow—Res judicata. See HINDU LAW 2.

Hindu Law—Partition between widow and mother, both claiming life interest—

Alienation by mother—Declaratory decree. See HINDU LAW 12.

Hindu widow—Decree against widow. See HINDU WIDOW 2.

Review of Judgment—

Criminal case—Criminal Procedure Code, s. 369. The High Court has no power under s. 369 of the Criminal Procedure Code to review an order dismissing an application for revision made by an accused person, and the only remedy is by an appeal to the prerogative of the Crown as exercised by the Local Government.

Per BRODHURST, J.—The Legislature has not conferred in express words upon a High Court the power of reviewing its judgments in all criminal cases as it has done under the Civil Procedure Code in civil cases; and the provisions of s. 369 of the Criminal Procedure Code, so far as they affect the High Court, apply merely to questions of law arising in its original criminal jurisdiction, and which are reserved and are subsequently disposed of under the provisions of s. 434 of the Criminal Procedure Code and ss. 18 and 19 of the Letters Patent for the High Court of the North-Western Provinces. *Queen v. Godai Raout* referred to.

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"Right to sue."—

See CIVIL PROCEDURE CODE, s. 407 (c): MOSQUE.

Rioting—

See CRIMINAL PROCEDURE CODE, s. 35: MAGISTRATE.

Sadhs—

See HINDU LAW 12.

Sale—

See PRE-EMPTION 3.

Order confirming. See CIVIL PROCEDURE CODE, ss. 311, 312.

Order disallowing objections to. See CIVIL PROCEDURE CODE, ss. 311, 312.

Sale in Execution of Decree—

See ALLUVION.

Sale set aside on objection by third person—Suit to have sale confirmed—Declaratory decree—Civil Procedure Code, ss. 244, 278, 283, 311—Act I of 1877, s. 42. Held that persons other than the decree-holder or the persons whose property was sold in execution of decree were not competent to apply to the Court under s. 311 of the Civil Procedure Code, to set aside the sale. M in whose name property had been purchased at an execution sale which was improperly set aside, brought a suit to have the order setting aside the sale reversed, and the sale confirmed in her favour, and for a declaration that the property was not liable to be sold in execution of a decree of the defendants against third persons, under which it had been attached and advertized for sale. Held that such a suit could only be maintained under s. 42 of the Specific Relief Act (I of 1877), but that s. 244 of the Civil Procedure Code indicated the intention of the Legislature that such questions should be determined in the execution department, and, reading together the provisions of ss. 244, 278, and 283 of the Code, the suit was premature, and therefore not maintainable.

MAN KUAR v. TARA SINGH VII 583

"Sanction"—

See CRIMINAL PROCEDURE CODE, s. 195.

Security for Costs—

See PRACTICE 2 AND 3.

Sentences—

Separate. See CRIMINAL PROCEDURE CODE, s. 35.

Separate Suit—

See CIVIL PROCEDURE CODE, ss. 244; 583.

Services—

Rent. See RENT-FREE GRANT.

Sessions Court—

Addition of charge triable by any Magistrate—Power of Sessions Judge to add charge and try it—Criminal Procedure Code, ss. 28, 226, 236, 237, 537. Subject to the other provisions of the Criminal Procedure Code, s. 28 gives power to the High Court and the Court of Session to try any offence under the Penal Code; and the provision it contains as to the other Courts does not cut down or limit the jurisdiction of the High Court or the Court of Session. Three persons were jointly committed for trial before the Court of Sessions, two of them being charged with culpable homicide not amounting to murder of J, and the third with abetment of that offence. At the trial, the Sessions Judge added a charge against all the accused of causing hurt to C, and convicted them upon both the original charges and the added charge. The assault upon C took place either at the same time as or immediately after the attack which resulted in the death of J. Held that the case did not come within the terms of s. 226 of the Criminal Procedure Code, and the adding of the charge was an irregularity which was not covered by ss. 236 and 237, those sections having no application to such a state of things; but that inasmuch as the Sessions Judge was addressed by the pleader who appeared for the accused, and heard all the objections raised, and witnesses might have been called for the defence upon the added charge, the provisions of s. 537 were applicable to the case. Held also that the Sessions Judge had power, under s. 28 of the Code, to try the charge, assuming that he had power to add it.

QUFEN-EMPRESS v. KHARGA VIII 665

Witness for defence—Refusal by Magistrate to summon witness under Criminal Procedure Code, s. 216—Witness summoned by Sessions Court—Power of Sessions Judge to summon witness. See CRIMINAL PROCEDURE CODE, s. 216.

Set-off—

1. *Civil Procedure Code*, s. 111—"Ascertained" sum—*Act XV of 1877*, s. 22, sch. II, Nos. 52, 53, 83. A suit was brought by P against the Elgin Mills Company for recovery of the price of wood supplied under two contracts, each of which contained a clause by which the plaintiff contracted to indemnify the defendants for loss arising by reason of failure on his part to supply the wood as contracted for. No wood was supplied after the 11th November 1879. The suit was brought on the 10th October 1882. In January 1883, the partners of the Elgin Mills Company were, on their own application, brought upon the record as defendants. The defendants claimed a set-off as damages for loss incurred by the plaintiff's failure to supply all the wood contracted for, such loss having arisen on the 25th October 1879, and subsequently. *Held* that art. 53, and not art. 52, sch. II of the Limitation Act was applicable to the plaintiff's claim, the intention of the parties having been that the price of wood was not claimable as of right on the date of its being supplied, but rather when the contract was completed by the whole wood being supplied, or when the contract came to an end. *Held* that although, taking the word "ascertained" to mean "liquidated," the claim of the defendants for damages would not come within the meaning of a set-off under s. 111 of the Civil Procedure Code, that section was one regulating procedure, and was not intended to take away any right of set-off, whether legal or equitable, which parties would have had independently of its provisions; that the right of set-off would be found to exist not only in cases of mutual debts and credits, but also where the cross-demands arose out of one and the same transaction, or were so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit, and that as, in the present case, the claim sprang out of the same contract which the plaintiff sought to enforce, and could readily be determined in the same suit, it was equitable that it should be so determined. *Gauri Sahai v. Ram Sahai, Kistnasamy Pillay v. The Municipal Commissioner of Madras and Kishor Chand Champa Lal v. Madhooji Visram* followed. *Held* that the law of limitation applicable to the set-off was art. 83, sch. II of the Limitation Act; that limitation would run from the time when the plaintiff was actually damaged, and should be reckoned to the date of the institution of the suit, and not to that of claiming the set-off, which was after the defendants' names were brought on the record, and that the set-off was therefore in time. *Walker v. Clements* referred to. *Per* OLDFIELD, J.—That the excess of the set-off in favour of the defendants over and above the claim of the plaintiff might properly be decreed to them, and that the set-off should be allowed, if at all, to its full extent, and not merely to the extent of defeating the claim. *Per* DUTHOIT, J.—That although the set-off might properly be admitted as an equitable protection to the defendants against being cast in the plaintiff's suit, the defendants could not, failing the provisions of s. 111 of the Civil Procedure Code, be allowed to recover a sum of money from the plaintiff, they having paid no court-fees on that account. *Held* that s. 22 of the Limitation Act refers to cases where a new defendant is substituted or added, and that when the partners of the Elgin Mills Company were brought on the record as defendants in January 1883, there was no institution or addition of new defendants, the defendants having been comprised in the designation of Elgin Mills Company, and at most what was done was to correct a misdescription.

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1. *Res judicata*—*Civil Procedure Code*, ss. 13, 111—*Court-fee on set-off*. In a suit to recover a sum of money due as wages, the plaintiff alleging that the defendant had engaged him to sell cloth on his account at a monthly salary, the defendant claimed a set-off as the price of cloth which, he alleged, the plaintiff had sold on his account on commission. It appeared that the defendant had previously sued the plaintiff to recover the same amount as was now claimed by way of set-off as being due for the price of cloth sold and delivered by the defendant to him; and the plaintiff (then defendant) pleaded that there had been no sale to him, but the cloth had been delivered to him on commission-sale. The suit was dismissed on the ground that there was no proof of a sale of cloth, and the question whether any sum was due for cloth sold on commission-sale was not gone into. The cloth now alleged to have been delivered on commission-sale was the same as that alleged in the former suit to have been actually sold to the plaintiff. *Held* that the defendant was entitled, under s. 111 of the Civil Procedure Code, to set-off the amount claimed as due for goods sold on commission against the plaintiff's demand, and that the claim for such set-off was not barred under the provisions of s. 23. *Held* also that the court-fee payable on the claim for set-off was the same as for a plaint in a suit.

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Simple Mortgage—

See PRE-EMPTION 18.

Sir Land—

See ACT XII OF 1881, s. 7: SS. 7, 9: MORTGAGE 1.

1. *Act IV of 1882, ss. 41, 48—Transfer by ostensible owner—Act XII of 1881, s. 7—Meaning of “held”—Statute, Construction of—Retrospective effect—Mortgage of sir-land before passing of Act XVIII of 1878—Sale of mortgager's rights while that Act was in force—Right of mortgagee.* In 1869, A and J, two co-sharers of a moiety of a ten biswas share in a village (F and W being also co-sharers in the same moiety), joined with H, the holder of the other moiety, in giving to K, usufructuary mortgage of 87 bighas of land, being the whole of the sir-land appertaining to the ten biswas share. The deed of mortgage authorized the mortgagee to retain possession of the land until payment of the mortgage-money and to receive profits in lieu of interest; and he obtained possession accordingly. In 1872, F, W, and A gave to other persons a usufructuary mortgage of their five biswas share, together with a moiety of the 87 bighas of sir-land; and it was stated in the deed that half the mortgage-money due to K on the mortgage of 1869 was due by the executants, and that they accordingly left the same with the mortgagees in order that the latter might redeem. In November 1876, H's five biswas share, together with its sir-land, was sold in execution of a decree. Subsequently K, alleging that the mortgagees under the deed of 1872, and the purchasers under the execution-sale of 1876 had dispossessed him, and that his mortgage-debt had not been paid, sued to recover possession of the 87 bighas of sir-land, by virtue of his mortgage-deed of 1869. The Court of First Instance held that the plaintiff was not entitled to enforce his mortgage in respect of F's and W's share in the 87 bighas, because they were not parties to the deed of 1869. The lower appellate Court further held that from the date of the execution-sale of November 1876, H became an ex-proprietary tenant of his sir-land, and that to give the plaintiff possession thereof would be contrary to the provision of s. 7 of Act XVIII of 1873, (N.-W. P. Rent Act). Held that inasmuch as it was clear that at the time when the mortgage-deed of 1869 was executed, F and W were aware of the transaction which made K the mortgagee, under the deed, of the whole property, and that, knowing this, they allowed the possession of A, J, and H to appear as if covering the entire zamindari rights in the ten biswas share of the sir-land, and inasmuch as the statements contained in the mortgage-deed of 1872 were an admission on the part of F and W that the mortgage of 1869 was executed with their consent, the equitable doctrine contained in s. 41 of the Transfer of Property Act applied to the case, and F and W had no defence, either in law or in equity, to the plaintiff's suit, with reference to their shares, and for the purpose of obviating the lien of 1869. *Ramcoomar Koondoo v. McQueen* referred to. *Per MAHMOOD, J.*, with reference to the effect of the execution-sale of November 1876, in regard to the provisions of s. 7 of Act XVIII of 1873, that the general rule that statutory provisions have no retrospective operation did not apply to the case; that, by reason of the sale, H who had proprietary rights in the mahal, and held the five biswas share of the sir as such (the word “held” as used in s. 7 of the Rent Act not being confined to manual or physical holding), lost his proprietary rights, and so became an ex-proprietary tenant of the land belonging to him at that time; that although the mortgage of 1869 must not be so affected as to deprive the mortgagee of all his rights, yet by the terms of s. 7 of Act XVIII of 1873, and by virtue of the sale, his means of benefiting by the mortgage were necessarily changed; that neither the preamble nor s. 1 of the Act contained any saving clause, which would justify the interpretation that all the conditions included in a usufructuary mortgage are to be exempted from the operation of the Act, or of s. 7 in particular, merely because the mortgage was a subsisting one; that under these circumstances possession must be given to the plaintiff of such rights as H had at the time of the mortgage, subject only to H's right as an ex-proprietary tenant; that the rights of the purchaser of H's share under the sale were subject to the mortgage of 1869; and that, by virtue of the rule enunciated in s. 48 of the Transfer of Property Act, the rights of the mortgagees under the deed of 1872 must give way to the incidents of the prior deed of 1869, both mortgages being usufructuary. *Tulshi v. Radha Kishan* referred to. *Per TYRELL, J.*, that in 1876, by reason of the execution-sale, the sir rights and interests of H mortgaged by him in 1869, as such, went out of existence, and assumed a different character; that over that tenure in its altered character the plaintiff, though he still had his mortgage charge, had not, in the existing state of the law, a right to physical possession of the actual land; and that, subject to this new right of H, the plaintiff retained his mortgage charge of 1869 over the zamindari interests in the portion of the land acquired by H's vendees.

